DARSHAN LAL NAGPAL (DEAD) BY L.RS.

v.

GOVERNMENT OF NCT OF DELHI AND OTHERS

(Civil Appeal No. 11169 of 2011)

JANUARY 3, 2012

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Land Acquisition Act, 1894 – s. 17(1), (4) and s. 5A (2) – Proposal for establishment of electric sub-station – Issuance of notification invoking s. 17 (1) and (4) and dispensing with the rule of hearing in s. 5 A(2) for the purpose of acquiring land belonging to appellant for the public purpose – Challenge to – High Court negatived appellants' challenge to acquisition of their right – On appeal held: There was long time gap of more than five years between initiation of the proposal for establishment of the sub-station and the issue of notification u/s. 4 (1) read with s. 17 (1) and (4) – Government of NCT of Delhi did not produce any material to justify its decision to dispense with the application of s. 5A – Approval accorded by the Lieutenant Governor did not contain anything from which it could be inferred that a conscious decision was taken to dispense with the application of s. 5A which represents two facets of the rule of hearing – No tangible evidence produced by the Government of NCT before the court to show urgency in establishing the sub-station was such that even few months time, which may have been consumed in the filing of objections by the land owners and other interested persons u/s. 5A(1) and holding of enquiry by the Collector u/s. 5A(2) would have frustrated the project – Thus, the High Court not justified in rejecting the appellants' challenge to the invoking of urgency provisions on the premise that the land was required for implementation of a project which would benefit large section of the society – Order

passed by the High Court set aside and acquisition of land of the appellant quashed.

s. 17 (1) and (4) – Invocation of urgency provisions under – Justification of – Held: Invocation of urgency provisions can be justified only if even small delay of few weeks or months may frustrate the public purpose for which the land is sought to be acquired.

Constitution of India, 1950 – Article 300A – Eminent domain – Exercise of power – Held: State in exercise of power of eminent domain, can acquire the private property for public purpose – Compulsory acquisition of the property belonging to a private individual has grave repercussions on his Constitutional right of not being deprived of his property without the sanction of law-Article 300A and the legal rights – Degree of care required to be taken by the State is greater when the power of compulsory acquisition of private land is exercised by invoking s. 17 because that results in depriving the owner of his property without being afforded an opportunity of hearing.

In the year 2004, DTL Company requested the Delhi Development Authority for allotment of land for establishment of electric sub-station. The next year, different functionaries of DTL made some correspondence inter-se in the said matter. Between the year 2006 and 2008, the officers of the DTL, the DDA and the Government of N.C.T. of Delhi exchanged letters on the issue of allotment of land for the sub-station. Thereafter, the Government of N.C.T. of Delhi issued a notification under Section 4(1) read with Section 17(1) and (4) of the Land Acquisition Act, 1894 for the acquisition of 80 bighas 15 biswas land. By another notification, the Land Acquisition Collector was authorised to take possession of the land. Pursuant thereto, the appellant made a representation to MLA that as per Master Plan of

Delhi-2021 only 29.6 bigha land was required for the sub-station and that barren land available in the area could be utilized for the same but the representation was not acceded to. The notifications were issued under Section 4(1) read with Section 17(1) and (4) and Section 6(1) of the Act. The appellants filed a writ petitions for quashing of notifications on the ground that there was no urgency for the acquisition of land which could justify invoking of Section 17(1) and (4) of the Act. The High Court dismissed the writ petition negating the appellants challenge to the invoking of s. 14 of the Act. Therefore, the appellants filed the instant appeal.

The questions which arose for consideration in the instant appeal are whether the Government of NCT of Delhi could have invoked Section 17(1) and (4) of the Land Acquisition Act, 1894 and dispensed with the rule of hearing embodied in Section 5A(2) thereof for the purpose of acquiring land measuring 80 bighas 15 biswas including 21 bighas 3 biswas belonging to the appellants for a public purpose, namely, establishment of electric sub-station by DTL Company at village 'M'; and whether the Division Bench of the High Court rightly negatived the appellants' challenge to the acquisition of their land.

Allowing the appeal, the Court

HELD: 1.1. Although in exercise of the power of eminent domain, the State can acquire the private property for public purpose, it must be remembered that compulsory acquisition of the property belonging to a private individual is a serious matter and has grave repercussions on his Constitutional right of not being deprived of his property without the sanction of law-Article 300A and the legal rights. Therefore, the State must exercise this power with great care and

circumspection. At times, compulsory acquisition of land is likely to make the owner landless. The degree of care required to be taken by the State is greater when the power of compulsory acquisition of private land is exercised by invoking the provisions like the one contained in Section 17 of the Act because that results in depriving the owner of his property without being afforded an opportunity of hearing. [Para 14]

1.2. It is to be seen whether there was any justification for invoking the urgency provisions contained in Section 17 (1) and (4) of the Act for the acquisition of the appellants' land. The Division Bench of the High Court accepted the explanation given by the respondents by observing that sub-station in East Delhi is needed to evacuate and utilize the power generated from 1500 MW gas based plant at place 'B'. While doing so the Bench completely overlooked that there was long time gap of more than five years between initiation of the proposal for establishment of the sub-station and the issue of notification under Section 4 (1) read with Section 17 (1) and (4) of the Act. The High Court also failed to notice that the Government of NCT of Delhi had not produced any material to justify its decision to dispense with the application of Section 5A of the Act. The documents produced by the parties including the notings recorded in file and the approval accorded by the Lieutenant Governor did not contain anything from which could be inferred that a conscious decision was taken to dispense with the application of Section 5A which represents two facets of the rule of hearing that is the right of the land owner to file objection against the proposed acquisition of land and of being heard in the inquiry required to be conducted by the Collector. [Para 15]

Sayeedur Rehman v. State of Bihar **(1973) 3 SCC 333: 1973 (2) SCR 1043;** *Maneka Gandhi v. Union of India* **(1978)**

1 SCC 248: 1978 (2) SCR 621; *Mohinder Singh Gill v. Chief Election Commr*. **(1978) 1 SCC 405: 1978 (2) SCR 272;** *Swadeshi Cotton Mills v. Union of India* **(1981) 1 SCC 664: 1981 (2) SCR 533;** *A.K. Kraipak v. Union of India* **(1969) 2 SCC 262: 1970 (1) SCR 457;** ***State of Orissa v. Dr. Binapani Dei*** **(1967) 2 SCR 625;** *Munshi Singh v. Union of India* **(1973) 2 SCC 337:1973 (1) SCR 973 – referred to.**

Ridge v. Baldwin **(1964) AC 40 – referred to.**

1.3. It is also apposite to mention that no tangible evidence was produced by the respondents before the court to show that the task of establishing the sub-station at place 'M' was required to be accomplished within a fixed schedule and the urgency was such that even few months time, which may have been consumed in the filing of objections by the land owners and other interested persons under Section 5A(1) and holding of inquiry by the Collector under Section 5A(2), would have frustrated the project. It seems that the Bench of the High Court was unduly influenced by the fact that consumption of power in Delhi was increasing everyday and the DTL was making an effort to ensure supply of power to different areas and for that purpose establishment of sub-station at village 'M' was absolutely imperative. The High Court was not justified in rejecting the appellants' challenge to the invoking of urgency provisions on the premise that the land was required for implementation of a project which would benefit large section of the society. The majority of the projects undertaken by the State and its agencies/ instrumentalities, the implementation of which requires public money, are meant to benefit the people at large or substantially large segment of the society. If what the High Court has observed is treated as a correct statement of law, then in all such cases the acquiring authority will be justified in invoking Section 17 of the Act and

dispense with the inquiry contemplated under Section 5A, which would necessarily result in depriving the owner of his property without any opportunity to raise legitimate objection. However, the invoking of the urgency provisions can be justified only if there exists real emergency which cannot brook delay of even few weeks or months. In other words, the urgency provisions can be invoked only if even small delay of few weeks or months may frustrate the public purpose for which the land is sought to be acquired. Nobody can contest that the purpose for which the appellants' land and land belonging to others was sought to be acquired was a public purpose but it is one thing to say that the State and its instrumentality wanted to execute a project of public importance without loss of time and it is an altogether different thing to say that for execution of such project, private individuals should be deprived of their property without even being heard. [Para 21]

1.4. The idea of establishing 400/220 KV sub-station was mooted prior to August, 2004. For next almost three years, the officers of the DTL and the DDA exchanged letters on the issue of allotment of land. On 28.7.2008 Secretary (Power), Government of NCT of Delhi-cum-CMD, DTL made a suggestion for the acquisition of land by invoking Section 17 of the Act. This became a tool in the hands of the concerned authorities and the Lieutenant Governor mechanically approved the proposal contained in the file without trying to find out as to why the urgency provisions were being invoked after a time gap of five years. If the sub-station was to be established on emergency basis, the authorities of the DTL would not have waited for five years for the invoking of urgency provisions enshrined in the Act. They would have immediately approached the Government of NCT of Delhi and made a request that land be acquired by invoking Section 17 of the Act. However, the fact of the

matter is that the concerned officers / functionaries of the DTL, the DDA and the Government of NCT of Delhi leisurely dealt with the matter for over five years. Even after some sign of emergency was indicated in letter dated 9.9.2008 of the Joint Secretary (Power), who made a mention of the Commonwealth Games scheduled to be organised in October, 2010, it took more than one year and two months to the competent authority to issue the preliminary notification. Therefore, the view taken by the High Court on the sustainability of the appellants' challenge to the acquisition of their land cannot be approved. [Para 22]

Deepak Pahwa v. Lt. Governor of Delhi **(1984) 4 SCC 308: 1985 (1) SCR 588;** *Jage Ram v. State of Haryana* **(1971) 1 SCC 671;** *Kasireddy Papaiah v. Government of A.P.* **AIR 1975 AP 269 – referred to.**

1.5. The impugned order is set aside. The writ petition filed by the appellants is allowed and the acquisition of their land is quashed. However, it is made clear that this judgment shall not preclude the competent authority from issuing fresh notification under Section 4(1) and taking other steps necessary for the acquisition of the appellant's land. If the respondents initiate fresh proceedings for the acquisition of the appellants' land then they shall be free to file objections under Section 5A(1) and they shall also be entitled to be heard in the inquiry to be conducted by the Collector in terms of Section 5A(2) of the Act. [Para 28]

First Land Acquisition Collector and Ors. ***v.*** *Nirodhi Prakash Ganguli and Anr.* **(2002) 4 SCC 160: 2002 (2) SCR 326;** *Union of India & Ors. v. Praveen Gupta and Ors.* **(1997) 9 SCC 78: 1996 (7) Suppl. SCR 201;** *Nand Kishore Gupta and Ors. v. State of U.P. and Ors.* **(2010) 10 SCC 282: 2010 (11) SCR 356;** *Bijwasan Gram Vikas Samiti v. Lt. Governor and Ors.***WP (C) No. 1307/2010, decided on 5.10.2010;** *Rajiv*

Joshi v. Union of India **2009 (159) DLT 214;** *Rajinder Kishan Gupta and Anr. v. Lt. Governor, Government of NCT of Delhi* **2010 (114) DLT 708;** *Sumit Import Services Ltd. and Anr. v. Delhi Metro Rail Corporation and Ors.* **2008 (103) DRJ 263;** *M/s. A.B.Tools Ltd. and Anr. v. Union of India* **WP (C) No.4611/1996, decided in 3.2.2010;** *Deepak Resorts v. Union of India* **2008 (149) DLT 582;** *Ajay Kumar Sanghi v. Delhi Police* 2009 (163) DLT 74; *Union of India and Ors. v. Pramod Gupta* **(1997) 9 SCC 78: 1996 (7) Suppl. SCR 201;** *Sheikhar Hotels Gulmohar Enclave v. State of U.P.* **(2008) 14 SCC 716: 2008 (8) SCR 273;** *Jai Narain v. Union of India* **(1999) 1 SCC 9;** *Anand Singh v. State of U.P.* **(2010) 11 SCC 242: 2010 (9) SCR 133;** *Radhy Shyam v. State of U.P.* **(2011) 5 SCC 553;** *Deepak Pahwa v. Lt. Governor of Delhi* **(1984) 4 SCC 308: 1985 (1) SCR 588;** *Chameli Singh v. State of U.P.* **(1996) 2 SCC 549: 1995 (6) Suppl. SCR 827;** *State of U.P. v. Pista Devi* **(1986) 4 SCC 251: 1986 (3) SCR 743;** *Rajasthan Housing Board v. Shri Kishan* **(1993) 2 SCC 84: 1993 (1) SCR 269;** *Anand Buttons Ltd. v. State of Haryana* **(2005) 9 SCC 164;** *Tika Ram v. State of U.P.* **(2009) 10 SCC 689: 2009 (14) SCR 905;** *Nand Kishore Gupta v. State of U.P.* **(2010) 10 SCC 282: 2010 (11) SCR 356;** *Narayan Govind Gavate v. State of Maharashtra* **(1977) 1 SCC 133: 1977 (1) SCR 763;** *State of Punjab v. Gurdial Singh* **(1980) 2 SCC 471: 1980 (1) SCR 1071;** *Om Prakash v. State of U.P.* **(1998) 6 SCC 1: 1998 (3) SCR 643;** *Union of India v. Mukesh Hans* **(2004) 8 SCC 14;** *Union of India v. Krishan Lal Arneja* **(2004) 8 SCC 453: 2004 (1) Suppl. SCR 801;** *Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai* **(2005) 7 SCC 627: 2005 (3) Suppl. SCR 388;** *Essco Fabs (P) Ltd. v. State of Haryana* **(2009) 2 SCC 377;** *Babu Ram v. State of Haryana* **(2009) 10 SCC 115: 2009 (14) SCR 1111;** *Dev Sharan v. State of U.P.* **(2011) 4 SCC 769: 2011 (3) SCR 728;** *State of West Bengal v. Prafulla Churan Law* **(2011) 4 SCC 537;** *Devender Kumar Tyagi v. State of U.P.* **(2011) 9 SCC 164;** *Narayan Govind Gavate v. State of Maharashtra* **(1977) 1 SCC 133: 1977 (1) SCR 763 – referred to.**

Case Law Reference:

2002 (2) SCR 326	**Referred to.**	**Para 8**
1996 (7) Suppl. SCR 201	**Referred to.**	**Para 8**
2010 (11) SCR 356	**Referred to.**	**Para 8**
2009 (159) DLT 214	**Referred to.**	**Para 8**
2010 (114) DLT 708	**Referred to.**	**Para 8**
2008 (103) DRJ 263	**Referred to.**	**Para 8**
2008 (149) DLT 582	**Referred to.**	**Para 8**
2009 (163) DLT 74	**Referred to.**	**Para 8**
1996 (7) Suppl. SCR 201	**Referred to.**	**Para 8**
2008 (8) SCR 273	**Referred to.**	**Para 8**
(1999) 1 SCC 9	**Referred to.**	**Para 8**
2010 (9) SCR 133	**Referred to.**	**Para 9**
(2011) 5 SCC 553	**Referred to.**	**Para 9**
1985 (1) SCR 588	**Referred to.**	**Para 9**
1995 (6) Suppl. SCR 827	**Referred to.**	**Para 9**
1986 (3) SCR 743	**Referred to.**	**Para 11**
1993 (1) SCR 269	**Referred to.**	**Para 11**
(2005) 9 SCC 164	**Referred to.**	**Para 11**
2009 (14) SCR 905	**Referred to.**	**Para 11**
2010 (11) SCR 356	**Referred to.**	**Para 11**
1977 (1) SCR 763	**Referred to.**	**Para 11**
1980 (1) SCR 1071	**Referred to.**	**Para 11**
1998 (3) SCR 643	**Referred to.**	**Para 11**

(2004) 8 SCC 14	**Referred to.**	**Para 11**
2004 (1) Suppl. SCR 801	**Referred to.**	**Para 11**
2005 (3) Suppl. SCR 388	**Referred to.**	**Para 11**
(2009) 2 SCC 377	**Referred to.**	**Para 11**
2009 (14) SCR 1111	**Referred to.**	**Para 11**
2011 (3) SCR 728	**Referred to.**	**Para 11**
(2011) 4 SCC 537	**Referred to.**	**Para 11**
(2011) 9 SCC 164	**Referred to.**	**Para 11**
1977 (1) SCR 763	**Referred to.**	**Para 13**
1973 (2) SCR 1043	**Referred to.**	**Para 16**
1978 (2) SCR 621	**Referred to.**	**Para 17**
1978 (2) SCR 272	**Referred to.**	**Para 18**
1981 (2) SCR 533	**Referred to.**	**Para 19**
(1964) AC 40	**Referred to.**	**Para 19**
1970 (1) SCR 457	**Referred to.**	**Para 19**
(1967) 2 SCR 625	**Referred to.**	**Para 19**
1973 (1) SCR 973	**Referred to.**	**Para 20**
(1971) 1 SCC 671	**Referred to.**	**Para 24**
AIR 1975 AP 269	**Referred to.**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11169 of 2011.

From the Judgment & Order dated 14.01.2011 of the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 13376 of 2009.

Dhruv Mehta, Ashish Was, Tamali Wad for the Appellant.

P.P. Malhotra, ASG, Najmi Waziri, Neha Kapoor, Sudarshan Rajan, Rachana Srivastava, Ranchi Daga, Krutin Joshi, Abhinav Mukerji for the Respondents.

The Judgment of the Court was delivered by

G. S. SINGHVI, J. 1. The questions which arise for consideration in this appeal are whether the Government of NCT of Delhi could have invoked Section 17(1) and (4) of the Land Acquisition Act, 1894 (for short, 'the Act') and dispensed with the rule of hearing embodied in Section 5A(2) thereof for the purpose of acquiring land measuring 80 bighas 15 biswas including 21 bighas 3 biswas belonging to the appellants for a public purpose, namely, establishment of electric sub-station by Delhi Transco Limited (for short, 'DTL') at village Mandoli and whether the Division Bench of the Delhi High Court had rightly negatived the appellants' challenge to the acquisition of their land.

2. For deciding the aforesaid questions, it will be useful to notice the events which led to the issue of notification dated 13.10.2009 under Section 4(1) read with Section 17(1) and (4) of the Act and declaration dated 9.11.2009 under Section 6(1) of the Act.

2.1 It is not clear from the pleadings of the parties and the record produced before the High Court and this Court as to when the decision was taken to establish 400/220 KV sub-station at East of Loni Road but this much is evident that by a communication sent in August, 2004, the DTL requested the Delhi Development Authority (for short, 'the DDA') for allotment of land. For the next about 10 months nothing appears to have happened. Between June and October, 2005 different functionaries of DTL made some correspondence inter-se in the matter of establishment of the sub-station. On 5/6.12.2005, Manager (400/220 KV SS&L) sent a communication to the

Commissioner (Planning), DDA wherein he emphasized that establishment of the sub-station was necessary to meet the power demand of East Delhi and particularly the upcoming Commonwealth Games. In his reply dated 8.2.2006, Joint Director (MP), DDA informed the DTL that allotment of sites suggested by it is not feasible because site 'A' was developed as a park and site 'B' was earmarked as a community centre.

2.2 Between January, 2006 and July, 2008, the officers of the DTL, the DDA and the Government of N.C.T. of Delhi exchanged letters on the issue of allotment of land for the sub-station. While the officers of DTL stressed the need for early allotment of land, the officers of the DDA repeatedly expressed their inability to allot the particular site by pointing out that the same was reserved for other purpose. On 28.07.2008, Secretary (Power), Government of NCT of Delhi-cum-CMD, DTL requested the DDA to change the land use of the particular site and inform the Government of N.C.T. of Delhi so that action could be taken for the acquisition of land under Section 17 of the Act. In that letter, it was also mentioned that due to paucity of land, the DTL has proposed to establish a GIS indoor type sub-station which could be accommodated in a space of about 200 x 125 meters as against the original requirement of 700 x 500 meters. The relevant portions of that letter are extracted below:

> "In pursuance of above, a meeting was held with Vice-Chairman, DDA on 06.05.2008 wherein a request was made for the allotment of land in East Delhi. Officers of Delhi Transco Limited, State Transmission Utility, along with Officers of DDA and the concerned ADM of the area had identified the land in their joint inspection held on 30th June, 2008. Copy of Khasra Nos. and their Report is enclosed as Annexure-I. However, in the meantime DDA informed that the land in question is not acquired by DDA. It was further informed that as per Master Plan, Agriculture/ Green area can be utilized for Utilities. Copy of the letter

No. F.6(4)2004/MP/D-127 dated 19.5.2008 is enclosed as Annexure-II. *Since the establishment of the Grid Station is of paramount importance for strengthening the power supply in East Delhi, DDA is requested to change the land use and to inform GNCTD so that action be taken for acquisition of the same under Section 17, i.e., for the public utility*.

Earlier it was proposed to construct an outdoor 400/200 KV Grid Station but keeping in view the paucity and availability of land DTL has now proposed to establish a GIS indoor type sub-station which could be accommodated in a space of about 200 x 125 meters. It shall be appreciated if appropriate directions are issued to the concerned officers for doing the needful expeditiously."

(underlining is ours)

2.3 After about one month, Joint Secretary (Power) sent communication dated 9.9.2008 to the Principal Secretary, Land and Building Department with the request that action may be initiated for the acquisition of the identified piece of land by invoking Section 17 of the Act. The relevant portions of that letter are extracted below:

"Hon'ble Prime Minister of India has laid the foundation for 1500 KV gas based power plant at Bawana on 24.03.2008 being constructed by Pragati Power Corporation Limited, a company owned by Govt, of NCT of Delhi in order to evacuate and utilize the generation from this plant for the benefit of Delhi, a study was conducted by Central Electricity Authority which has recommended the establishment of a 220 KV substation in East Delhi for evacuation of power.

Officers of Delhi Transco Limited along with officers of DDA and concerned ADM have identified the land

measuring 200 M x 150 M in East Delhi for the proposed grid. Copy of Khasra Nos. and their report is enclosed at Annexure-1. Sketch showing broad location of the plot proposed to be acquired with Khasra Nos. of the proposed location is at Annexure-II. DDA has informed that the land in question is not acquired by DDA. However, as per Master Plan 2021, public utilities are permitted in all use zones. In this regard, a copy of Director (Planning) DDA letter dated 19.05.2008 is enclosed as Annexure-III. The proposed site has already been taken up with VC, DDA for change of land use (Annexure-IV).

The commissioning of 155 MW power plant at Bawana is scheduled before the Commonwealth Games in October-2010. Therefore, keeping in view the urgency involved, kindly initiate the process for acquisition of identified peace of land in East Delhi in favour of Department of Power, GNCTD as provided under section 17 of the Land Acquisition Act at the very earliest."

(underlining is ours)

Soon thereafter, the Land and Building Department sent letter dated 30.9.2008 to Additional District Magistrate-cum-Land Acquisition Collector (North-East) to send the following information/documents:

"1. Draft notification u/s 4, 6 and 17 along with the copy of Aks Sizra, field book etc.

2. Report after conducting Joint Survey.

3. 80% estimated compensation amount with Calculation Sheet."

2.4 After about six months, Deputy General Manager (Planning-I), DTL sent letter dated 6.3.2009 to Deputy Secretary (Land Acquisition) and informed him that land

measuring 250 x 200 sq. mts. with approach road will be required to accommodate the proposed three voltage level equipment as against the requirement of 200 x 125 sq. mts. indicated in the earlier communications. The concerned officer also requested that the acquisition of 80 bighas 15 biswas land may be finalized as per the joint site inspection carried out on 12.01.2009.

2.5 On its part, the DDA sent letter dated 8.5.2009 to the Deputy Secretary (Land Acquisition) that a joint site inspection be carried out for finalization of the site. However, the latter sent communication dated 16.6.2009 to the DDA to issue NOC required for initiation of the acquisition proceedings.

2.6 In September, 2009, the Land and Building Department of the Government of NCT of Delhi prepared proposal for the acquisition of land measuring 200 x 125 sq. mts. by invoking Sections 4 and 6 read with Section 17(1) and (4) of the Act. This is evident from the notings recorded in paragraphs 56 to 61 and 63 to 65 of file bearing No. F.S(11)/ 08/L&B/LA, which are extracted below:

> "56. A requisition was received from Joint Secretary (Power) Department of Power for acquisition of land measuring 200 x 125 Sq. m. identified in East Delhi for construction of 400 x 200 KV grid station (Village Mandoli) vide their letter No. F.11(88)/2008/Power/2186 dated 09.09.2009 (P-6/C). Accordingly, the ADM/LAC (NE) was requested for draft notifications and other revenue records vide letter dated 30.09.2008 (P-7/C).
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> 57. The ADM/LC (NE) vide his letter dated 31.01.2009 (P-28/C) forwarded draft notification u/s 4 & 6 (P-26 & 27/C) for acquisition of land measuring 80 Bigha 15 Biswa. Copy of Joint Survey Report (P-23/C), copy of Field Book (P-20/C), copy of Asks Sizra (P-19/C) and Calculation Sheet for estimated compensation amount (P-25/C).

> 58. The revenue staff scrutinized the draft notification and some discrepancies have been found. The report of revenue branch may be seen at page (P-5 & 6/N).
>
> 59. Accordingly, LAC (NE) was requested for clarification vide letter dated 2/3/09 (page-29/C). A clarification was given by LAC (NE) in aforesaid context and may be seen at P-32 to 39/C. Report of revenue branch may be seen at page 11 & 12/N. Letter dated 30/7/08 and 6/3/09 received from Delhi Transco Ltd. regarding change of proposal may be seen at P.30 and 31/C. Delhi Transco Ltd. has given the justification for the change of proposal regarding requirement of land, i.e., 80 Bigha 15 Biswa instead of 200 x 125 Sq.m.
>
> 60. Vide letter No.F.6(4)2004-MP/265 dated 7/9/09 Jt. Director (MP) DD has informed that DDA has no objection with respect to proposed location of land for establishing 400/200 KV ESS subject to compliance of the following conditions:-
>
> a. Submission of a layout plan/location plan with description of the land under reference be submitted to ascertain the boundaries of the site.
>
> b. Justification for an area of 6.8 hact. against 2.96 hact. required for establishment of 200/400 KV ESS as per MPD-2021 norms.
>
> c. This is a Master Plan level utility for which change of land use will be processed after land is acquired.
>
> d. Submission of transmission route alignment plan as the surrounding area is thickly populated.
>
> e. The site shall not be used for any other purpose other than ESS.
>
> 61. As the matter is urgent and related to Commonwealth

Games, if approved Hon'ble L.G. may be requested to kindly approve acquisition of land measuring 80 Bigha 15 Biswa as per the draft notifications placed opposite for acquisition of land for establishment of 400 x 200 KV sub-station in village-Mandoli and issuance of notification u/s 4 read with 17(4) and section 6 along with 17(1) of Land Acquisition Act, 1894.

63. May kindly see the proposal at page 21/N regarding acquisition of land measuring 80 Bigha 15 Biswa for construction of 400 x 200 KV grid station in village Mandoli. The proposal has been received from Power Department, Govt., of NCT of Delhi, which is available at page 6/C. It has been mentioned in the proposal that Hon'ble Prime Minister of India has laid the foundation stone for 155 MW gas based power plant at Bawana on 24-3-2008 which is being constructed by Pragati Power Corporation Limited, a company owned by Govt., of NCT of Delhi. It has been also mentioned in the proposal that to evacuate and utilize the generation from this plant for the benefit of Delhi, a study was conducted by Central Electricity Authority which has recommended the establishment of a 220 KV sub-station in East Delhi for evacuation of power. The Power Department has requested that the acquisition of the above said land may be proceeded with under the emergency provisions of the Land Acquisition Act because 1500 MW power at Bawana is scheduled to be commissioned before the Commonwealth Games, 2010.

64. The Land Acquisition Collector (N/E) has prepared a draft notification under section 4 & 6 (page 26 & 27/C) after conduction the Joint survey report along with concerned department and copy of the same is available at page 23/C along with relevant records. As per the joint survey available at page 22/C and 23/C it appears that entire land is laying vacant except to Bhattas (Brick Kiln)

and boundary walls in 3 Khasras. The DDA has also provided no objection for acquisition subject to certain conditions as mentioned in letter dated 07-09-09, which is available at page 64/C.

65. From the proposal of the Power Department it is clear that land is required for valid public purpose and urgent need for acquisition of the land has also been justified by the Power Department. Therefore, if approved, Hon'ble Lt. Governor may kindly be requested to approve acquisition of land measuring 80 Bigha 15 Biswa as per the draft notification placed opposite for the public purpose namely for establishing 400 x 200 KV grid sub-station for Power Department in Village-Mandoli and issuance of notification u/s 4 read with 17(4) and section 6 along with 17(1) of Land Acquisition Act, 1894."

2.7 The Lieutenant Governor of Delhi accorded his approval on 26.9.2009 in the following terms:

"I have gone through the records and requirement of Delhi Transco Ltd. for acquisition of land for Establishment of 400x200 kv station at village Mandoli and the draft notifications prepared by LAC (North-East).

I am fully satisfied that the land measuring 80 Bigha 15 Biswa is urgently required for above purpose. In view of the urgency of the scheme, I order that the provisions of section 5A shall not apply and notifications under section 4 read with 17(4), 6 & 17(1) of the Land Acquisition Act, 1894 be issued immediately.

Sd/-
Tejendra Khanna
Lt. Governor Delhi
26.09.2009."

3. In compliance of the direction given by the Lieutenant Governor, the Government of N.C.T. of Delhi issued notification

dated 13.10.2009 under Section 4(1) read with Section 17(1) and (4) for the acquisition of 80 bighas 15 biswas land. The declaration issued under Section 6(1) was published vide notification dated 9.11.2009. By another notification of the same date, Land Acquisition Collector (North-East), Delhi was authorised to take possession of the land on the expiry of 15 days.

4. When the appellants learnt about the proposed acquisition of their land, they made a representation to the Member of the Legislative Assembly that as per Master Plan of Delhi-2021 only 29.6 bigha land was required for the sub-station and that barren land available in the area could be utilized for that purpose leaving out their land. The concerned Member of the Legislative Assembly forwarded the representation to the Government of NCT of Delhi on 28.4.2009 but the same did not yield the desired result and the notifications were issued under Section 4(1) read with Section 17(1) and (4) and Section 6(1) of the Act. Thereupon, the appellants filed Writ Petition No. 13376 of 2009 for quashing of notifications dated 13.10.2009 and 9.11.2009. The main plank of their challenge was that there was no urgency for the acquisition of land which could justify invoking of Section 17(1) and (4) of the Act. They pleaded that more than 4 years time spent in the correspondence exchanged between the DTL, the State Government and the DDA clearly shows that there was no urgency in the establishment of the sub-station and the cause put forward by the DTL in 2008-2009, namely, the requirement of power for Commonwealth Games did not warrant invoking of Section 17(1) and (4) which resulted in depriving them of their property without being heard. The appellants further pleaded that the Lieutenant Governor had not applied mind on the issue of urgency and approved the proposal prepared by the Land and Building Department, Government of NCT of Delhi without satisfying himself that there was emergent need for the acquisition of land for the purpose for which the proposal had been initiated prior to August, 2004. The appellants also

claimed that other parcels of land including waste land belonging to the public authorities and the Gaon Sabha were available, which could be utilized for establishing the sub-station but, without examining the feasibility of acquiring an alternative piece of land, the respondents arbitrarily deprived them of their property.

5. In the counter affidavit filed on behalf of the Government of NCT of Delhi and the Lieutenant Governor of Delhi it was averred that with a view to provide power to the city of Delhi, 1500 MW gas based power plant was being constructed at Bawana by a Government owned company, viz., Pragati Power Corporation Limited; that the plant is scheduled to be commissioned in a time-bound manner in October, 2010 before the commencement of the Commonwealth Games; that in order to evacuate and utilize the power generated from the new plant for the benefit of Delhi, the Central Electricity Authority recommended establishment of 220 KV sub-station in East Delhi; that after identifying the land in question the Power Department of Government of NCT of Delhi made a request for initiation of the acquisition proceedings on urgent basis; that on receipt of letter dated 9.9.2008, instructions were issued to the Land Acquisition Collector to conduct a joint survey, prepare a draft notification and also make calculation of 80 per cent of the estimated compensation and that after taking all the necessary steps, a note was put up before the Lieutenant Governor, who approved the proposal for the acquisition of land under Section 4 read with Section 17(1) and (4) and also to dispense with the inquiry envisaged under Section 5A of the Act. It was also pleaded that the beneficiary of the acquisition deposited a sum of Rs.9,27,11,840/- towards 80 per cent of the estimated compensation as required by Section 17(3A) of the Act, which was remitted to the Land Acquisition Collector for payment. In Para 11 of the counter affidavit it was averred that there is an urgent need of the land for the purpose of construction of sub-station by the DTL in the larger public interest.

6. In a separate written statement filed on behalf of the DTL it was pleaded that decision was taken by the Government to establish 400 / 220 KV grid sub-station to meet the growing demand of power in Delhi and the establishment of the sub-station was approved by Delhi Electricity Regulatory Commission vide order dated 16.6.2009. In paragraphs 5 to 7 of the counter affidavit of the DTL reference was made to the decision taken by the Government to construct 1500 MW Pragati III Power Plant at Bawana IPGCL; 2 x 490 MW Thermal Power Stations at Dadri and 1500 MW Thermal Station at Jhajjar and also to establish grid sub-stations for evacuation of power from different plants. According to the DTL, as per the Master Plan of Delhi-2021, the minimum land required for establishment of a conventional outdoor 400/220/66 KV sub-station is 60 acres but because of scarcity of land, it was decided to establish an indoor GIS sub-station and for that purpose 80 bighas land was required. It was also the pleaded case of the DTL that the appellants' land was identified after inspections carried out by the officers of the DDA, Land and Building Department, Land Acquisition Collector, Government of NCT of Delhi and its own officers. In paragraphs 13, 14 and 15 of the counter affidavit of the DTL, the following averments were made:

> "13. That proposed 400KV sub-station cannot be established in the 30 bighas of Gram Sabha land. The said Gram Sabha land does not fulfill the complete purpose of the answering respondent because 80 bighas are required for the establishment of the proposed sub-station. Further, the said Gram Sabha's land does not give any entrance / exit point towards State Highway. Therefore, the acquisition of the said Gram Sabha's land does not serve any purpose.
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> 14. That Delhi Electricity Regulatory Commission, which is a statutory body of Govt. of NCT of Delhi vide its letter No. F.17(51)/Engg./DERC/2009-10/1074 dated 16.6.2009 granted investment approval of scheme for supply testing and commissioning of 400/220/66KV GIS sub-station at East of Loni Road to the tune of Rs. 250.24 crores. The true copy of the letter dated 16.6.2009 is marked and annexed as Annexure – E.
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> 15. Further the Power Grid Corporation of India Ltd. vide its letter dated 28.8.2009 addressed to the answering respondent emphasized on the urgency regarding the setting up and commission of the 400 KV sub-station East of Loni Road since the transmission line is being constructed for catering the additional load of Commonwealth Games, 2010 from 2 x 490 MW, NTPC Dadri Power Plant (under construction) and set the timeline of completion by June, 2010. It was further pointed out that location of Lone Road sub-station and coordinates of 400 KV switch yard gantry were urgently required for the completion of the survey work. the true copy of the letter dated 28.8.2009 is marked and annexed as Annexure – F. Therefore, it was a comprehensive scheme consisting of establishment of 400/220KV grid sub-station by the answering respondent whereas in feed i.e. 400 KV transmission line from Dadri Generating Station upto the proposed grid sub-station at East of Loni Road."

7. The Division Bench of the High Court noticed the correspondence exchanged between the DTL, the DDA and the Government of NCT of Delhi and proceeded to observe:

> "The only argument made was that urgency was because of ensuing Common Wealth Games and since those have already concluded, the urgency as seized to exist. This is a myopic view of the requirement for such a project. No doubt, endeavour was to establish the sub-station before the Commonwealth Games, 2010 but that was not the only reason for urgency. The primary reason for urgency was, and continuous to be, that the substation in East Delhi is needed to evacuate and utilize the power generated from

1500 MW Gas based Plant at Bawana which is being constructed. The urgency was, and continuous to exist, i.e. the need for adequate power supply to the residents of this city. This is an urgent need keeping in view the wide gap between the demand and supply. No doubt, the plans were to commission it before Common Wealth Games. That has not happened also because of the reason that stay was granted in these proceedings. Be as it may, it cannot be argued that merely because Common Wealth Games are over, the respondent authorities can now set up the sub-station leisurely. These are the aspects which are to be gone into by the Competent Authority while exercising powers under Section 17 (4) of the Act. Once it is seen that all relevant factors were taken into consideration and the Competent Authority was not influenced by any irrelevant consideration or the power exercised was not the result of malafide, the subjective satisfaction of the Competent Authority, based on those objective considerations namely the purpose of invocation of urgency clause to acquire continued to exist the Court would be loathe to interfere with such discretion exercised by the Competent Authority dispensing with the enquiry under Section 5A of the Act."

8. The Division Bench of the High Court then referred to the judgments of this Court in *First Land Acquisition Collector and Others v. Nirodhi Prakash Ganguli and Another,* (2002) 4 SCC 160; *Union of India & Others v. Praveen Gupta and Others* (1997) 9 SCC 78; *Nand Kishore Gupta and Others v. State of U.P. and Others* (2010) 10 SCC 282 and of the High Court in *Bijwasan Gram Vikas Samiti v. Lt. Governor and Others* – WP(C) No. 1307/2010, decided on 5.10.2010 and negatived the appellants' challenge to the invoking of Section 17 of the Act. The Division Bench distinguished the judgments relied upon by the appellants' counsel by observing that those cases did not involve challenge to the acquisition of land for infrastructure projects meant for larger public interest. At the

same time, the Division Bench referred to the judgments in *Rajiv Joshi v. Union of India* 2009 (159) DLT 214, *Rajinder Kishan Gupta and another v. Lt. Governor, Government of NCT of Delhi* 2010 (114) DLT 708, *Sumit Import Services Ltd. and another v. Delhi Metro Rail Corporation and others* 2008 (103) DRJ 263, *M/s. A.B.Tools Ltd. and another v. Union of India* WP (C) No.4611/1996, decided on 3.2.2010, *Deepak Resorts v. Union of India* 2008 (149) DLT 582, *Ajay Kumar Sanghi v. Delhi Police* 2009 (163) DLT 74, *Union of India and others v. Pramod Gupta* (1997) 9 SCC 78, *Sheikhar Hotels Gulmohar Enclave v. State of U.P.* (2008) 14 SCC 716 and *Jai Narain v. Union of India* (1999) 1 SCC 9 in which the acquisition of land for Airport, construction of metro station/ metro line, installation of LPG Bottling Plant, construction of sewage treatment plant, construction of police station, relocation of timber merchants outside the walled city and widening of National Highway by invoking the urgency provisions contained in Section 17 of the Act was upheld by the High Court and this Court.

9. Learned counsel for the parties reiterated the arguments made before the High Court. While Shri Dhruv Mehta relied upon the judgments of this Court in *Anand Singh v. State of U.P.* (2010) 11 SCC 242 and *Radhy Shyam v. State of U.P.* (2011) 5 SCC 553 to emphasize that the acquisition of land for establishment of 400/220 KV sub-station did not warrant invoking of the urgency provisions contained in the Act because the proposal for establishment of the sub-station was initiated more than five yeas prior to the issue of notification under Section 4(1) read with Section 17(1) and (4) of the Act and there was no justification to deprive the appellants of the right to be heard before being deprived of their property, Shri P.P. Malhotra, learned Additional Solicitor General argued that the time consumed in the exchange of correspondence between the functionaries of the Government, the DTL and the DDA cannot be made a ground for nullifying the exercise of the State's power of eminent domain. In support of his argument,

Shri Malhotra relied upon the judgments of *Deepak Pahwa v. Lt. Governor of Delhi* (1984) 4 SCC 308 and *Chameli Singh v. State of U.P.* (1996) 2 SCC 549. Shri Waziri, learned counsel for the DTL, supplemented the argument of learned Additional Solicitor General and submitted that the Court may not quash the acquisition of the appellants' land because the work for establishing the sub-station has been completed to a large extent. Learned counsel submitted that the appellants' land cannot be left out because the same is needed for construction of project road. Shri Waziri also submitted that the sub-station is required for evacuation of power which will be made available from the Dadri Power Plant and no other suitable land was available for the sub-station.

10. We have considered the respective arguments/ submissions and carefully scrutinized the record including the documents made available during the course of hearing. The compulsory acquisition of land has generated enormous litigation in the country in last more than five decades and this Court has been repeatedly called upon to adjudicate upon the legality of the notifications issued under the Act.

11. In *State of U.P. v. Pista Devi* (1986) 4 SCC 251, *Rajasthan Housing Board v. Shri Kishan* (1993) 2 SCC 84, *Jai Narain v. Union of India* (supra), *Union of India v. Praveen Gupta* (supra), *Land Acquisition Collector v. Nirodhi Prakash Ganguli* (supra), *Anand Buttons Ltd. v. State of Haryana* (2005) 9 SCC 164, *Tika Ram v. State of U.P.* (2009) 10 SCC 689, *Nand Kishore Gupta v. State of U.P.* (2010) 10 SCC 282 and some other judgments, the acquisition of land under Section 4(1) read with Section 17(1) and 17(4) and some of the State amendments for different public purposes, i.e., for construction of houses for poor and the members of reserved categories, establishment of medical college, construction of sewage treatment plant under the Court's order and for construction of Express Way has been approved. As against this, the acquisition of land by invoking the urgency provisions for the public purposes, like, planned residential, commercial,

industrial or institutional development has been disapproved in *Narayan Govind Gavate v. State of Maharashtra* (1977) 1 SCC 133, *State of Punjab v. Gurdial Singh* (1980) 2 SCC 471, *Om Prakash v. State of U.P.* (1998) 6 SCC 1, *Union of India v. Mukesh Hans* (2004) 8 SCC 14, *Union of India v. Krishan Lal Arneja* (2004) 8 SCC 453, *Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai* (2005) 7 SCC 627, *Essco Fabs (P) Ltd. v. State of Haryana* (2009) 2 SCC 377, *Babu Ram v. State of Haryana* (2009) 10 SCC 115, *Anand Singh v. State of U.P.* (supra), *Dev Sharan v. State of U.P.* (2011) 4 SCC 769, *State of West Bengal v. Prafulla Churan Law* (2011) 4 SCC 537 , *Radhy Shyam v. State of U.P.* (supra) and *Devender Kumar Tyagi v. State of U.P.* (2011) 9 SCC 164 because the explanation given by the acquiring authority for invoking Section 17(1) and/or 17(4) was found to be wholly unsatisfactory or it was found that there was total non-application of mind by the competent authority on the question of necessity and desirability of invoking the urgency provisions.

12. Although, it is neither possible nor desirable to lay down any straight jacket formula which can be applied to each and every case involving challenge to the acquisition of land by invoking the urgency provision, it will be profitable to notice two recent judgments in which several judicial precedents including some of the judgments referred to in the impugned order have been considered and some concrete propositions have been laid down which could supply guidance for deciding such matters. In Anand Singh v. State of U.P. (supra), this Court considered the question whether the State Government could invoke Section 17(4) for the acquisition of land for a residential colony to be constructed by Gorakhpur Development Authority, Gorakhpur. After noticing factual matrix of the case and about 16 judgments, the Court held:

> "43. 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.

44. 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.

45. 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.

46. 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 realising 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.

47. 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 a conflict of view in the two decisions of this Court viz. Narayan Govind Gavate and Pista Devi. In Om Prakash this Court held that the decision in Pista Devi 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. We agree.

48. 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."

13. In *Radhy Shyam v. State of U.P.* (supra), this Court considered challenge to the acquisition of land under Section 4(1) read with Section 17(1) and (4) for planned industrial development of District Gautam Budh Nagar by Greater Noida Industrial Development Authority and extensively referred to the judgment in *Narayan Govind Gavate v. State of Maharashtra* (1977) 1 SCC 133 and also adverted to other judgments, in which the importance of the rules of natural justice has been highlighted, and culled out the following principles:

"(i) Eminent domain is a right inherent in every sovereign to take and appropriate property belonging to citizens for public use. To put it differently, the sovereign is entitled to reassert its dominion over any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good – *Dwarkadas Shrinivas v. Sholapur Spg. and Wvg. Co. Ltd., Charanjit Lal Chowdhury v. Union of India and Jilubhai Nanbhai Khachar v. State of Gujarat*.

(ii) The legislations which provide for compulsory acquisition of private property by the State fall in the category of expropriatory legislation and such legislation must be construed strictly – *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana; State of Maharashtra v. B.E. Billimoria and Dev Sharan v. State of U.P.*

(iii) Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, it must be remembered that compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the

society or people suffering from other handicaps, then the court is not only entitled but is duty-bound to scrutinise the action/decision of the State with greater vigilance, care and circumspection keeping in view the fact that the landowner is likely to become landless and deprived of the only source of his livelihood and/or shelter.

(iv) The property of a citizen cannot be acquired by the State and/or its agencies/instrumentalities without complying with the mandate of Sections 4, 5-A and 6 of the Act. A public purpose, however laudable it may be does not entitle the State to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, can the State invoke the urgency provisions and dispense with the requirement of hearing the landowner or other interested persons.

(v) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even a few weeks or months. Therefore, before excluding the application of Section 5-A, the authority concerned must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry under Section 5-A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.

(vi) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the authorities concerned did not apply their mind to the relevant factors and the records.

(vii) The exercise of power by the Government under Section 17(1) does not necessarily result in exclusion of Section 5-A of the Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-section (4) of Section 17 makes it clear that it merely enables the Government to direct that the provisions of Section 5-A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of the exercise of power under Section 17(1).

(viii) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Sections 17(1) and/or 17(4). The court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of *audi alteram partem* embodied in Sections 5-A(1) and (2) is not at all warranted in such matters.

(ix) If land is acquired for the benefit of private persons, the court should view the invoking of Sections 17(1) and/or 17(4) with suspicion and carefully scrutinise the relevant record before adjudicating upon the legality of such acquisition."

14. What needs to be emphasized is that although in exercise of the power of eminent domain, the State can acquire the private property for public purpose, it must be remembered that compulsory acquisition of the property belonging to a private individual is a serious matter and has grave

repercussions on his Constitutional right of not being deprived of his property without the sanction of law – Article 300A and the legal rights. Therefore, the State must exercise this power with great care and circumspection. At times, compulsory acquisition of land is likely to make the owner landless. The degree of care required to be taken by the State is greater when the power of compulsory acquisition of private land is exercised by invoking the provisions like the one contained in Section 17 of the Act because that results in depriving the owner of his property without being afforded an opportunity of hearing.

15. In the light of the above, it is to be seen whether there was any justification for invoking the urgency provisions contained in Section 17 (1) and (4) of the Act for the acquisition of the appellants' land. The Division Bench of the High Court accepted the explanation given by the respondents by observing that sub-station in East Delhi is needed to evacuate and utilize the power generated from 1500 MW gas based plant at Bawana. While doing so the Bench completely overlooked that there was long time gap of more than five years between initiation of the proposal for establishment of the sub-station and the issue of notification under Section 4 (1) read with Section 17 (1) and (4) of the Act. The High Court also failed to notice that the Government of NCT of Delhi had not produced any material to justify its decision to dispense with the application of Section 5A of the Act. The documents produced by the parties including the notings recorded in file bearing No. F.S(11)/08/L&B/LA and the approval accorded by the Lieutenant Governor do not contain anything from which it can be inferred that a conscious decision was taken to dispense with the application of Section 5A which represents two facets of the rule of hearing that is the right of the land owner to file objection against the proposed acquisition of land and of being heard in the inquiry required to be conducted by the Collector.

16. The scope of the rule of hearing, i.e., audi alteram

partem was highlighted by the three-Judge Bench in *Sayeedur Rehman v. State of Bihar* (1973) 3 SCC 333 in the following words:

> "*11*. … This unwritten right of hearing is fundamental to a just decision by any authority which decides a controversial issue affecting the rights of the rival contestants. This right has its roots in the notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision, for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties.

17. In *Maneka Gandhi v. Union of India* (1978) 1 SCC 248 Bhagwati, J. speaking for himself and Untwalia and Fazal Ali, JJ. observed:

> "*14*. … The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation'. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. *But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case*. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not

> mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. *The Court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that 'natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances'. The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise*."
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> (emphasis supplied)

18. In *Mohinder Singh Gill v. Chief Election Commr.*(1978) 1 SCC 405, Krishna Iyer, J. speaking for himself, Beg, C.J. and Bhagwati, J. observed as under:

> "*43*. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes it, applies when people are affected by acts of authority. It is the hone of healthy Government, recognised from earliest times and not a mystic testament of Judge-made law. Indeed, from the legendary days of Adam—and of *Kautilya's Arthashastra*—the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence

has sanctioned its prevalence even like the Anglo-American system."

"48. Once we understand the soul of the rule as fair play in action—and it is so—we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation: nothing more—but nothing less. The 'exceptions' to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Textbook excerpts and ratios from rulings can be heaped, but they all converge to the same point that audi alteram partem is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation."

19. In *Swadeshi Cotton Mills v. Union of India* (1981) 1 SCC 664 the majority of the three-Judge Bench held that the rule of *audi alteram partem* must be complied with even when the Government exercises power under Section 18-AA of the Industries (Development and Regulation) Act, 1951 which empowers the Central Government to authorise taking over of the management of industrial undertaking. Sarkaria, J. speaking for himself and Desai, J. referred to the development of law relating to applicability of the rule of *audi alteram partem* to administrative actions, noticed the judgments in *Ridge v. Baldwin* (1964) AC 40, *A.K. Kraipak v. Union of India* (1969) 2 SCC 262, *Mohinder Singh Gill v. Chief Election Commr.*

(supra), *Maneka Gandhi v. Union of India* (supra) and *State of Orissa v. Dr. Binapani Dei* (1967) 2 SCR 625 and quashed the order passed by the Central Government for taking over the management of the industrial undertaking of the appellant on the ground that opportunity of hearing has not been given to the owner of the undertaking and remanded the matter for fresh consideration and compliance with the rule of *audi alteram partem.*

20. In *Munshi Singh v. Union of India* (1973) 2 SCC 337, the three-Judge Bench of this Court emphasised the importance of Section 5-A in the following words:

"7. … Sub-section (2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. The decision of the appropriate Government on the objections is then final. The declaration under Section 6 has to be made after the appropriate Government is satisfied, on a consideration of the report, if any, made by the Collector under Section 5-A(2). The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A.

21. It is also apposite to mention that no tangible evidence was produced by the respondents before the Court to show that the task of establishing the sub-station at Mandoli was required to be accomplished within a fixed schedule and the urgency was such that even few months time, which may have been consumed in the filing of objections by the land owners and other interested persons under Section 5A(1) and holding of

inquiry by the Collector under Section 5A(2), would have frustrated the project. It seems that the Bench of the High Court was unduly influenced by the fact that consumption of power in Delhi was increasing everyday and the DTL was making an effort to ensure supply of power to different areas and for that purpose establishment of sub-station at village Mandoli was absolutely imperative. In our view, the High Court was not justified in rejecting the appellants' challenge to the invoking of urgency provisions on the premise that the land was required for implementation of a project which would benefit large section of the society. It needs no emphasis that majority of the projects undertaken by the State and its agencies / instrumentalities, the implementation of which requires public money, are meant to benefit the people at large or substantially large segment of the society. If what the High Court has observed is treated as a correct statement of law, then in all such cases the acquiring authority will be justified in invoking Section 17 of the Act and dispense with the inquiry contemplated under Section 5A, which would necessarily result in depriving the owner of his property without any opportunity to raise legitimate objection. However, as has been repeatedly held by this Court, the invoking of the urgency provisions can be justified only if there exists real emergency which cannot brook delay of even few weeks or months. In other words, the urgency provisions can be invoked only if even small delay of few weeks or months may frustrate the public purpose for which the land is sought to be acquired. Nobody can contest that the purpose for which the appellants' land and land belonging to others was sought to be acquired was a public purpose but it is one thing to say that the State and its instrumentality wants to execute a project of public importance without loss of time and it is an altogether different thing to say that for execution of such project, private individuals should be deprived of their property without even being heard. It appears that attention of the High Court was not drawn to the following observations made in *State of Punjab v. Gurdial Singh* (supra):

> "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 pre-emptive 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 Articles 14 (and 19), burke an enquiry 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 power."

22. A recapitulation of the facts would show that the idea of establishing 400/220 KV sub-station was mooted prior to August, 2004. For next almost three years, the officers of the DTL and the DDA exchanged letters on the issue of allotment of land. On 28.7.2008 Secretary (Power), Government of NCT of Delhi-cum-CMD, DTL made a suggestion for the acquisition of land by invoking Section 17 of the Act. This became a tool in the hands of the concerned authorities and the Lieutenant Governor mechanically approved the proposal contained in the file without trying to find out as to why the urgency provisions were being invoked after a time gap of five years. If the sub-station was to be established on emergency basis, the authorities of the DTL would not have waited for five years for the invoking of urgency provisions enshrined in the Act. They would have immediately approached the Government of NCT of Delhi and made a request that land be acquired by invoking Section 17 of the Act. However, the fact of the matter is that the concerned officers / functionaries of the DTL, the DDA and the Government of NCT of Delhi leisurely dealt with the matter for over five years. Even after some sign of emergency was indicated in letter dated 9.9.2008 of the Joint Secretary (Power), who made a mention of the Commonwealth Games scheduled to be organised in October, 2010, it took more than

one year and two months to the competent authority to issue the preliminary notification. Therefore, we are unable to approve the view taken by the High Court on the sustainability of the appellants' challenge to the acquisition of their land.

23. Before concluding we deem it appropriate to notice the judgments relied upon by the learned Additional Solicitor General. A cursory reading of the judgment in *Deepak Pahwa v. Lt. Governor of Delhi* (supra) (3-Judge Bench) gives an impression that the proposition contained therein supports the argument of Shri Malhotra, that pre-notification delay is not relevant for deciding legality of the exercise of the State's power of eminent domain and invoking of the urgency provisions contained in the Act but careful reading of the judgment along with the precedents referred to in paragraph 8 makes it clear that nothing contained therein can be relied upon for overlooking the time gap of five years between the initiation of proposal for establishment of the sub-station and the issue of notification under Section 4(1) read with Section 17 (1) and (4) of the Act. That case involved challenge to the acquisition of land for construction of 'New Transmitting Station for the Delhi Airport'. The High Court dismissed the writ petition in limine. The special leave petition was also dismissed at the threshold. While dealing with the argument that there was no justification to invoke Section 17(4) of the Act and to dispense with the inquiry under Section 5A because eight years time was spent in inter-departmental discussions, this court observed:

> "The other ground of attack is that if regard is had to the considerable length of time spent on inter-departmental discussion before the notification under Section 4(1) was published, it would be apparent that there was no justification for invoking the urgency clause under Section 17(4) and dispensing with the enquiry under Section 5-A. We are afraid, we cannot agree with this contention. *Very often persons interested in the land proposed to be acquired make various representations to the concerned*

> *authorities against the proposed acquisition. This is bound to result in a multiplicity of enquiries, communications and discussions leading invariably to delay in the execution of even urgent projects.* Very often the delay makes the problem more and more acute and increases the urgency of the necessity for acquisition. It is, therefore, not possible to agree with the submission that mere pre-notification delay would render the invocation of the urgency provisions void. We however wish to say nothing about post-notification delay. In *Jage Ram v. State of Haryana* (1971) 1 SCC 671 this Court pointed out the fact that the State Government or the party concerned was lethargic at an earlier stage is not very relevant for deciding the question whether on the date on which the notification was issued, there was urgency or not. In *Kasireddy Papaiah v. Government of Andhra Pradesh,* AIR 1975 AP 269 it was held, "… delay on the part of tardy officials to take the further action in the matter of acquisition is not sufficient to nullify the urgency which existed at the time of the issue of the notification and to hold that there was never any urgency". In the result both the submissions of the learned counsel for the petitioners are rejected and the special leave petitions are dismissed."
>
> (underlining is ours)

In making the aforesaid observation, the Court appears to have been unduly influenced by what was perceived at the relevant time as pulling of strings in the power corridors by the interested persons which resulted in frustration of the public oriented projects. The general observations made in Deepak Pahwa's case cannot supply basis for approving the impugned order and the notifications challenged by the appellants because it is neither the pleaded case of the respondents nor it has been suggested that the delay was caused due to the representation made by the appellants or that they brought extraneous pressure to prevent the acquisition of their land.

24. We may now notice the two decisions referred to in paragraph 8 of the judgment in Deepak Pahwa's case. In *Jage Ram v. State of Haryana* (1971) 1 SCC 671 the acquisition of land for setting up a factory for the manufacture of China-ware, Porcelain-ware including wall glazed tiles, etc., at the instance of a private industrialist by invoking Section 17(2)(c) of the Act (as amended by Haryana Legislature) was challenged. The State Government had issued notification dated 14/17.03.1969 under Section 4 of the Act. Simultaneously, a direction was given for taking action under Section 17(2)(c) and it was declared that the provisions of Section 5A shall not apply. On 8.4.1969 the appellants filed writ petition, which was dismissed by the High Court. This Court negatived the challenge to the invoking of the urgency provisions by making the following observations:

> "The allegations in the writ petition include the assertion that there was no urgency in the matter of acquiring the land in question and therefore there was no justification for having recourse to Section 17 and thus deprive the appellants of the benefit of Section 5-A of the Act. It was further alleged therein that the acquisition in question was made for the benefit of a company and hence proceedings should have been taken under Sections 38 to 44(B) of the Act and that there was no public purpose involved in the case. It was further pleaded that the land acquired was not waste and arable land and that Section 2(c) of the Act did not confer power on the Government to dispense with the proceedings under Section 5-A. In the counter-affidavit filed by the Deputy Director of Industries (Administration), Government of Haryana on behalf of the State of Haryana, the above allegations were all denied. Therein it is stated that at the instance of the State of Haryana, Government of India had issued a letter of intent to a company for setting up a factory for the manufacture of Glazed Tiles etc. in village Kasser. That project was to be started with the collaboration of a foreign company known as Pilkington

> Tiles Ltd. The scheme for setting up the project had been finalised and approved by the concerned authorities. On November 26, 1968, the Government wrote to one of the promoters of the project, Shri H.L. Somany asking him to complete the "arrangements for the import of capital equipment and acquisition of land in Haryana State for setting up of the proposed factory". It was further stated in that communication that the Government was pleased to extend the time for completing the project up to April 30, 1969. Under those circumstances it had become necessary for the State of Haryana to take immediate steps to acquire the required land. It was under those circumstances the Government was constrained to have recourse to Section 17 of the Act. The Government denied the allegation that the facts of this case did not come within the scope of Section 17(2)(c). It was also denied that the acquisition in question was not made for a public purpose.
>
> There is no denying the fact that starting of a new industry is in public interest. It is stated in the affidavit filed on behalf of the State Government that the new State of Haryana was lacking in industries and consequently it had become difficult to tackle the problem of unemployment. There is also no denying the fact that the industrialisation of an area is in public interest. That apart, the question whether the starting of an industry is in public interest or not is essentially a question that has to be decided by the Government. That is a socio-economic question. This Court is not in a position to go into that question. So long as it is not established that the acquisition is sought to be made for some collateral purpose, the declaration of the Government that it is made for a public purpose is not open to challenge. Section 6(3) says that the declaration of the Government that the acquisition made is for public purpose shall be conclusive evidence that the land is needed for a public purpose. Unless it is shown that there was a colourable exercise of power, it is not open to this

Court to go behind that declaration and find out whether in a particular case the purpose for which the land was needed was a public purpose or not: see *Smt Somavanti v. State of Punjab* and *Raja Anand Brahma Shah v. State of U.P.* On the facts of this case there can be hardly any doubt that the purpose for which the land was acquired is a public purpose.

Now coming to the question of urgency, it is clear from the facts set out earlier that there was urgency. The Government of India was pleased to extend time for the completion of the project up to April 30, 1969. Therefore urgent steps had to be taken for pushing through the project. The fact that the State Government or the party concerned was lethargic at an earlier stage is not very relevant for deciding the question whether on the date on which the notification was issued, there was urgency or not. The conclusion of the Government in a given case that there was urgency is entitled to weight, if not conclusive."

There is nothing in the aforesaid judgment which can possibly support the cause of the respondents. The scheme for setting up an industry by a company known as Pilkington Tiles Ltd. of which one H.S. Somany was a promoter was finalized on 26.11.1968 and the notification was issued on 14/17.3.1969. This shows that the time gap between finalization of the scheme and the issue of preliminary notification was less than four months. Therefore, the judgment in Jage Ram's case could not have been relied upon for taking the view that pre-notification delay cannot be considered while deciding legality of the State's action to invoke the urgency provisions. That apart, we have serious reservation whether the Court could have approved the invoking of urgency provisions for the acquisition of land on behalf of a private company ignoring that there is a separate Chapter for such acquisition.

25. In *Kasireddy Papaiah v. Government of A.P.* AIR 1975

AP 269 to which reference has been made in the judgment of Deepak Pahwa's case, the learned Single Judge (Chinnappa Reddy, J., as he then was) rejected the challenge to the acquisition of land under Section 4(1) read with Section 17(4). The facts of that case show that notification under Section 4(1) read with Section 17(4) was issued on 19.5.1970 and was published in the official gazette dated 24.9.1970. The declaration under Section 6 was published in official gazette dated 25.2.1971. The writ petition was filed on 16.9.1971. The High Court held that the time gap of six months was not fatal to the invoking of the urgency provisions because the land was acquired for providing house sites to the Harijans. There is nothing in that judgment which merits serious consideration by this Court.

26. In *Chameli Singh v. State of U.P.* (supra) this Court simply followed the observations made by the learned Single Judge of the Andhra Pradesh High Court in Kasireddy Papaiah's case and held that the acquisition of land for providing housing accommodation for Harijans did warrant invoking of the urgency provisions and delay by the officials cannot be made a ground to nullify the acquisition. There is no particular discussion in the judgment about the time lag between the proposal for the acquisition of land and the issue of notification under Section 4(1) read with Section 17(1) and (4). Therefore, that judgment is also of no assistance to the respondents.

27. It is also appropriate to mention that in paragraph 48 of the judgment in *Anand Singh v. State of UP* (supra) this Court did take cognizance of the conflicting views expressed on the effect of pre-notification and post-notification delay on the invoking of urgency provisions and observed that such delay will have material bearing on the question of invocation of urgency power, particularly, when no material is produced by the appropriate Government to justify elimination of the inquiry envisaged under Section 5A.

28. In the result, the appeal is allowed and the impugned order is set aside. As a corollary, the writ petition filed by the appellants is allowed and the acquisition of their land is quashed. However, it is made clear that this judgment shall not preclude the competent authority from issuing fresh notification under Section 4(1) and taking other steps necessary for the acquisition of the appellant's land. If the respondents initiate fresh proceedings for the acquisition of the appellants' land then they shall be free to file objections under Section 5A(1) and they shall also be entitled to be heard in the inquiry to be conducted by the Collector in terms of Section 5A(2) of the Act. The parties are left to bear their own costs.

N.J. Appeal allowed.

RUSHIKESH TANAJI BHOITE
v.
STATE OF MAHARASHTRA & ORS.
(Criminal Appeal No.24 of 2012)

JANUARY 4, 2012

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

Preventive detention – Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 – s.2(b-1) and s.3(1) – Detention order – Legality of – Challenged on ground of non-placing and non-consideration of bail order in favour of the dentenu – Held: In a case where detenu is released on bail and is enjoying his freedom under the order of the court at the time of passing the order of detention, then such order of bail must be placed before the detaining authority to enable him to reach at the proper satisfaction – In the instant case, since the bail order granted in favour of the dentenu on August 15, 2010 in a criminal case registered on August 14, 2010 and referred to in the grounds of detention was neither placed before the detaining authority at the time of passing the order of detention nor the detaining authority was aware of the order of bail, the detention order dated 10th January, 2011 was rendered invalid – The subjective decision of the detaining authority was vitiated – Moroever, none of the criminal cases, except the offence registered on August 14, 2010, referred to in the grounds for detention, was proximate to the order of detention – Order of detention accordingly set aside.

On January 10, 2011, the District Magistrate, in exercise of the powers conferred upon him by sub-section (1) of Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 and the Government Order Home Department (Special)

Mantralaya, Mumbai No. DDS 1210/Cr-207/SPL-3(B) dated 31.12.2010 directed the appellant's father to be detained under the provisions of the 1981 Act. This order was followed by another order of the same date directing that appellant's father shall be detained in Central Prison, Nagpur. The legality of the detention order dated January 10, 2011 was challenged by the appellant in the High Court. The Division Bench of that Court dismissed the Criminal Writ Petition filed by the appellant. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. In pursuance of Section 8 of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981, the detenu was supplied with the grounds for detention setting out therein particulars of offences and the action taken against him. The offences registered against the detenu way back in the year 1980 upto the last offence registered on August 14, 2010 have been noted by the detaining authority in reaching at the satisfaction that the detenu's activities were prejudicial to the maintenance of public order and he was dangerous person within the meaning of Section 2 (b-1) of the 1981 Act. The last criminal case referred to in the grounds is against the detenu for the offences under Sections 143, 147, 323, 504, 506, 353, 427 of IPC read with Section 7 of Criminal Law Amendment Act read with Section 37 (1)(3) for breach of Section 135 of the Bombay Police Act, 1951, registered at Police Station on August 14, 2010. [Para 6]

1.2. The admitted position is that detenu was arrested in connection with the above crime on August 15, 2010 and he was released on bail by the Judicial Magistrate, 1st Class, on that very day. One of the conditions imposed in the Order of Bail was that the detenu would appear at

Police Station on every Monday between 10.00 a.m. to 12 O'Clock till the charge-sheet was filed. Later on, the detenu made an application before the Judicial Magistrate, 1st Class, seeking relaxation of the above condition. That application was allowed and the above condition was relaxed by the concerned Judicial Magistrate on January 4, 2011. [Para 7]

1.3. It would be, thus, seen that the order releasing the detenu on bail in the crime registered on August 14, 2010 and the order relaxing the bail condition were passed by the Judicial Magistrate, 1st Class, Dharangaon much before the issuance of detention order dated January 10, 2011. However, the detention order or the grounds supplied to the detenu do not show that the detaining authority was aware of the bail order granted in favour of the dentenu on August 15, 2010. [Para 8]

2.1. In a case where detenu is released on bail and is enjoying his freedom under the order of the court at the time of passing the order of detention, then such order of bail must be placed before the detaining authority to enable him to reach at the proper satisfaction. [Para 9]

2.2. In the present case, since the order of bail dated August 15, 2010 was neither placed before the detaining authority at the time of passing the order of detention nor the detaining authority was aware of the order of bail, the detention order is rendered invalid. Non-placing and non-consideration of the material as vital as the bail order has vitiated the subjective decision of the detaining authority. [Para 10]

2.3. The other offences referred to in the order of detention suffer from remoteness and want of proximity to the order of detention. None of the criminal cases, except the offence registered on August 14, 2010, referred

to in the grounds for detention, can be said to be proximate to the order of detention. [Para 14]

2.4. In view of the above, it is clear that the order of detention dated January 10, 2011 cannot be sustained and has to be set aside. [Para 15]

Rekha v. *State of Tamil Nadu Through Secretary to Government and Another* **(2011) 5 SCC 244 and** *Vijay Narain Singh* vs. *State of Bihar and Others* **(1984) 3 SCC 14 – relied on.**

Case law reference:

(2011) 5 SCC 244	**relied on**	**Para 11**
(1984) 3 SCC 14	**relied on**	**Para 13**

CRIMINAL APPELLAT ORIGINAL JURISDICTION : Criminal Appeal No. 24 of 2012.

From the Judgment and Order dated 13.05.2011 of the High Court of Bombay at Aurangabad in Criminal W.P. No. 123 of 2011.

Dr. A.M. Singhvi and Jayant Bhushan, Shivaji M. Jadhav, Anish R. Shah, Jayant Bhatt, Nishant R Katneshawarkar, Shankar Chillarge, Asha Gopalan Nair, Debasis Misra and Suhas Kadam for the appearing parties.

The Judgment of the Court was delivered by

R.M. Lodha, J. 1. Leave granted.

2. We have heard Dr. A.M. Singhvi, learned senior counsel for the appellant, Mr. Shankar Chillarge, learned counsel for the State of Maharashtra and Mr. Suhas Kadam, learned counsel for the respondent no. 4.

3. On January 10, 2011, the District Magistrate, Jalgaon in exercise of the powers conferred upon him by sub-section

(1) of Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 (for short 'the 1981 Act') and the Government Order Home Department (Special) Mantralaya, Mumbai No. DDS 1210/Cr-207/SPL-3(B) dated 31.12.2010 directed Tanaji Keshavrao Bhoite resident of Kishavkunj, Bhoite Nagar, Jalgaon to be detained under the provisions of the 1981 Act. This order was followed by another order of the same date directing that Tanaji Keshavrao Bhoite shall be detained in Central Prison, Nagpur.

4. The legality of the detention order dated January 10, 2011 was challenged by the present appellant, who is son of the detenu, in the Bombay High Court at Aurangabad Bench, Aurangabad. The Division Bench of that Court dismissed the Criminal Writ Petition filed by the appellant on May 13, 2011. It is from this order that the present appeal, by special leave, has arisen.

5. Dr. A.M. Singhvi, learned senior counsel for the appellant urged diverse grounds in challenging the order of the High Court. We do not want to deal with all the grounds urged by Dr. A.M. Singhvi as in our view, appeal deserves to be allowed on the short ground that we indicate hereinafter.

6. In pursuance of Section 8 of 1981 Act, the detenu was supplied with the grounds for detention setting out therein particulars of offences and the action taken against him. The offences registered against the detenu way back in the year 1980 upto the last offence registered on August 14, 2010 have been noted by the detaining authority in reaching at the satisfaction that the detenu's activities were prejudicial to the maintenance of public order and he was dangerous person within the meaning of Section 2 (b-1) of the 1981 Act. The last criminal case referred to in the grounds is against the detenu for the offences under Sections 143, 147, 323, 504, 506, 353, 427 of the Indian Penal Code read with Section 7 of Criminal Law Amendment Act read with Section 37 (1)(3) for breach of

Section 135 of the Bombay Police Act, 1951, registered at Dharangaon Police Station on August 14, 2010.

7. The admitted position is that detenu was arrested in connection with the above crime on August 15, 2010 and he was released on bail by the Judicial Magistrate, 1st Class, Dharangaon on that very day. One of the conditions imposed in the Order of Bail was that the detenu would appear at Dharangaon Police Station on every Monday between 10.00 a.m. to 12 O'Clock till the charge-sheet was filed. Later on, the detenu made an application before the Judicial Magistrate, 1st Class, Dharangaon seeking relaxation of the above condition. That application was allowed and the above condition was relaxed by the concerned Judicial Magistrate on January 4, 2011.

8. It would be, thus, seen that the order releasing the detenu on bail in the crime registered on August 14, 2010 and the order relaxing the bail condition were passed by the Judicial Magistrate, 1st Class, Dharangaon much before the issuance of detention order dated January 10, 2011. However, the detention order or the grounds supplied to the detenu do not show that the detaining authority was aware of the bail order granted in favour of the dentenu on August 15, 2010.

9. In a case where detenu is released on bail and is enjoying his freedom under the order of the court at the time of passing the order of detention, then such order of bail, in our opinion, must be placed before the detaining authority to enable him to reach at the proper satisfaction.

10. In the present case, since the order of bail dated August 15, 2010 was neither placed before the detaining authority at the time of passing the order of detention nor the detaining authority was aware of the order of bail, in our view, the detention order is rendered invalid. We cannot attempt to assess in what manner and to what extent consideration of the order granting bail to the detenu would have effected the

satisfaction of the detaining authority but suffice it to say that non-placing and non-consideration of the material as vital as the bail order has vitiated the subjective decision of the detaining authority.

11. A three Judge Bench of this Court in the case of *Rekha vs. State of Tamil Nadu Through Secretary to Government and Another,* reported in (2011) 5 SCC 244, decided recently held as under:

> *"In this connection,it may be noted that there is nothing on the record to indicate whether the detaining authority was aware of the fact that the bail application of the accused was pending on the date when the detention order was passed on 08.04.2010. On the other hand, in para 4 of the grounds of detention it is mentioned that "Thiru. Ramakrishnan is in remand in crime No. 132/ 2010 and he has not moved any bail application so far". Thus, the detaining authority was not even aware whether a bail application of the accused was pending when he passed the detention order, rather the detaining authority passed the detention order under the impression that no bail application of the accused was pending but in similar cases bail had been granted by the courts. We have already stated above that no details of the alleged similar cases has been given. Hence, the detention order in question cannot be sustained."*

12. In the case of *Rekha* (supra), the detention order was held to be bad as the detaining authority was not aware of the fact that the bail application of the detenu was pending on the date when the detention order was passed. In the present case, the detenu was already released on bail but the detaining authority was not aware of the fact of grant of bail to the detenu.

13. A reference to the decision of the majority view in the case of *Vijay Narain Singh vs. State of Bihar and Others,* reported in (1984) 3 SCC 14, may not be out of the context. In

paragraph 32 of the Judgment, Venkataramiah, J. (as His Lordship then was) speaking for the majority observed as follows:

> "When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court."

14. The other offences referred to in the order of detention suffer from remoteness and want of proximity to the order of detention. None of the criminal cases, except the offence registered on August 14, 2010, referred to in the grounds for detention, can be said to be proximate to the order of detention.

15. In view of the above, we are satisfied that the order of detention dated January 10, 2011 cannot be sustained and has to be set aside. We order accordingly.

16. Appeal is allowed and the order dated May 13, 2011 passed by the Bombay High Court, Aurangabad Bench, Aurangabad, is set aside. The detenu – Tanaji Keshavrao Bhoite - is ordered to be released forthwith, if not required in any other case.

17. In light of the above order, no order is required to be passed on the Application for Impleadment and the same stands disposed of accordingly.

B.B.B. Appeal disposed of.

M/S. PUSHPA SAHAKARI AVAS SAMITI LTD.

v.

M/S. GANGOTRI SAHAKARI AVAS S. LTD. AND ORS.

(Civil Appeal No(s.) 8297-8298 of 2004)

MARCH 30, 2012

[DEEPAK VERMA AND DIPAK MISRA, JJ.]

Code of Civil Procedure, 1908 - s.47 and Or. XXI - Execution of decree - Questions to be determined - Compromise decree - Stipulating condition of payment of sum within a particular time - Objections rejected by executing court and order for execution of decree - High Court in civil revision holding that execution application having been filed before the stipulated time, was premature and hence liable to be rejected - Other objections not dealt with - On appeal, held: Premature filing of execution application does not entail its rejection - The decree did not lose its potentiality of executability having been filed on a premature date - Matter remitted to High Court to deal with the objections which were not dealt with by High Court.

In a suit for injunction filed by the appellant/plaintiff against first respondent/defendant, a compromise decree was passed. As per the compromise, defendant was required to pay a sum to the plaintiff within six months from the date of the compromise. Since the defendant did not honour the terms of the decree, appellant/ decree-holder filed application for execution of the decree. The respondent/judgment-debtor objected to the application. Executing court rejected all the objections and directed for execution of the decree. Single judge of the High Court allowed the civil revision holding that the execution application was premature and thus was liable to be rejected. High Court did not entertain other objections. Hence the present appeals.

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

HELD: 1. On a perusal of the various provisions relating to execution as enshrined under Order XXI CPC, there is nothing which lays down that premature filing of an execution would entail its rejection. It is not correct to say that the executing court could not have entertained the execution proceeding solely because it was instituted before the expiry of the period stipulated in the compromise decree despite the factum that by the time the court adverted to the petition, the said period was over. It is also not correct that the decree had lost its potentiality of executability having been filed on a premature date. [paras 10, 15 and 16]

2. The executing court did not commit any error by entertaining the execution petition. The Single Judge in civil revision has annulled the said order without any justification. While so doing, he had not dealt with other objections raised by the Judgment-debtor on the ground that they are raised for the first time. The matter is remitted to the High Court to deal with the objections on merits. [para 19]

Vithalbhai (P) Ltd. v. Union Bank of India **2005 (2) SCR 680 : (2005) 4 SCC 315;** *Martin & Harris Ltd. v. VIth Additional Distt. Judge and Ors.* **1997 (6) Suppl. SCR 380 : (1998) 1 SCC 732;** *Hindusthan Commercial Bank Ltd. v. Punnu Sahu (Dead) Through Legal Representatives* **(1971) 3 SCC 124;** *Dhurandhar Prasad Singh v. Jai Prakash University and Ors.* **2001 (3) SCR 1129 : (2001) 6 SCC 534- relied on.**

Lal Ram v. Hari Ram **1970 (2) SCR 898 : AIR 1970 SC 1093;** *Jai Narain Ram Lundia v. Kedar Nath Khetan* **1956 SCR 62 : AIR 1956 SC 359;** *Chen Shen Ling v. Nand Kishore Jhajharia* **AIR 1972 SC 726 - distinguished.**

Anandilal Bhanwarlal v. Kasturi Devi Ganeriwala **(1985) 1 SCC 442;** *Lakshmiratan Engineering Works Ltd. v. Asst. Comm., Sales Tax, Kanpur* **1968 SCR 505 : AIR 1968 SC 488;** *State of Haryana v. Maruti Udyog Ltd. and Ors.* **(2000) 7 SCC 348 : 2000 (3) Suppl. SCR 185 - referred to.**

Case Law Reference:

2005 (2) SCR 680	**Relied on**	**Para 7**
1970 (2) SCR 898	**Distinguished**	**Para 8**
1956 SCR 62	**Distinguished**	**Para 8**
AIR 1972 SC 726	**Distinguished**	**Para 8**
1997 (6) Suppl. SCR 380	**Relied on**	**Para 12**
(1985) 1 SCC 442	**Referred to**	**Para 12**
(1971) 3 SCC 124	**Relied on**	**Para 13**
1968 SCR 505	**Referred to**	**Para 13**
2000 (3) Suppl. SCR 185	**Referred to**	**Para 14**
2001 (3) SCR 1129	**Relied on**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8297-8298 of 2004.

From the Judgment & Order dated 10.01.2002 & 07.03.2003 of the High Court of Judicature at Allahabad in Civil Revision No. 341 of 1997 and Review Application No. 38861 of 2002.

Dinesh Dwivedi, Shalini Kumar, Neeru Vaid for the Appellant.

S.K. Dubey, Manoj Prasad, Y. Tiwari, Kushmanjali Sharma, Manoj Prasad for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeals by special leave are directed against the judgment and order dated 10.01.2002 and 07.03.2003 passed by the learned Single Judge of the High Court of Judicature at Allahabad in Civil Revision No. 341 of 1997 and Review Application No. 38861 of 2002 respectively. The facts as uncurtained in the two appeals are that the appellant as plaintiff initiated a civil action forming subject matter of suit No. 501 of 1995 against the respondent and others for permanent injunction. In the suit, the parties entered into a compromise and on the basis of the compromise, a decree was drawn up on 06.09.1996. The terms and conditions of the compromise were made a part of the decree. Be it noted, the compromise between the parties stipulated certain conditions and one such condition was that within a span of six months' time, the defendant would pay a certain sum to the plaintiff. For the sake of clarity and convenience, the said clause of the compromise is reproduced hereunder:-

> "That the defendant No. 1 acknowledges and undertakes to pay Lacs Rs. 38,38000/- (Rupees Thirty Eight Lacs and Thirty Eight Thousand) only to the plaintiff within six months from the date of this compromise. The payment of the said amount by the defendant No. 1 to the plaintiff shall have the effect of settling entire claim of the plaintiff as against the defendant No. 1 in full and final"

2. In the petition for compromise which formed a part of the decree, there were other stipulations but they are not necessary to be stated for the adjudication of these appeals. As has been indicated earlier, the decree was drawn up on 06.09.1996.

3. As the first respondent did not honour the terms of the decree, the appellant filed an application for execution of the decree on 17.02.1997 and the said application was registered as Misc. Case No. 9 of 1997. The respondent No. 1 entered contest and filed an objection under Section 47 of the Code of Civil Procedure (for short, 'the Code') which was registered as

Misc. Case No. 43 of 1997. Allegations, counter allegations and rejoinders were put forth before the Executing Court. One of the objections raised in the application under Section 47 of the Code was that as the decree holder had moved the executing court for execution of the decree prior to the expiry of the six months' period, the application was premature and, therefore, entire execution proceeding was vitiated being not maintainable. The learned Civil Judge who dealt with the execution case did not find any merit in any of the objections raised and rejected the same. It is worth noting that by the time the matter was taken up and the order came to be passed, the decree had become mature for execution. After rejection of the objection, the executing court took into consideration the submission of the judgment-debtor and, accordingly, directed that the entire balance money as agreed to in the compromise should be paid to the decree holder.

4. Aggrieved by the aforesaid order, the first respondent preferred Civil Revision No. 341 of 1997. The learned Single Judge noted the contentions and subsequent orders that were passed in the execution petition. The revisional court opined that no other objection could be raised for the first time in the revision and hence, no finding was warranted to be recorded on the said score.

5. As far as the premature filing of the execution petition is concerned, the learned Single Judge expressed his view as under:-

> "The question whether the execution was premature or not is to be decided with regard to the date at which the execution was filed. If a suit is found to have been filed premature, it cannot be decreed for the reason that the period has expired during the pendency of the suit. Similar principle will not apply to the execution. If the execution was premature when it was filed, it is liable to be rejected and cannot be proceeded with because it has prematured during the pendency of the case."

Being of this view, he allowed the revision and set aside the order passed by the learned Civil Judge as a consequence of which the execution case entailed in dismissal.

6. We have heard Mr. Dinesh Dwivedi, learned senior counsel for the appellant, and Mr. S. K. Dubey, learned Senior counsel for the first respondent.

7. Criticizing the impugned order passed in Civil Revision, Mr. Dwivedi, learned senior counsel, has contended that when a suit is premature on the date of its institution and the Court can grant relief to the plaintiff if no manifest injustice or prejudice is caused to the party proceeded against, there is no reason or justification for not applying the said principle to an execution proceeding. It is urged by him that the question of a suit being premature does not go to the root of the jurisdiction of the Court, but the Court in its judicial discretion may grant a decree or refuse to do so and, therefore, in the case at hand, when the executing court had proceeded after the expiry of the stipulated period in the decree, there was no warrant on the part of the revisional court to interfere with the same, for the said order did not suffer from lack of appropriate exercise of jurisdiction or exercise of jurisdiction that the court did not possess. It is canvassed by him that if the petition filed under Section 47 of the Code is scrutinized, it will clearly reveal that objections have been raised in a routine manner to delay the execution proceeding and such dilatory tactics by a judgment-debtor should, in all circumstances, be deprecated and decried. In support of his contentions, he has placed reliance on *Vithalbhai (P) Ltd. v. Union Bank of India*[1].

8. Mr. Dubey, learned senior counsel for the first respondent, per contra, contended that the executing court could not have entertained the application as it was filed prior to the expiration of the period. In support of his stand, he has placed reliance on *Lal Ram v. Hari Ram*[2]. The next submission of Mr.

Dubey is that as the execution was levied in a premature manner before the expiry of the period, the decree lost its potentiality of executability. Elaborating the said submission, it is canvassed that the compromise decree could not have been taken up for the purpose of execution and hence, the objection under Section 47 of the Code should have been accepted by the executing court, but as it failed to do so, the High Court, in exercise of the supervisory jurisdiction, has rectified the jurisdictional error.

The learned senior counsel further urged that when the compromise decree imposed mutual obligations on both sides some of which were conditional, no execution could be ordered unless the party seeking execution not only offered to perform his part but also satisfied the executing court that he was in a position to do so. In essence, the proponement of Mr. Dubey is that by levying the execution in a premature manner, the stipulations in the compromise decree have been totally overlooked and the real construction of the terms of the decree have been given an indecent burial. To bolster the said submissions, he has commended us to the decisions in *Jai Narain Ram Lundia v. Kedar Nath Khetan*[3] and *Chen Shen Ling v. Nand Kishore Jhajharia*[4].

9. At the very outset, it may be stated that it is an admitted position that the execution was levied prior to the expiration of the period stipulated in the decree. The executing court, as is evident, has addressed itself to all the objections that were raised in the application and rejected the same. The principal objection relating to the maintainability of the proceeding on the foundation that it was instituted prematurely did not find favour with it. The learned Single Judge has observed that if an execution is premature when it is filed, it is liable to be rejected. Mr. Dwivedi has drawn an analogy between a premature suit and premature execution by placing heavy reliance on the

3. AIR 1956 SC 359.

4. AIR 1972 SC 726.

authority in *Vithalbhai (P) Ltd*. (supra). In *Vithalbhai* (supra), while dealing with the premature filing of a suit, a two-Judge Bench of this Court, after referring to a number of decisions of various High Courts and this Court, came to hold as follows:-

> "The question of suit being premature does not go to the root of jurisdiction of the court; the court entertaining such a suit and passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the court to grant decree or not. The court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiff's entitlement to relief became due and whether by granting the relief in such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filing the suit before the date of maturity of cause of action, the court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and unmerited advantage to the plaintiff or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors."

After so stating, the Bench ruled that the plea as regards the maintainability of the suit on the ground of its being premature should be promptly raised and it will be equally the responsibility of the Court to dispose of such a plea. Thereafter, it was observed as follows:-

> "However, the court shall not exercise its discretion in favour of decreeing a premature suit in the following cases: (i) *when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the court's jurisdiction; and (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, such as in an election petition which affects and involves the entire constituency.* (*See Samar Singh v. Kedar Nath 13.*) One more category of suits which may be added to the above, is: where leave of the court or some authority is mandatorily required to be obtained before the institution of the suit and was not so obtained."

[Emphasis Supplied]

10. We have referred to the aforesaid dictum in extenso as we find that the Bench has given emphasis on various aspects, namely, an issue getting into the root of the jurisdiction of the Court; causing of irreparable and manifest injustice; adjustment of equities; concept of statutory bar; presentation that invites a void action and anything that affects the rights of the other party; and obtaining of leave of the Court or authority where it is a mandatory requirement, etc. On a perusal of the various provisions relating to execution as enshrined under Order XXI of the Code, we do not find anything which lays down that premature filing of an execution would entail its rejection. The principles that have been laid down for filing of a premature suit, in our considered opinion, do throw certain light while dealing with an application for execution that is filed prematurely and we are disposed to think that the same can safely be applied to the case at hand.

11. Presently, we shall advert to the submission of Mr. Dubey that the executing court could not have entertained the application as it was filed before the expiration of the period. The learned senior counsel has relied on the decision rendered in *Lala Ram* (supra). In the said case, an order of acquittal passed -by the learned Magistrate was assailed before the High Court by seeking leave under Section 417(3) of the Code

of Criminal Procedure, 1898 and the High Court granted leave as a consequence of which the appeal came to be filed eventually. The High Court accepted the appeal and convicted the accused. It was contended before this Court that the appeal could not have been entertained by the High Court having been filed beyond the expiry of sixty days in view of the language employed under Section 417(4) of the Code. Emphasis was laid on the term "entertain". Repelling the contention, this court held as follows: -

> "The learned counsel also suggests that the word "entertain" which occurs in Section 417 (4) means "to deal with or hear" and in this connection he relies on the judgment of this Court in *Lakshmi Rattan Engineering Works v. Asst. Commr., Sales Tax,* (1968) 1 SCR 505 = (AIR 1968 SC 488). It seems to us that in this context "entertain" means "file or received by the Court" and it has no reference to the actual hearing of the application for leave to appeal; otherwise the result would be that in many cases applications for leave to appeal would be barred because the applications have not been put up for hearing before the High Court within 60 days of the order of acquittal"

On a perusal of the aforesaid passage, it is vivid that the three-Judge Bench interpreted the terms 'were entertained' in the context they were used under the old Code and did not accept the submission 'to deal with or hear'. Regard being had to the context, we have no shadow of doubt that the said decision is distinguishable and not applicable to the obtaining factual matrix.

12. In this context, we may refer with profit to the two-Judge Bench decision in *Martin & Harris Ltd. v. VIth Additional Distt. Judge and others*[5]. In the said Case, the Court was interpreting the language employed in the proviso to Section 21(1) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction)

5. (1998) 1 SCC 732

Act, 1972. The proviso stipulated that where the building was in occupation of a tenant before its purchase by the landlord, such purchase being made after the commencement of the Act, no application shall be entertained on the grounds mentioned in Clause (a) of the said Section unless three years' period had lapsed since the date of purchase. A contention was canvassed that filing of an application before the expiry of the three years' period was barred by the provision contained in the said proviso. Repelling the said submission, the Bench opined thus: -

> "It must be kept in view that the proviso nowhere lays down that no application on the grounds mentioned in clause (a) of Section 21(1) could be "instituted" within a period of three years from the date of purchase. On the contrary, the proviso lays down that such application on the said grounds cannot be "entertained" by the authority before the expiry of that period. Consequently it is not possible to agree with the extreme contention canvassed by the learned Senior Counsel for the appellant that such an application could not have been filed at all within the said period of three years."

After so stating, the Bench distinguished the decision rendered in *Anandilal Bhanwarlal v. Kasturi Devi Ganeriwala*[6] which dealt with "institution" and eventually came to hold as follows: -

> "Thus the word "entertain" mentioned in the first proviso to Section 21(1) in connection with grounds mentioned in clause (a) would necessarily mean entertaining the ground for consideration for the purpose of adjudication on merits and not at any stage prior thereto as tried to be submitted by learned Senior Counsel, Shri Rao, for the appellant. Neither at the stage at which the application is filed in the office of the authority nor at the stage when summons is

6. (1985) 1 SCC 442

issued to the tenant the question of entertaining such application by the prescribed authority would arise for consideration.

13. In this context, we may usefully refer to the decision in *Hindusthan Commercial Bank Ltd. v. Punnu Sahu (Dead) Through Legal Representatives*[7]. In the said case, this Court was interpreting Rule 90 of Order XXI of the Code of Civil Procedure as amended by the Allahabad High Court. The amended proviso to Rule 90 stipulated the circumstances under which no application to set aside the sale shall be entertained. It was contended before this Court that the expression "entertain" found in the proviso referred to the initiation of the proceedings and not to the stage when the Court had taken up the application for consideration. This Court referred to the earlier decision in *Lakshmiratan Engineering Works Ltd. v. Asst. Comm., Sales Tax, Kanpur*[8] and opined that the expression "entertain" conveys the meaning "adjudicate upon" or "proceed to consider on merits".

14. In *State of Haryana v. Maruti Udyog Ltd. and Others*[9], this Court was dealing with Section 39 (5) of the Haryana General Sales Tax Act, 1973 which stipulated that no appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the appellate authority was satisfied that the amount of tax assessed and the penalty and interest, if any, recoverable from the persons had been paid. The Bench interpreting the term "entertainment" of the appeal ruled that when the first proviso to Section 39 (5) speaks of the "entertainment of the appeal", it means that the appeal will not be admitted for consideration unless there is satisfactory proof available of the making of the deposit of admitted tax.

7. (1971) 3 SCC 124.

8. AIR 1968 SC 488.

9. (2000) 7 SCC 348

15. In view of the aforesaid authorities in the field, the submission of Mr. Dubey that the executing court could not have entertained the execution proceeding solely because it was instituted before the expiry of the period stipulated in the compromised decree despite the factum that by the time the Court adverted to the petition the said period was over, is absolutely unacceptable.

16. The next limb of proponement of Mr. Dubey is that the decree had lost its potentiality of executability having been filed on a premature date. On a first flush, the aforesaid submission looks quite attractive but on a deeper probe and keener scrutiny, it melts into insignificance. In *Dhurandhar Prasad Singh v. Jai Prakash University and Others*[10], while dealing with the power of the executing court under Section 47 of the Code of Civil Procedure, a two-Judge Bench has expressed thus:-

> "The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void *ab initio* and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing "

17. Tested on the anvil of the aforesaid principle, it is difficult to accept the stand that the decree had become inexecutable, and, accordingly, we repel the same.

18. The learned senior counsel for the respondent has further propounded that the executing court could not have passed any order on the application for execution as it was filed

10. (2001) 6 SCC 534.

prior to the expiry of the period. Pyramiding the said submission, it is urged by him that such advertence in an execution proceeding frustrates the construction of the terms of the decree. Mr. Dubey has drawn immense inspiration from the verdict in *Chen Shen Ling (supra).* On a careful perusal of the aforesaid decision, it is plain and patent that the three-Judge Bench had dealt with the consideration of the terms of the decree and eventually, placing reliance on the decision in *Jai Narain Ram Lundia* (supra), expressed the view that no execution can be ordered unless the party seeking execution not only offered to perform his part but, also when objection was taken, satisfied the executing court that he was in a position to do so. Be it noted, in the case *Jai Narain Ram Lundia* (supra), this Court has adverted to the reciprocal application, their inter-linking and the indivisibility of the terms of the decree and opined that the executing court cannot go behind the decree and it cannot defeat the directions in the decree. In both the decisions, the issue pertained to the nature of order to be passed by the executing court or the type of direction to be issued by it. The ratio enunciated therein does not remotely deal with the filing of an execution petition in respect of a compromise decree prior to the expiry of the date as stipulated in the terms and conditions of the decree. Hence, we have no scintilla of doubt that the said authorities do not support the stand so vehemently put forth by Mr. Dubey, learned senior counsel for the first respondent.

19. In view of our aforesaid premised reasons, we arrive at the irresistible conclusion that the executing court did not commit any error by entertaining the execution petition. The learned Single Judge in civil revision has annulled the said order without any justification. While so doing, he had not dealt with other objections raised by the Judgment-debtor on the ground that they are raised for the first time. On a query being made, Mr Dwivedi, learned senior counsel for the petitioner, fairly stated that the said objections were raised in a different manner in the objection filed under Section 47 of the Code and

the revisional court should have been well advised to deal with the same on merits. Regard being had to the aforesaid analysis, we set aside the order passed in civil revision and remit the matter to the High Court to deal with the objections on merits. As it is an old matter, we request the learned Chief Justice of the High Court of Allahabad to nominate a learned Judge to dispose of the civil revision within a period of six months. It is hereby made clear that the parties shall not seek unnecessary adjournment before the revisional court and should cooperate so that the revision shall be disposed of within the timeframe.

20. Consequently, the appeals are allowed to the extent indicated hereinabove leaving the parties to bear their respective costs.

K.K.T. Appeals allowed.

SHOBHAN SINGH KHANKA
v.
THE STATE OF JHARKHAND
(Criminal Appeal No. 592 of 2012)

MARCH 30, 2012

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

Code of Criminal Procedure, 1973:

s.438 - Anticipatory bail - Criminal proceedings against Chairman and Members of State Public Service Commission and Examiners regarding large scale bungling and manipulation of marks - Inquiry by Vigilance department - FIR lodged - Appellant, an Expert also arraigned as an accused - Application for anticipatory bail of appellant rejected by Special Judge and High Court - Held: Considering the limited allegation against the appellant in the FIR and other details, his academic qualifications including the fact that he does not belong to the State and has no relatives and is not a Member of the JPSC, acted as Expert only for a short period, the appellant has made out a case for anticipatory bail - Even if the prosecution has any apprehension, sub-s. (2) of s. 438 enables the court concerned to impose such conditions/ directions as it may thinks fit - Appellant, in the event of arrest, directed to be released on bail, subject to the conditions stipulated in the judgment.

s.438 - Anticipatory bail - Factors to be considered - Explained.

On an inquiry conducted by the vigilance department, it was revealed that in holding the second Jharkhand Public Service Commission Civil Services Examination - 2005, there had been large-scale bungling, manipulation, tampering of marks, irregularity in

appointment of Examiners, and the Members of the Interview Board and the Chairman in connivance with the Members and also in conspiracy with the successful candidates for securing monetary gains to the officials of JPSC, by practicing corrupt method, made recommendations to the Government for appointment of various persons. It was also alleged that the Members either had not given declaration regarding their relatives appearing in the examination nor had they provided the required details. An FIR was lodged against several persons, including the Chairman and Members of the JPSC as also the appellant who was engaged as an Expert. This gave rise to Special case No. 23 of 2010 for offences under the IPC and Prevention of Corruption Act, 1988.

The appellant filed an application for anticipatory bail u/s 438 CrPC which was rejected by the Special Judge as also by the High Court.

Allowing the appeal, the Court

HELD: 1.1. It is settled law that personal liberty is a precious fundamental right. While considering the claim of pre-arrest bail, the factors to be considered are: (i) the nature and gravity of the accusation; (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence; (iii) the possibility of the applicant to flee from justice; and (iv) whether the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested. [para 7 and 12]

1.2. It is not in dispute that the appellant is not a regular Member of the JPSC nor he belong to the State of Jharkhand. Admittedly, he is in Central Government service and he was nominated as Expert No.1 by the

Board. The appellant has excellent academic career. He has been a regular expert in the Selection Committees of UGC, AICTE, ICSSR and other Universities. He has to his credit the authorship of numerous Research/Reference Books and Textbooks. Recently, he was awarded "Shiksha Rattan Puraskar" by the Governor of Arunachal Pradesh. The President of India based on the academic qualification of the appellant nominated him as her nominee for recruitment of Assistant/Associate Professors in the Faculty of Commerce and Management in the Indira Gandhi National Tribal University, Amar Kantak, Madhya Pradesh. [para 8]

1.3. The perusal of the FIR also shows that the appellant was not acquainted with or related to any of the candidates interviewed by the panel of which he was a Member. In view of the assertion that the appellant does not belong to the State of Jharkhand and has no relatives, friends or kinsmen in the State of Jharkhand, there is no prima facie case to include him in the alleged conspiracy. Considering his academic qualifications and experience and taking note of his claim that of an impeccable career as academician and of the fact that he has no interest in the State of Jharkhand, this Court holds that the appellant has made out a case for anticipatory bail u/s 438 of the Code of Criminal Procedure, 1973. Even if the prosecution has any apprehension, sub-s. (2) of s. 438 enables the court concerned to impose such conditions/ directions as it may thinks fit. [para 11-12]

1.4. The order passed by the Special Judge as well as the High Court dismissing the petition of the appellant for anticipatory bail are set aside. Accordingly, it is directed that in the event of arrest, the appellant shall be released on bail subject to the conditions laid down in the judgment. [para 13]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 592 of 2012.

From the Judgment & Order dated 21.09.2011 of the High Court of Jharkhand at Ranchi A.B.A. No. 3230 of 2011.

Uday U. Lalit, Nitin Sangra, Satyajeet Saha, V.D. Khanna for the Appellant.

Sunil Kumar, Chhaya Kumari, Anil K. Jha for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 21.09.2011 passed by the High Court of Jharkhand at Ranchi in A.B.A. No. 3230 of 2011 whereby the High Court rejected the application for anticipatory bail filed by the appellant herein.

3. Brief facts:

(a) The appellant herein, who acted as one of the Expert in the Interview Board to the Jharkhand Public Service Commission (in short "the JPSC"), filed a petition before the Special Judge (Vigilance), for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 (in short "the Code") in connection with Special Case No. 23 of 2010 arising out of Vigilance PS No. 23 of 2010 under Sections 420, 423, 424, 467, 468, 469, 471, 477A, 120-B, 109 and 201 of the Indian Penal Code, 1908 (in short "the IPC") and Section 13(2) read with Section 13(1) (c) (d) of the Prevention of Corruption Act, 1988.

(b) According to the appellant, he was intimated that he had been nominated as Expert No1 in the Interview Board for holding interview from 28.01.2008 to 01.02.2008. He was

selected by the Members of the Expert Committee including the Chairman of the JPSC.

(c) The allegations against the appellant, Chairman and other Members of the JPSC are that they provided highest marks to the candidates whom they desire to be selected or appointed by giving undue favour. The appellant is also responsible for conspiracy with the Chairman, Members of the JPSC and the candidates who were given highest marks by the Interview Board. It is also alleged that the appellant is responsible for cutting, manipulation, interpolation in the marks sheet of the Interview Board in order to provide benefit to the candidates for selection and appointment.

(d) The prosecution case in a nutshell is that an enquiry was conducted by the vigilance department regarding the irregularity committed by the Chairman, Members and officers of the JPSC in conducting Second JPSC Civil Services Examination pursuant to advertisement No. 7 of 2005 dated 12.11.2005. It is alleged by the prosecution that the examination was not held in accordance with the guidelines. The Members either have not given declaration regarding their relation appearing in the examination and those who have given declaration have not provided the required details. The further allegation of the prosecution is that there has been manipulation in the numbers awarded to the students. The prosecution examined 22 copies and it has been alleged that they have found manipulation in the answer sheets. It is the further case of the prosecution that there has been large-scale bungling, manipulation, tampering of marks, irregularity in the appointment of Examiners and Members of the Interview Board and the Chairman in connivance with the Members and also in conspiracy with the successful candidates for securing monetary gains to the officials of JPSC in utter disregard to the rules and by practicing corrupt method recommendations for appointment of various persons were made to the Government. Accordingly, a First Information Report (in short "FIR") was lodged against several persons including the appellant.

(e) By order dated 01.08.2011, the Special Judge (Vigilance) Ranchi, on consideration of the materials refused to enlarge the appellant on anticipatory bail and rejected his petition. Against the order of the Special Judge, the appellant preferred A.B.A. No. 3230 of 2001 before the High Court of Jharkhand at Ranchi. By impugned order dated 21.09.2011, the High Court confirmed the order of the Special Judge and dismissed his petition for anticipatory bail.

4. Heard Mr. Uday U. Lalit, learned senior counsel for the appellant and Mr. Sunil Kumar, learned senior counsel for the respondent-State of Jharkhand.

5. After taking us through all the materials including the FIR and the allegations pertaining to the present appellant, Mr. Lalit, learned senior counsel submitted that in the FIR except for stating that the appellant was one of the Expert, there is nothing which can even remotely connect the appellant with any offence much less the offences alleged therein. He also submitted that the appellant who hails from District Pithoragarh, Uttarakhand, presently posted at Faridabad, Haryana has no relatives, friends or kinsmen in the State of Jharkhand and, therefore, had no reason or motive to favour anybody and in that event be a part of any conspiracy to commit the alleged crime. He further pointed out the role of the appellant as Expert Member was only to award marks to each candidate on a separate sheet and had nothing to do beyond it. He also pointed out that the observation of the High Court in the impugned order rejecting his anticipatory bail application on the ground that the appellant stands on a similar footing as that of other accused is factually incorrect inasmuch as the appellant cannot be equated with the case of other Experts who belong to the State of Jharkhand and are alleged to be related or known to candidates and, therefore, had no reason or motive to commit the alleged crime. On the other hand, learned counsel for the State submitted that considering the serious nature of the crime and of the fact that the appellant's initial selection as expert is itself contrary to the rules and several manipulations have been done by all the

persons concerned in the selection panel, it is not a fit case in which the anticipatory bail is to be granted.

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

7. Inasmuch as we are concerned about the eligibility or otherwise relating to grant of anticipatory bail, there is no need to go into all the factual details and arrive a finding one way or the other which will affect the ultimate trial of the case. We have already referred to the offences alleged in the FIR. It is settled law that personal liberty is a precious fundamental right. With this background, we have to see that whether a case has been made out for grant of anticipatory bail.

8. It is not in dispute that he is not a regular Member of the JPSC. Admittedly, he is in Central Government service and he was nominated as Expert No.1 by the Board. Thought it is pointed out that his nomination itself is bad, that is not a relevant issue at this moment. Mr. Lalit, learned senior counsel for the appellant pointed out his higher academic qualifications. All those details are available in Annexure-P1 which shows that the appellant possesses qualifications of M.Com., (Gold Medallist) and holder of 5 Ph.Ds. He is a Professor and Coordinator in Fellow Programme and Management in National Institute of Financial Management of the Central Government and he has an experience of 16 years as Professor since 21.10.1994. He has 13 years administrative experience as Head of the Department of Business Administration and 13 years experience as Dean in the School of Management Studies. The appellant has specialization in Human Resources Management, Organisational behaviour and Entrepreneurship Development and besides that, he has experience on International Exposure of visiting Professor in other foreign countries. It is also pointed out that the appellant has been a regular expert in the Selection Committees of UGC, AICTE, ICSSR and other Universities. He has to his credit the authorship of numerous Research/Reference Books and

Textbooks. Recently on 26.05.2011, the appellant was awarded "Shiksha Rattan Puraskar" by H.E. the Governor of Arunachal Pradesh. It is also brought to our notice that in July, 2011, Hon'ble the President of India based on the academic qualification of the appellant nominated him as her nominee for recruitment of Assistant/Associate Professors in the Faculty of Commerce and Management in the Indira Gandhi National Tribal University, Amar Kantak, Madhya Pradesh. The above details show that the appellant has excellent academic career.

9. In the FIR, the appellant has been named as accused No.7. Though it is pointed out that the appellant has given highest marks to the candidates who were given only 10 marks by the Chairman of the Interview Board, it is not in dispute that he is not a Member of the JPSC Board nor belongs to Jharkhand State. As stated earlier, he was selected as specialized member for a short period only. Mr. Lalit has also taken us through the chart showing marks given by experts including the present appellant - Expert No.1, Expert No.2 and the Chairman Shanti Devi. Interestingly, the Chairman has allotted 10 marks to each of the candidate irrespective of his/her performance. We are not here to assess and give a finding whether the marks awarded by the appellant (Expert No.1) is excessive or unreasonable. All those things have to be analyzed only at the time of trial by way of evidence.

10. Though the High Court has concluded that on the ground of parity and on the similar footing that the other co-accused declined to grant anticipatory bail, we are of the view that inasmuch as all other Members of the Board including the Chairman belong to Jharkhand and some of their relatives participated in the selection and considering the fact that the present appellant has no connection with the JPSC and hails from a different State, namely, Uttarakhand, the said observation/conclusion is not acceptable.

11. The perusal of the FIR also shows that the appellant was not acquainted with or related to any of the candidates

interviewed by the panel of which he was a Member. In view of the assertion that the appellant does not belong to the State of Jharkhand and has no relatives, friends or kinsmen in the State of Jharkhand, there is no prima facie case to include him in the alleged conspiracy. Considering his academic qualifications and experience and taking note of his claim that of an impeccable career as academician and of the fact that he has no interest in the State of Jharkhand, we hold that the appellant has made out a case for anticipatory bail under Section 438 of the Code.

12. While considering the claim of pre-arrest bail, the following factors have to be considered:

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested.

Considering the limited allegation in the FIR and other details, his academic qualifications including the fact that he does not belong to the State of Jharkhand and has no relatives and is not a Member of the JPSC, acted as Expert No.1 only for a short period, the appellant has made out a case for anticipatory bail. Even if the prosecution has any apprehension, sub-section (2) of Section 438 enables the court concerned to impose such conditions/directions as it may thinks fit.

13. Under these circumstances, the order passed by the Special Judge as well as the High Court dismissing his petition

for anticipatory bail are set aside. Accordingly, we direct that in the event of arrest, the appellant shall be released on bail in connection with PS case No. 23 of 2010 corresponding to Special Case No. 23 of 2010, Vigilance PS, Ranchi, Jharkhand subject to the following conditions:-

(i) the appellant shall make himself available for interrogation as and when required;

(ii) the appellant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) the appellant shall not leave India without the previous permission of the special court.

14. It is made clear that the conclusion reached by us is limited to the disposal of the application for anticipatory bail and the Special Judge is free to decide the charges in the ultimate trial in accordance with law uninfluenced by any of the observation/conclusion made herein.

15. The appeal is allowed on the above terms.

R.P. Appeal allowed.

STATE OF KERALA & ANR.
v.
P.V. MATHEW (DEAD) BY L.RS.
(Civil Appeal No. 3337 of 2012)

APRIL 2, 2012

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

KERALA FOREST ACT, 1961:

s.52 read with s.2(f) (as amended by Amendment Act 23 of 1974), s,61 A(as inserted by Amendment Act 28 of 1975 and s.69 - Confiscation of vehicle used in committing a forest offence - Vehicle confiscated on the allegation that the same was used by the offenders to go to the forest to kill an elephant and to transport the tusks therein - Held: It is significant to note that the definition of "forest produce" in s. 2(f) does not include any part of living or dead wild animals which is being taken care of by the Wild Life (Protection) Act, 1972 - Consequent to the amendment of expression "forest produce" in s. 2(f) of the Act, the claim of the State that even in the absence of "ivory" in the definition "forest produce", in view of s. 61A of the Act, the authorities are entitled to confiscate the vehicle cannot be sustained - The definition of "forest produce" in the Act u/s 2(f) doesn't take ivory in its purview - The presumption under Sec.69 of the Act applies only to the "Forest Produce" so even if s.61A of the Act takes in its fold 'ivory' as one of the items liable to be confiscated the presumption u/s 69 of the Act will not be available to the Government as it is not a "forest produce".

In a case registered on the allegation of illicit killing of a wild elephant in 1990, one of the accused stated on 1.4.1991 that the vehicle of the original respondent was used by the accused to go to the forest and again to transport of the tusks. After the investigation by order

dated20.12.1996 the vehicle was confiscated. The appeal of the original respondent was allowed by the District Judge. The High Court declined to interfere.

In the instant appeal filed by the State, it was contended for the respondent that after the amendment of definition of "forest produce" in s.2(f) of the Kerala Forest Act, 1961, the forest authorities wee not empowered to confiscate the vehicle unless it was established that a forest offence was committed in terms of the Act.

Dismissing the appeal, the Court

HELD: 1.1 Clause (iii) of the unamended s. 2(f) has been deleted by Act 23 of 1974 and the present definition of "forest produce" does not include "ivory". Section 52 of the Act which deals with seizure of property liable to confiscation, clearly contemplates that the power of confiscation is confined to only those vehicles used in committing any forest offence in respect of any timber or other forest produce. Though a reading of s. 61A of the Act as inserted by Amendment Act, 28 of 1975 shows that ivory is also included in respect of any forest offence under the Act and under sub-s. (2) thereof, the vehicle used for committing such offence is also liable to confiscation by the Authorised Officer. However, consequent to the amendment of expression "forest produce" in s. 2(f) of the Act, the claim of the State that even in the absence of "ivory" in the definition "forest produce", in view of s. 61A of the Act, the authorities are entitled to confiscate the vehicle cannot be sustained. It is significant to note that the definition of "forest produce" in s. 2(f) does not include any part of living or dead wild animals which is being taken care of by the Wild Life (Protection) Act, 1972. [para 7]

1.2 Inasmuch as "ivory" being not a "forest produce" as defined in s. 2(f) after the Amendment Act 23 of 1974, no forest offence as defined in s. 2(e) of the Act can be said to have been done in respect of the "ivory" as alleged in the instant case and, therefore, the action taken u/s 61A of the Act cannot be supported. [para 6]

1.3 Further, since seizure of ivory is not justified even u/s 52 of the Act, the power of confiscation u/s 61A commences only when a valid seizure of the property is effected under the Act and the report is made to the Authorised Officer. Therefore, the District Court has rightly held that "the fact that offences punishable under other analogous statutes have been committed in respect of ivory which is the property of the Government cannot expose the appellant's vehicle to the consequence of confiscation u/s 61A of the Act". [para 8]

1.4 In the instant case, neither any property was seized from the car nor had any seizure taken effect as provided under sub-s. (1) of s. 52. Inasmuch as seizure u/s 52 of the Act has not taken place and no forest offence in respect of a "forest produce" is shown to have been committed or established in the case, there is absolutely no justification for the seizure and the order of confiscation of the aforesaid car as the same is beyond the jurisdiction of the authorized officer. These aspects have been rightly considered by the District Court as well as the High Court. [para 8]

1.5 Inasmuch as the provisions of the Wild Life (Protection) Act, 1972 take care of wild animals skins, tusks, horns, bones, honey, wax and other parts or produce of animals, in the absence of specific charge under the said Act, the Authorized Officer was not justified in ordering confiscation of the vehicle. [para 8]

1.6 The definition of "forest produce" in the Act u/s

2(f) doesn't take ivory in its purview. The presumption under Sec.69 of the Act applies only to the "Forest Produce" so even if s.61A of the Act takes in its fold 'ivory' as one of the items liable to be confiscated the presumption u/s 69 of the Act will not be available to the Government as it is not a "forest produce". [para 9]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3337 of 2012.

From the Judgment & Order dated 02.12.2005 of the High Court of Kerala at Ernakulam in C.R.P. No. 1587 of 1999.

Bina Madhavan, Praseena E. Joseph for the Appellants.

S. Gopakumaran Nair, K.N. Madhusoodhanan, T.G.Narayanan Nair for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 02.12.2005 passed by the High Court of Kerala at Ernakulam in C.R.P. No. 1587 of 1999 whereby the High Court while affirming the order dated 04.12.1998 of the District Judge, Thrissur in C.M.A. No. 16 of 1997 dismissed the revision petition filed by the State of Kerala, the appellant herein.

3. **Brief facts:**

(a) According to the prosecution, a case was registered as C.R. No. 5 of 1990 in Vazhachal Range in Vazhachal Forest Division of Kerala on the allegation of illicit killing of a wild elephant. During the course of investigation, three persons, viz., Nelladan George, Madhura Johny and Chirayath Jose were taken into custody and questioned. On 01.04.1991, Nelladan George and Madhura Johny gave statements before the

Divisional Forest Officer, Chalakudy and Chirayath Jose had given statement before the Range Officer, Flying Squad, Thrissur. While questioning, they admitted having gone to Vazhikadavu and shot dead wild tuskers about six months back. In the statement given by Madhura Johny, he admitted that about seven months back he along with four others, namely, Nelladan George, Parambal Chandran, Kaitharam Paulachan, Kottatti Jose had gone to Vazhikadavu area in a car bearing Registration No. KL 8 6755 for shooting elephants with two unlicensed guns. After reaching there, they sent back the car and went to the forest. After two or three days, Madhura Johny shot dead two tuskers, one big elephant and another small one. They collected the tusks and kept it in a cave and returned to Thrissur by bus. Again they went to Vazhikadavu in the same car and collected the tusks hided in the cave. They brought the tusks to Thrissur and sold it to Chirayath Jose for Rs.72,000/-. They paid Rs.3,500/- to the driver of the car for two trips and the balance amount they divided among them.

(b) After recording the statement, on 09.04.1991, Range Officer, Thrissur Flying Squad and his party seized the car. On the same day, the car was produced before the Divisional Forest Officer, Chalakudy and thereafter he entrusted the car to the Range Officer, Pariyaram for safe custody and asked him to conduct a detailed enquiry.

(c) The owner of the vehicle - the respondent herein - filed O.P. No. 4554 of 1991 before the High Court praying for release of the vehicle. The High Court, by order dated 30.04.1991, directed to release the vehicle for interim custody to the respondent herein on furnishing security of immovable property to the extent of Rs.50,000/-. Accordingly, the car was released to the respondent herein on his furnishing the security.

(d) After investigation, the Forest Range Officer, Pariyaram submitted a report on 02.10.1996. On 30.10.1996, the Investigating Officer issued a show cause notice to the original respondent i.e. P.V. Mathew as to why the car should not be

confiscated to Government under Section 61A of Kerala Forest Act, 1961 (hereinafter referred to as "the Act") and called upon him to appear in person on 26.11.1996. After hearing him and after perusing the final report of the Investigating Officer, the Divisional Forest Officer, Chalakudy passed an order dated 20.12.1996 for confiscation of the car.

(e) Aggrieved by the said order of confiscation, the original respondent preferred an appeal being C.M.A. No. 16 of 1997 before the District Judge, Thrissur. By order dated 04.12.1998, the District Judge allowed the appeal.

(f) Against the order passed by the District Judge, the State preferred a revision petition being C.R.P. No. 1587 of 1999 before the High Court. The High Court, by the impugned judgment dated 02.12.2005, dismissed the revision filed by the State.

(g) Aggrieved by the said judgment, the State has preferred this appeal by way of special leave before this Court. During the pendency of the appeal, sole respondent died and his LRs were brought on record as R(i) to (viii).

4. Heard Ms. Bina Madhavan, learned counsel for the appellant-State and Mr. S. Gopakumaran Nair, learned senior counsel for the respondent.

5. By the impugned judgment, the High Court found that the vehicle of the respondents which was used for illegally transporting ivory collected from the forest cannot be confiscated invoking power under Section 61A of the Act because ivory is not a "forest produce" coming under Section 2(b) of the Act and no forest offence can be said to have been committed in respect of ivory. Ms. Bina Madhavan, learned counsel appearing for the appellant-State, after taking us through the relevant provisions from the Act including Section 61A, submitted that the Divisional Forest Officer was fully justified in confiscating the vehicle which transported ivory and

the District Court as well as the High Court committed an error in setting aside the same. On the other hand, Mr. Gopakumaran Nair, learned senior counsel for the respondents submitted that after the amendment in respect of the definition "forest produce" in Section 2(f) of the Act, the forest authorities are not empowered to confiscate unless it is established that forest offence has been committed in terms of the Act. He also submitted that the District Court and the High Court were fully justified in setting aside the order of the Divisional Forest Officer based on the amended provisions.

6. Among the various provisions of the Act, we are concerned about the following provisions:

2 (e) **"forest offence"** means an offence punishable under this Act or any rule made thereunder.

2 (f) **"forest produce"** includes-

(i) the following whether found in or brought from, a forest or not, that is to say-

timber, charcoal, wood oil, gum, resin, natural varnish, bark lac, fibres and roots of sandalwood and rosewood; and

(ii) the following when found in, or brought from, a forest, that is to say,-

(a) trees and leaves, flowers and fruits, and all other parts or produce not herein before mentioned, of trees;

(b) plants not being trees (including grass, creepers, reeds and moss) and all parts or produce of such plants; and

(c) silk cocoons, honey and wax;

(d) peat, surface oil, rock and minerals (including

limestone, laterite), mineral oils and all products of mines or quarries;

52. Seizure of property liable to confiscation.- (1) When there is reason to believe that a forest offence has been committed in respect of any timber or other forest produce, such timber, or produce, together with all tools, ropers, chain, boats, vehicles and cattle used in committing any such offence may be seized by any Forest Officer or Police Officer.

Explanation:- The terms 'boats' and 'vehicles' in this section, 9section 53, section 55, section 61A and section 61B) shall include all the articles and machinery kept in it whether fixed to the same or not.

(2) Every officer seizing any property under sub-section (1) shall place on such property or the receptacle, if any, in which, it is contained a mark indicating that the same has been so seized and shall, as soon as may be make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that, when the timber or forest produce with respect to which such offence is believed to have been committed is the property of the Government and the offender is unknown, it shall be sufficient if the Forest Officer makes, as soon as may be, a report of the circumstances to his official superior.

61A. Confiscation by Forest Officers in certain cases.- (1) Notwithstanding anything contained in the foregoing provisions of this chapter, where a forest offence is believed to have been committed in respect of timber, charcoal, firewood or ivory which is the property of the Government, the officer seizing the property under sub-section (1) of Section 52 shall, without any unreasonable

delay, produce it, together with all tools, ropes, chains, boats, vehicles and cattle used in committing such offence, before an officer authorized by the Government in this behalf by notification in the Gazette, not being below the rank of an Assistant Conservator of Forests (hereinafter referred to as authorized officer).

(2) Where an authorized officer seizes under sub-section (1) of section 52 any timber, charcoal, firewood or ivory which is the property of the Government, or where any such property is produced before an authorized officer under sub-section (1) of this section and he is satisfied that a forest offence has been committed in respect of such property, such authorized officer may, whether or not a prosecution is instituted for the commission of such forest offence, order confiscation of the property so seized together with all tools, ropes, chains, boats, vehicles and cattle used in committing such offence."

It is clear that definition 2(f) was amended and the present provision was substituted by Act 23 of 1974. A perusal of the amended provision clearly shows exclusion of "ivory" within the ambit of "forest produce". Further, after the amendment of the expression "forest produce" under Section 2(f) of the Act consequent to the enactment of the Wild Life (Protection) Act, 1972 it could not be said that "ivory" is a forest produce or that possession and transportation of "ivory" without valid authority is an offence punishable under the Act or any rule made thereunder. Inasmuch as "ivory" being not a "forest produce" as defined in Section 2(f) after the Amendment Act 23 of 1974, no forest offence as defined in Section 2(e) of the Act can be said to have been done in respect of the "ivory" as alleged in the instant case and, therefore, the action taken under Section 61A of the Act cannot be supported.

7. As rightly pointed out by learned senior counsel for the respondents that after the Wild Life (Protection) Act, 1972,

Section 2(f) of the Act came to be amended. The unamended Section 2(f) of the Act reads as under:

"2 (f) "forest produce" includes the following when found in or brought from, a forest, that is to say-

(i) trees and leaves, flowers and fruits and all other parts or produce of trees, and charcoal,

(ii) plants not being trees (including grass, creepers, reeds and moss) and all other parts or produce of such plants,

(iii) wild animals and skins, tusks, horns, bones, silk cocoons, honey and wax and all other parts or produce of animals,

(iv) peat, surface oil, rock and minerals (including limestone and laterite), mineral oils and all produce of mines and minerals;"

Clause (iii) of the unamended Section 2(f) has been deleted by Act 23 of 1974 and the present definition of "forest produce" does not include "ivory". We have already extracted Section 52 of the Act which deals with seizure of property liable to confiscation. The said Section clearly contemplates that the power of confiscation is confined to only those vehicles used in committing any forest offence in respect of any timber or other forest produce. Though a reading of Section 61A of the Act as inserted by Amendment Act, 28 of 1975 shows that ivory is also included in respect of any forest offence under the Act and under sub-section (2) thereof, the vehicle used for committing such offence is also liable to confiscation by the Authorised Officer. However, consequent to the amendment of expression "forest produce" in Section 2(f) of the Act, the claim of the State that even in the absence of "ivory" in the definition "forest produce", in view of Section 61A of the Act, the authorities are entitled to confiscate the vehicle cannot be sustained. For the sake of repetition, we reiterate that the

definition of "forest produce" in Section 2(f) does not include any part of living or dead wild animals which is being taken care of by the Wild Life (Protection) Act, 1972. In view of the same, the interpretation and the argument of the learned counsel for the State cannot be accepted.

8. Further, since seizure of ivory is not justified even under Section 52 of the Act, the power of confiscation under Section 61A commences only when a valid seizure of the property is effected under the Act and the report is made to the Authorised Officer. Therefore, we are of the view that the District Court has rightly held that "the fact that offences punishable under other analogous statutes have been committed in respect of ivory which is the property of the Government cannot expose the appellant's vehicle to the consequence of confiscation under Section 61A of the Act". We have already quoted the entire Section 61A. In the instant case, neither any property was seized from the car nor had any seizure taken effect as provided under sub-section (1) of Section 52. Inasmuch as seizure under Section 52 of the Act has not taken place and no forest offence in respect of a "forest produce" is shown to have been committed or established in the case, there is absolutely no justification for the seizure and the order of confiscation of the aforesaid car is beyond the jurisdiction of the authorized officer. These aspects have been rightly considered by the District Court as well as the High Court and we are in entire agreement with the same. Inasmuch as the provisions of the Wild Life (Protection) Act, 1972 take care of wild animals skins, tusks, horns, bones, honey, wax and other parts or produce of animals, in the absence of specific charge under the said Act, the Authorized Officer was not justified in ordering confiscation of the vehicle.

9. The definition of "forest produce" in the Act under Section 2(f) doesn't take ivory in its purview. The presumption under Sec.69 of the Act applies only to the "Forest Produce" so even if Sec.61A of the Act takes in its fold 'ivory' as one of

the items liable to be confiscated the presumption under Section 69 of the Act will not be available to the Government as it is not a "forest produce".

10. In the light of the above discussion, we are unable to agree with the stand of the State. Consequently, the appeal fails and the same is dismissed. No order as to costs.

R.P. Appeal dismissed.

MODERN DENTAL COLLEGE AND RESEARCH CENTRE AND OTHERS

v.

STATE OF MADHYA PRADESH & ORS.

IA Nos. 57 & 59

IN

(Civil Appeal No. 4060 of 2009)

APRIL 3, 2012

[DEEPAK VERMA, DR. B.S. CHAUHAN, K.S. RADHAKRISHNAN, JJ.]

*Education/Educational Institutions: Medical and Dental Colleges - Private unaided medical/dental colleges in the State of Madhya Pradesh - Admission - Unfilled NRI seats - Whether unfilled NRI seats are to be transferred to general pool and be shared equally to be filled up on the basis of the Common Entrance Test conducted by the State level Committee or the Common Entrance Test conducted by the association of Private Dental and Medical Colleges - Held: It is open to the unaided professional educational institutions to fill up unfilled NRI seats through the entrance test conducted by them subject to the conditions laid down in *Inamdar case - The policy of reservation should not be enforced by the State nor any quota or percentage of admissions could be carved out to be appropriated by the State in unaided educational institution - In the matter of filling up of unfilled NRI seats, the principles laid down in **TMA Pai and *Inamdar cases were not correctly applied in ***R.D. Gargi - M.P. Admission Rules, 2008 - r.8 - Madhya Pradesh Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk ka Nirdharan) Adhiniyam, 2007.*

****TMA Pai Foundation and Others v. State of Karnataka and Others* (2002) 8 SCC 481: 2002 (3) Suppl. SCR 587;** ***TMA Pai Foundation and Others v. State of Karnataka and*

Others **(1994) 4 SCC 728;** ***TMA Pai Foundation and Others v. State of Karnataka and Others* **(1995) 5 SCC 220: 1995 (2) Suppl. SCR 608;** *AP (P) Engg. College Management Assn. v. Govt. of A.P.* **(2000) 10 SCC 565;** **P.A. Inamdar and others v. State of Karnataka and others* **(2005) 6 SCC 537: 2005 (2) Suppl. SCR 603 - relied on.**

Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh and Ors. **(2009) 7 SCC 751: 2009 (9) SCR 845;** ****R.D. Gardi Medical College and Anr. etc. v. State of M.P. and Ors.* **(2010) 10 SCC 225: 2010 (12) SCR 692 - referred to.**

Case Law Reference:

2002 (3) Suppl. SCR 587	**relied on**	**Para 3**
2005 (2) Suppl. SCR 603	**relied on**	**Para 3, 11**
2009 (9) SCR 845	**referred to**	**Para 4**
2010 (12) SCR 692	**referred to**	**Para 5,7,8, 12,13**
(1994) 4 SCC 728	**relied on**	**Para 10**
1995 (2) Suppl. SCR 608	**relied on**	**Para 10**
(2000) 10 SCC 565	**relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : I.A. No. 57 & 59.

IN

Civil Appeal No. 4060 of 2009.

From the Judgment & Order dated 15.05.2009 of the High Court of Madhya Pradesh at Jabalpur in W.P. No. 2732 of 2009.

C.A. Sundaram, Dr. Rajeev Dhawan, Puneet Jain, Sushil Kumar Jain, Pragati Neekhra, Suryanaryana Singh, B.S.

Banthia, Vikas Upadhyay, Gaurav Sharma, Prathia M. Singh, Surbhi Mehta, Abhinav Mukerji, Amit Kumar, Avijit Mani Tripathi, Sunil Kumar Jain, R.C. Kohli, Harish Pandey, Dharmendra Kumar Sinha, Arun Kumar Beriwal, Sanjay K. Agrawal for the appearing parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are in these applications called upon to decide the question as to whether the unfilled NRI seats are to be transferred to general pool and be shared equally to be filled up on the basis of the Common Entrance Test conducted by the State level Committee - Vyavsayik Pariksha Mandal (VYAPAM) or by the Common Entrance Test conducted by the Association of Private Dental and Medical Colleges (APDMC), so far as the private unaided medical/dental colleges in the State of Madhya Pradesh are concerned.

2. Applicants, herein had filed Writ Petition No. 2732 of 2009 before the High Court of Madhya Pradesh (Jabalpur) challenging the constitutional validity of Madhya Pradesh Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk ka Nirdharan) Adhiniyam, 2007 (in short 'the Act') and the Rules framed thereunder. The High Court vide its judgment dated 15.5.2009 repelled the challenge to the Act and the Rules but declared that the provisions of Rule 10(2)(iii) of 2009 as ultra vires. The High Court also held that the Judgment would not affect the Common Entrance Test already conducted by VYAPAM for the year 2009-10. The above-mentioned Writ Petition was disposed of along with other similar matters and a common Judgment was delivered by the High Court.

3. Aggrieved by the judgment in Writ Petition No. 2732 of 2009, Civil Appeal No. 4060 of 2009 was filed by the applicants herein. While admitting the appeal, a Bench of this Court had prima facie found that the provisions of the Act handing over the entire selection process to the State Government or the

agencies appointed by the State Government for undergraduate, graduate and postgraduate medical/dental colleges and fee fixation was contrary to and inconsistent with the principles laid down by the eleven-Judges Bench Judgment in *TMA Pai Foundation and Others v. State of Karnataka and Others* [(2002) 8 SCC 481] (for short *'Pai Foundation'*) and the Judgment in *P.A. Inamdar and others v. State of Karnataka and others* [(2005) 6 SCC 537] (in short *'Inamdar'*). The Court also observed that 2007 Act would become unconstitutional, if read literally, but an interim arrangement was made with regard to the admissions in the private unaided medical/dental colleges in the State of Madhya Pradesh for the year 2009-10; the operative portion of that order reads as follows:

> "We, therefore, direct that the admissions in the private unaided medical/dental colleges in the State of Madhya Pradesh will be done by first excluding 15% NRI seats (which can be filled up by the private institutions as per para 131 of Inamdar case), and allotting half of the 85% seats for admission to the undergraduate and post graduate courses to be filled in by an open competitive examination by the State Government, and the remaining half by the Association of the Private Medical and Dental Colleges. Both the State Government as well as the Association of Private Medical and Dental Colleges will hold their own separate entrance examination for this purpose. As regards "the NRI seats", they will be filled as provided under the Act and the Rules, in the manner they were done earlier."

4. The Court also observed that the solution arrived at might not be perfect, but it had only tried to find out a best via media for admissions for the academic year 2009-10. However, it was recommended that the same might also be considered for future sessions. The order passed by the Court is reported in *Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh and Ors.* [(2009) 7 SCC 751]. (in short *Modern Dental College*)

5. The above arrangement indicates that 15% of the total sanctioned intake in the unaided Private Medical and Dental Colleges was set apart for giving admission to NRI students and the remaining 85% seats would be filled up equally through the examination conducted by the State and the Common Entrance Test conducted by the Colleges. Controversy now is only with regard to unfilled NRI seats due to lack of sufficient NRI students, and in what manner those seats have to be filled up. State, has maintained the stand that those unfilled seats would also go to the general pool and be shared by both the State and the Colleges equally. Such a stand was taken by the State on the basis of the interpretation placed by this Court in filling up the unfilled NRI seats in its judgment dated 30.9.2010 in *R.D. Gardi Medical College and Anr. etc. v. State of M.P. and Ors.* (2010) 10 SCC 225 (in short *Gardi Medical College*), wherein, while interpreting Rule 8 of the M.P. Admission Rules, 2008 the two-Judges Bench of this Court observed as follows:

> "A plain reading of the above leaves no manner of doubt that unfilled NRI seats had to be transferred to the general pool to be filled up on the basis of the merit of the candidates in the State-level common entrance test conducted by the Madhya Pradesh Vyavsayik Pariksha Mandal or by any other agency authorised by the State Government for that purpose. The unfilled seats in the NRI quota were, therefore, to be treated as a part of the general pool and once that was done the share of the college in terms of the order passed by this Court would be 50% out of the said seats. The High Court has, in that view, rightly held that while the management was justified in filling up 5 unfilled seats in NRI quota, the remaining 5 could not have been filled up otherwise than on the basis of the entrance test referred to in Rule 8."

Court, in the above case, was dealing with the admissions for the academic year 2010-11.

6. The State Government while framing the Madhya

Pradesh Private Medical and Dental Under Graduate Course Entrance Examination Rules, 2011 incorporated Rule 5 with regard to unfilled NRI seats with specific reference to the above-mentioned judgment dated 30.9.2010. The Rule reads as follows:

> "RESERVATION: Every Institution shall be allowed to fill up to 15% of the sanctioned seats by NRI candidates only, in the manner prescribed by the admission and Fee Regulatory Committee. These NRI seats shall be filled up through a separate counselling. NRI seats remaining vacant shall be merged into the counselling of Non NRI Candidates, as per Hon'ble Supreme Court Order in Civil Appeal No. 8429-8430/2010 dated 30.9.2010."

7. The applicants, noticing that the judgment dated 30.9.2010 in *Gardi Medical College* would seriously affect the rights of unaided educational institutions in the matter of filling up of unfilled NRI seats, filed IA Nos. 51-52 of 2011 in Civil Appeal No. 4060 of 2009 for appropriate modification / clarification of the orders passed by two-Judges Bench in *Modern Dental College* as well as *R.D. Gardi Medical College*. The applications came up for hearing before two-Judges Bench of this Court on 1.8.2011 and this Court passed the following order:

> "We are of the opinion that there appears to be some conflict between the observations made in para 28 of the judgment of the two-Judges Bench rendered in the case of *R.D. Gardi Medical College and Another. etc. v. State of M.P. and Ors.* [(2010) 10 SCC 225], quoted below:
>
> > 28. A plain reading of the above leaves no manner of doubt that unfilled NRI seats had to be transferred to the general pool to be filled up on the basis of the merit of the candidates in the State-level common entrance test conducted by the Madhya Pradesh Vyavsayik Pariksha Mandal or by

> any other agency authorised by the State Government for that purpose. The unfilled seats in the NRI quota were, therefore, to be treated as a part of the general pool and once that was done the share of the College in terms of the order passed by this Court would be 50% out of the said seats. The High Court has, in that view, rightly held that while the management was justified in filling up 5 unfilled seats in NRI quota, the remaining 5 could not have been filled up otherwise than on the basis of the entrance test referred to in Rule 8.

and the observations made in para 27(1), quoted below, of T.M.A. Pai Foundation and others v. State of Karnataka and others [(1995) 5 SCC 220] which is a three Judge Bench decision:

> "27(1) So far as NRI quota is concerned, it is fixed at fifteen per cent for the current academic year. It shall be open to the management to admit NRI students and foreign students up to the aforesaid specified percentage, it shall be open to them to admit students on their own, in the order of merit, within the said quota. This direction shall be a general direction and shall operate in the case of all the States where admissions have not been finalized. It is, however, made clear that by virtue of this direction, no student who has already been admitted shall be disturbed or removed."

The Court, therefore, referred the matter to a larger Bench. However, by the time year 2011-2012 came to a close hence, the larger Bench could not resolve the apparent conflict and hence, a two Judges Bench of this Court disposed of both IA Nos.51 and 52 vide its order dated 23.9.2011.

8. The same issue, has again been cropped up, now for the academic year 2012-13, hence, it is necessary to clarify

the order dated 27.5.2009 in Modern Dental College and the judgment of this Court dated 30.9.2010 in R.D. Gardi Medical College as to how the unfilled NRI seats be filled up. For the said purpose, the applicants have filed IA Nos.57-59 of 2011, which came up for hearing before two-Judges Bench of this Court on 9.12.2011 and the Court ordered that the applications be placed before the Constitution Bench.

9. Since main issue referred to Constitution Bench is not likely to come up for hearing shortly and the issue projected in I.As with regard to unfilled seats is of urgent nature, thus, they have been considered by us. Hence, these applications have come up before us for consideration vide order passed by Hon'ble the Chief Justice of India.

10. We have heard learned senior counsel - Shri C.A. Sundaram and Dr. Rajeev Dhawan and learned counsel for the State of Madhya Pradesh - Shri B.S. Banthia. We may at the outset point out that in the instant applications, we are concerned only with the question as to how and in what manner the unfilled NRI seats be filled up for the year 2012-13 till the appeal is finally disposed of, which issue, in our view, is no more res integra. This Court had earlier in various judgments dealt with the purpose and object of creating NRI quota and the manner in which those quota had to be filled up. A three-Judges Bench of this Court in *TMA Pai Foundation and Others v. State of Karnataka and Others* (1994) 4 SCC 728 had an occasion to consider how, the vacant seats, in the NRI quota be filled up and ordered as follows:

> "So far as NRI quota is concerned, we fixed the same as 15% last year. We fixed NRI quota in respect of minorities' institutions as 5%. Although the NRI quota should not, normally, be more than 5% but keeping in view the reduction in the fee structure, we fix the same as 10% (of the total seats) for this year. *We further make it clear that in case any in the NRI quota remains unfilled, the same can be filled by the Management at its discretion.*"

Later another three-Judges Bench of this Court in *TMA Pai Foundation and Others v. State of Karnataka and Others* (1995) 5 SCC 220 had also endorsed the same view holding that it would be open to the Management to admit NRI students and foreign students within that quota and in case they were not able to get the NRI or foreign students upto the aforesaid specified percentage, it would be open to them to admit students on their own, in the order of merit, within the said quota. The operative portion of the order with regard to NRI quota for the year 1995-96 was as follows:

> (1) So far as NRI quota is concerned, it is fixed at fifteen per cent for the current academic year. *It shall be open to the management to admit NRI students and foreign students within this quota and in case they are not able to get the NRI or foreign students upto the aforesaid specified percentage, it shall be open to them to admit students on their own, in the order of merit, within the said quota. This direction shall be a general direction and shall operate in the case of all the States where admissions have not been finalized.* It is, however, made clear that by virtue of this direction, no student who has already been admitted shall be disturbed or removed."

Similar order was also passed by this Court in *AP (P) Engg. College Management Assn. v. Govt. of A.P.* (2000) 10 SCC 565. The operative portion of the order of the two-Judges Bench reads as follows:

> "4. After hearing learned counsel for the parties, we direct that the State of Andhra Pradesh shall allow the 5% NRI quota in the private engineering colleges in the State of Andhra Pradesh to be filled up in the manner earlier directed by this Court and to permit the management of the private engineering colleges to fill up the unfilled NRI quota, at its own discretion, subject, however, to the criteria of merit, qualification and fee structure - as prescribed by the Government not only for the current academic year but also for successive academic years, till the main matter is decided by this Court in the pending cases."

11. We may also in this connection refer to the judgment of the seven-Judges Bench in *P.A. Inamdar v. State of Maharashtra* [(2005) 6 SCC 537], wherein this Court had dealt with the rights of unaided minority and non-minority educational institutions and held that the State cannot regulate or control admissions, so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling up, the seats available, to be filled up at its discretion in such private institutions. Court held that would amount to nationalization of seats, such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. It was also ordered that such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.

Inamdar having said so dealt with NRI seats as well. In Para 131 of judgment, the Court had only dealt with the question as to how NRI seats had to be filled up: First, it was ordered that the seats should be utilized bona fide by NRIs only and for their children or wards. Further, it was ordered that within quota, merit should not be given a complete go-bye. Further, it was also ordered that the amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution might admit on subsidized payment of their fee.

Further, In para 132 of the *Inamdar,* it had also been clearly held that the policy of reservation should not be enforced by the State nor any quota or percentage of admissions could be

carved out to be appropriated by the State in a minority or non-minority unaided educational institution.

12. We are of the considered view that the above principles laid down by a larger Benches of this Court, in the matter of filling up of NRI seats were not correctly understood or applied by this Court in *R.D. Gardi Medical College* while interpreting Rule 8 of the M.P. Admission Rules, 2008. The finding recorded in *R.D. Gardi Medical College* that the unfilled seats in NRI quota in unaided professional colleges should be treated as a part of the general pool and be shared equally by the State and the unaided professional colleges goes contrary to the principles laid down by the eleven-Judges Bench in *Pai Foundation, Inamdar* as well as the Judgments rendered by the three Judges Bench in *Pai Foundation* referred to earlier. The wrong interpretation given by in *R.D. Gardi Medical College* is seen incorporated in Rule 5 of the Madhya Pradesh Private Medical and Dental Under Graduate Course Entrance Examination Rules 2011 as well, which in our view cannot be legally sustained.

13. We are, therefore, inclined to allow both the applications and over rule the direction given by the two learned Judges of this Court in *R.D. Gardi Medical College* and hold that it is open to the unaided professional educational institutions to fill up unfilled NRI seats for the year 2012-13 and for the succeeding years through the entrance test conducted by them till the disposal of the appeal subject to the conditions laid down in *Inamdar* strictly on the basis of merits.

14. IA Nos. 57 and 59 of 2011 in Civil Appeal No. 4060 of 2009 are allowed to the extent mentioned above and disposed of on the basis of the above modifications and clarifications.

D.G. Interlocatory Applications disposed of.

BHUSHAN KUMAR & ANR.

v.

STATE (NCT OF DELHI) & ANR.

(Criminal Appeal No. 612 of 2012)

APRIL 4, 2012

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

Code of Criminal Procedure, 1973:

ss.190, 204 - Cognizance of offence and summoning order - Distinction between - Held: Cognizance is taken of cases and not of persons - It is the condition precedent to the initiation of proceedings by the Magistrate or the Judge - A summon is a process issued by a Court calling upon a person to appear before a Magistrate - It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law - s.204 states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued.

s.204 - Requirement of assigning reasons for summoning a person - Held: Summoning order u/s.204 does not mandate the Magistrate to state reasons for issuance of summons since it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith.

Respondent No. 2 lodged FIR under Section 420 IPC against the appellants. The Magistrate summoned the appellants. The appellants challenged the summoning order before the High Court. By impugned order dated 30.07.2010, the High Court rejected the prayer for quashing the summoning order.

The questions which arise for consideration in these appeals were: whether taking cognizance of an offence by the Magistrate is same as summoning an accused to appear; and whether the Magistrate, while considering the question of summoning an accused, is required to assign reasons for the same.

Dismissing the appeals, the Court

HELD: 1. Under Section 190 of the Code of Criminal Procedure, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code. A summon is a process issued by a Court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in Court. A person who is summoned is legally bound to appear before the Court on the given date and time. Willful disobedience is liable to be punished under Section 174 IPC. It is a ground for contempt of court. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form

an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued. The order passed by the Magistrate could not be faulted with only on the ground that the summoning order was not a reasoned order. [Paras 8-10, 16]

S.K. Sinha, Chief Enforcement Officer v. Videocon International Ltd. & Ors. **(2008) 2 SCC 492: 2008 (2) SCR 36;** *Kanti Bhadra Shah & Anr. v. State of West Bengal* **(2000) 1 SCC 722: 2000 (1) SCR 27;** *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi & Ors.* **(1976) 3 SCC 736: 1976 (0) Suppl. SCR 123;** *Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal & Ors.* **(2003) 4 SCC 139: 2003 (2) SCR 621 - relied on.**

2. It is inherent in Section 251 of the Code that when an accused appears before the trial court pursuant to summons issued under Section 204 of the Code in a summons trial case, it is the bounden duty of the trial Court to carefully go through the allegations made in the charge sheet or complaint and consider the evidence to come to a conclusion whether or not, commission of any offence is disclosed and if the answer is in the affirmative, the Magistrate shall explain the substance of the accusation to the accused and ask him whether he pleads guilty otherwise, he is bound to discharge the accused as per Section 239 of the Code. The petition filed before the High Court under Section 482 of the Code was maintainable. However, on merits, the impugned order dated 30.07.2010 passed by the High Court of Delhi is confirmed. [Paras 17-19]

U.P. Pollution Control Board v. Dr. Bhupendra Kumar Modi & Anr., **(2009) 2 SCC 147: 2008 (17) SCR 349;** *Pepsi*

Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. **(1998) 5 SCC 749: 1997 (5) Suppl. SCR 12;** *Dhariwal Tobacco Products Ltd. & Ors. v. State of Maharashtra & Anr.* **(2009) 2 SCC 370: 2008 (17) SCR 844;** *M.A.A. Annamalai v. State of Karnataka & Anr.* **(2010) 8 SCC 524: 2010 (9) SCR 1124 - relied on.**

Case Law Reference:

2008 (2) SCR 36	**relied on**	**Para 7**
2000 (1) SCR 27	**relied on**	**Para 12**
1976 (0) Suppl. SCR 123	**relied on**	**Para 13**
2003 (2) SCR 621	**relied on**	**Para 14**
2008 (17) SCR 349	**relied on**	**Para 15**
1997 (5) Suppl. SCR 12	**relied on**	**Para 18**
2008 (17) SCR 844	**relied on**	**Para 18**
2010 (9) SCR 1124	**relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 612 of 2012 etc.

From the Judgment & Order dated 30.07.2010 of the High Court of Delhi at New Delhi in Crl. M.C. No. 3376 of 2009.

WITH

Crl. A. No. 613 of 2012.

Ranjit Kumar, Mohit Mathur, S. Prasad, Atul Kumar, Subramonium Prasad for the Appellant.

VIjay Aggarwal, Dibyadyoti Banerjee, R.P. Wadhwani, Sadhna Snadhu, B.V. Balram Das, Asha G. Nair, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are directed against the final judgment and order dated 30.07.2010 passed by the High Court of Delhi at New Delhi in Crl.M.C. Nos. 3376 & 3375 of 2009 whereby the High Court rejected the prayer of the appellants herein for quashing the summoning order dated 16.01.2009 passed by the Metropolitan Magistrate in FIR No. 290 of 2002 registered at Police Station, Okhla Industrial Area, New Delhi under Section 420 of the Indian Penal Code, 1860 (hereinafter referred to as "the IPC").

3. Brief facts:

(a) The present cases pertain to a property dispute regarding distribution of the assets left behind by late Shri Gulshan Kumar (of T-Series fame). On 19.02.1998, a handwritten note was executed between the appellants and Respondent No. 2 wherein distribution of certain assets and shares in different companies was provided for. Subsequently, on 21.02.1998, a fresh agreement was entered into between the appellants and the Respondent No. 2 which superseded the handwritten note.

(b) However, disputes arose soon after the above said second agreement dated 21.02.1998, giving rise to multifarious litigations at the behest of Respondent No. 2 which are presently pending adjudication before the High Court.

(c) However, after 4 years, due to non-materialization of the agreement dated 21.02.1998, the Respondent No. 2 got registered the present FIR under Section 420 IPC against all the other signatories to the said agreement wherein only one of the signatory was a party to it. For quashing the said FIR, the appellants herein filed Crl.M.C. No. 59 of 2005 before the High Court.

(d) On being informed by the State that chargesheet has been filed before the Magistrate, the High Court disposed of

the Crl.M.C. No. 59 of 2005 vide order dated 30.03.2009 giving liberty to the appellants to take appropriate steps in case they are summoned.

(e) By order dated 16.01.2009, the Magistrate summoned the appellants herein. Challenging the said summoning order, the appellants herein filed Criminal M.C. Nos. 3376 and 3375 of 2009 before the High Court.

(f) By the impugned order dated 30.07.2010, the High Court rejected the prayer of the appellants for quashing the summoning order passed by the Magistrate. Aggrieved by the said order, the appellants have filed these appeals by way of special leave before this Court.

4. Heard Mr. Ranjit Kumar, learned senior counsel for the appellants and Mr. Vijay Aggarwal, learned counsel for respondent No.2.

5. The questions which arise for consideration in these appeals are:

(a) Whether taking cognizance of an offence by the Magistrate is same as summoning an accused to appear?

(b) Whether the Magistrate, while considering the question of summoning an accused, is required to assign reasons for the same?

6. In this context, it is relevant to extract Sections 190 and 204 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") which read as under:

"190. Cognizance of offences by Magistrates. (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence ;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

"204. Issue of process. (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall

be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87."

7. In *S.K. Sinha, Chief Enforcement Officer vs. Videocon International Ltd. & Ors.,* (2008) 2 SCC 492, the expression "cognizance" was explained by this Court as it merely means "become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

8. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code.

9. A summon is a process issued by a Court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person

must appear in Court. A person who is summoned is legally bound to appear before the Court on the given date and time. Willful disobedience is liable to be punished under Section 174 IPC. It is a ground for contempt of court.

10. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

11. Time and again it has been stated by this Court that the summoning order under Section 204 of the Code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith.

12. In *Kanti Bhadra Shah & Anr. vs. State of West Bengal* (2000) 1 SCC 722, the following passage will be apposite in this context:

"12. If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across

interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. *But it is quite unnecessary to write detailed orders at other stages, such as issuing process,* remanding the accused to custody, framing of charges, passing over to next stages in the trial……." (emphasis supplied)

13. In *Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi & Ors.* (1976) 3 SCC 736, this Court held that it is not the province of the Magistrate to enter into a detailed discussion on the merits or demerits of the case. It was further held that in deciding whether a process should be issued, the Magistrate can take into consideration improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. It was further held that once the Magistrate has exercised his discretion, it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused.

14. In *Dy. Chief Controller of Imports & Exports vs. Roshanlal Agarwal & Ors.* (2003) 4 SCC 139, this Court, in para 9, held as under:

"9. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. This

question was considered recently in *U.P. Pollution Control Board v. Mohan Meakins Ltd.*(2000) 3 SCC 745 and after noticing the law laid down in *Kanti Bhadra Shah v. State of W.B.* (2000) 1 SCC 722, it was held as follows: (SCC p. 749, para 6)

"The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order."

15. In *U.P. Pollution Control Board vs. Dr. Bhupendra Kumar Modi & Anr.,* (2009) 2 SCC 147, this Court, in paragraph 23, held as under:

"23. It is a settled legal position that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused."

16. This being the settled legal position, the order passed by the Magistrate could not be faulted with only on the ground that the summoning order was not a reasoned order.

17. It is inherent in Section 251 of the Code that when an accused appears before the trial Court pursuant to summons issued under Section 204 of the Code in a summons trial case, it is the bounden duty of the trial Court to carefully go through the allegations made in the charge sheet or complaint and consider the evidence to come to a conclusion whether or not, commission of any offence is disclosed and if the answer is in the affirmative, the Magistrate shall explain the substance of the accusation to the accused and ask him whether he pleads guilty

otherwise, he is bound to discharge the accused as per Section 239 of the Code.

18.The conclusion of the High Court that the petition filed under Section 482 of the Code is not maintainable cannot be accepted in view of various decisions of this Court. (vide *Pepsi Foods Ltd. & Anr. vs. Special Judicial Magistrate & Ors.* (1998) 5 SCC 749, *Dhariwal Tobacco Products Ltd. & Ors. vs. State of Maharashtra & Anr.* (2009) 2 SCC 370 and *M.A.A. Annamalai vs. State of Karnataka & Anr.* (2010) 8 SCC 524).

19. In the light of the above discussion, we conclude that the petition filed before the High Court under Section 482 of the Code was maintainable. However, on merits, the impugned order dated 30.07.2010 passed by the High Court of Delhi is confirmed, consequently, the appeals fail and the same are dismissed. In view of the dismissal of the appeals, MM/South East 02, Patiala House, New Delhi is free to proceed further in accordance with law, uninfluenced by any observation made in these appeals.

D.G. Appeals dismissed.

MAHESHWARI PRASAD & ORS.

v.

STATE OF JHARKHAND & ORS.

(Civil Appeal No. 3393 of 2012 etc.)

APRIL 4, 2012

[ALTAMAS KABIR SURINDER SINGH NIJJAR, JJ.]

SERVICE LAW:

Recruitment - Police Drivers - Eligibility - Advertisement dated 6.2.2004 inviting applications for the posts of Police Drivers in State of Jharkhand - Held: The criteria for eligibility in the advertisement indicates that the candidate had to hold a licence for driving heavy motor vehicles or light motor vehicles along with heavy motor vehicles - It is not as if the advertisement indicated that a candidate possessing a licence for driving only light motor vehicles would be eligible, the same had to be combined with the right to drive heavy motor vehicles - Thus, those having a combined licence for driving both light motor vehicles and heavy motor vehicles, would be considered for appointment, along with those holding a licence to drive heavy motor vehicles exclusively.

The instant appeals arose out of the writ petitions filed by the appellants challenging the merit list of Police Drivers republished on 23.8.2005 pursuant to advertisement dated 6.2.2004 inviting applications to fill up 350 vacancies of Police Drivers in the State of Jharkhand. Their case was that the result-cum-merit list of successful candidates was published on 29.5.2005 in which they were declared successful, but the said result was revised and the merit list was republished on 23.8.2005 excluding their names. It was contended that there was no condition for possessing a licence for driving heavy motor vehicles and the said condition was

introduced only to accommodate other candidates.

Dismissing the appeals, the Court

HELD:

Even the advertisement on which reliance has been placed by the appellants, laid stress on a candidate having to possess a licence for driving heavy motor vehicles. The criteria for eligibility in the advertisement indicates that the candidate had to hold a licence for driving heavy motor vehicles or light motor vehicles along with heavy motor vehicles. The second criteria did not necessarily mean that a person holding a licence for driving light motor vehicles had to be selected, since in the advertisement it was a person holding a licence for driving light motor vehicles as well as heavy motor vehicles, who was eligible for appointment. It is not as if the advertisement indicated that a candidate possessing a licence for driving only light motor vehicles would be eligible, the same had to be combined with the right to drive heavy motor vehicles. Thus, those having a combined licence for driving both light motor vehicles and heavy motor vehicles, would be considered for appointment, along with those holding a licence to drive heavy motor vehicles exclusively. Moreover, it is for the recruiting authorities to consider the candidates to be appointed according to their needs. It does not appear that there has been a departure from the advertisement as published. Therefore, there is no reason to interfere with the judgment and order of the Division Bench of the High Court impugned in the appeals. [para 10- 12]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3393 of 2012 etc.

From the Judgment & Order dated 14.09.2006 of the High Court of Jharkhand at Ranchi in L.P.A. No. 229 of 2006.

WITH

C.A. Nos. 3394-3395 of 2012.

Shekhar Prit Jha, Vikrant Bhardwaj, Sumit Kumar, umari Supriya, Danish Zubain Khan for the Appellants.

Ratan umar Choudhari, Ambhoj Kumar Sinha, Dharmendra Kumar Sinha for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. These Appeals are directed against the judgment and order dated 14th September, 2006, passed by the Jharkhand High Court in L.P.A. No.229 of 2006, dismissing the same. The said Letters Patent Appeal was directed against the judgment and order passed by the learned Single Judge on 13th April, 2006 in W.P.(S) No.831 of 2006, and was disposed of in terms of an earlier order passed by the High Court in W.P.(S) NO.5459 of 2005. L.P.A. No.729 of 2005, preferred by the said Writ Petitioners, was dismissed by a Division Bench of the Jharkhand High Court on 22nd February, 2006, upholding the judgment and order of the learned Single Judge in W.P.(C) No.5459 of 2005. In order to appreciate the impugned judgment of the Division Bench of the High Court, it will be necessary to set out some facts in relation to L.P.A. No.729 of 2005, which had arisen out of W.P.(S) No.5459 of 2005 and had been dismissed.

3. By an advertisement No.2/2004 published in the "Hindustan", Ranchi on 6th February, 2004, candidates who had passed the VIIth Class were invited to file applications to fill up 350 vacancies in the post of Police Drivers in the different district forces of the Jharkhand Police. In order to be eligible, a candidate was required to have passed the VIIth standard and was also required to possess a licence for driving "heavy

and light/heavy vehicles" from at least two years prior to the date of the advertisement. The Appellants therein along with other candidates filled up the requisite forms and appeared in the test which was conducted pursuant to the advertisement. The result-cum-merit list of successful candidates was published in the "Hindustan" on 29th May, 2005, in which the Appellants were declared successful. However, the said result was revised and the merit list was republished on 23rd August, 2005, from which the Appellants have been excluded.

4. On behalf of the Writ Petitioners it was contended that in the advertisement, there was no condition for possessing a licence for driving heavy motor vehicles and that the condition relating to possession of a licence for driving heavy motor vehicles was introduced only to accommodate other candidates. The said submission was countered on behalf of the Respondent State and it was mentioned that a decision had been taken by the Selection Committee that only those selected candidates who had licence for driving heavy vehicles before publication of the advertisement, should be appointed. Since the Appellants did not hold driving licences for heavy motor vehicles, they were excluded from the revised list of successful candidates. It was also contended on behalf of the Respondent State that for the purpose of recruitment of Police Drivers in different J.A.P. Battalions only such candidates who held heavy motor vehicle driving licences, issued to them prior to the publication of the advertisement, had been considered and declared successful by all other Selection Boards constituted by the Police Headquarters. In the judgment delivered by the Division Bench of the Jharkhand High Court in L.P.A. No.729 of 2005, the condition relating to driving licences which the candidates were required to possess was set out in its Hindi form though in English script along with an English translation. Inasmuch as, the same is of importance for a decision in these appeals as well, the same is extracted hereinbelow :-

"Motorgari chalane ki Anugyapati : Jinke pass {bhari tatha chhoti/bhari gari chalane hetu} motor challan ki aisi anuagyapati prapt ho jo rikti ke vigyapan ki tithi se kam se kam do varas purva nirgat ki gayee ho."

English Translation :

Motor driving licence : A person having {Heavy and light/ heavy driving licence} such motor driving licence which must be issued at least two years prior to the date of publication of the vacancy.

5. On behalf of the Appellants it was contended by Mr. Shekhar Prit Jha, learned advocate, that the earlier decision in L.P.A. No.729 of 2005, did not correctly appreciate the provisions of the advertisement and the Division Bench of the High Court, which decided the present L.P.A. No.229 of 2006, committed an error in relying upon the same.

6. Mr. Jha submitted that the advertisement in question clearly indicated that the eligibility criteria for recruitment of Police Drivers in different J.A.P. Battalions made it compulsory for a candidate to have a licence which either enabled the licence holder to drive heavy motor vehicles or light motor vehicles and heavy motor vehicles. Mr. Jha submitted that reading the advertisement, as it is, it cannot be said that the eligibility criteria was confined to holding of a licence to drive heavy motor vehicles only. Learned counsel urged that by entertaining the candidature of only those who possessed licences for driving heavy motor vehicles, the Respondents had acted contrary to the advertisement and the recruitment process was, therefore, required to be nullified. Mr. Jha further submitted that the judgment of the Division Bench in L.P.A. No.729 of 2005 was based on certain surmises that for the purpose of driving armed forces vehicles, a candidate must possess a driving licence to drive heavy motor vehicles, which, according to Mr. Jha, went against the very grain of the advertisement.

7. As to the other question, as to whether having been selected, the Appellants were entitled to appointment, is another issue altogether since at the very basic stage the Appellants were being sought to be excluded from consideration since they did not have driving licences for driving heavy motor vehicles exclusively.

8. On the other hand, appearing for the State and the other Respondents, learned counsel submitted that the judgment and order passed in L.P.A. No.729 of 2005 was fully justified, since it was the Recruitment authorities who were conscious of the purpose for which the appointments were being made. It was submitted that in L.P.A. No.729 of 2005, a counter affidavit had been filed in which it was stated that a decision had been taken by the Selection Committee that only those successful candidates, who had licences for driving heavy motor vehicles, who should be appointed, since the purpose of recruitment for such drivers was to drive heavy motor vehicles, which the holder of a licence for driving light motor vehicles was not entitled to do.

9. Learned counsel submitted that the Division Bench of the Jharkhand High Court did not commit any error in disposing of the matter in terms of the judgment delivered in L.P.A. No.729 of 2005.

10. Having heard learned counsel for the respective parties, we are of the view that even the advertisement on which reliance has been placed by the Appellants herein, laid stress on a candidate having to possess a licence for driving heavy motor vehicles. The criteria for eligibility in the advertisement indicates that the candidate had to hold a licence for driving heavy motor vehicles or light motor vehicles along with heavy motor vehicles. In our view, the second criteria did not necessarily mean that a person holding a licence for driving light motor vehicles had to be selected, since in the advertisement it was a person holding a licence for driving light motor vehicles as well as heavy motor vehicles, who was eligible for

appointment. It is not as if the advertisement indicated that a candidate possessing a licence for driving only light motor vehicles would be eligible, the same had to be combined with the right to drive heavy motor vehicles. In other words, those having a combined licence for driving both light motor vehicles and heavy motor vehicles, would be considered for appointment, along with those holding a licence to drive heavy motor vehicles exclusively.

11. Moreover, we are inclined to agree with learned counsel for the Respondents that it is for the recruiting authorities to consider the candidates to be appointed according to their needs. It does not appear to us that there has been a departure from the advertisement as published.

12. We, therefore, see no reason to interfere with the judgment and order of the Division Bench of the Jharkhand High Court impugned in these Appeals and the same are, accordingly dismissed.

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

SOCIETY FOR UN-AIDED P.SCHOOL OF RAJASTHAN
v.
U.O.I. & ANR.
(WRIT PETITION (CIVIL) NO. 95 OF 2010 etc.)

APRIL 12, 2012

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

Right of Children to Free and Compulsory Education Act, 2009 – ss. 3, 2(n)(iv), 12(1)(b), 12(1)(c), 18(3) and 35 – Constitutional validity of the Act – Held: The Act is constitutionally valid – It is enacted in terms of Article 21A of the Constitution which is child centric and not institution centric – Object of the Act is to remove the barriers faced by the child seeking admission to class 1 and not to restrict the freedom under Article 19(1)(g) – s. 12(1)(c) is not violative of the right of unaided non-minority schools provided under Article 19(1)(g) – The right under Article 19(1)(g) is not absolute but subject to restriction under Article 19(6) – The restrictions provided under s.12(1)(c) would amount to reasonable restriction under Article 19(6) and cannot be termed as unreasonable – s. 12(1)(c) is not violative of Article 14 as it provides level playing field in the matter of right to education to children – Sections 12(1)(c) and 18(3) infringes the fundamental freedom guaranteed to unaided minority schools under Article 30(1) because the right under Article 30(1) is absolute – The Act is constitutionally valid qua aided minority and non-minority schools – The Act shall apply to (1) the schools established owned and controlled by appropriate Government or local authority (2) aided schools including minority and non-minority (3) schools belonging to specified category and (4) unaided non-minority schools – Applying the principle of severability, the Act will not apply to the unaided minority schools – Recommendation made to Government

to issue appropriate guidelines u/s. 35 clarifying whether the Act is applicable to boarding schools and orphanages – Constitution of India, 1950 – Articles 21A, 21, 45, 19(1)(g), 19(6), 14, 29 and 30(1) –Doctrines/Principles – Principle of severability.

Interpretation of Constitution – Interpretation of Fundamental Rights – Fundamental rights need to be interpreted in the light of directive principles –While determining constitutional validity of a law, it is to be kept in mind that what is enjoined by Directive Principles, must be upheld as a reasonable restriction under Article 19(2) to 19(6) – Constitution of India, 1950 – Fundamental Rights and Directive Principles of State Policy.

Right of Children to Free and Compulsory Education Act, 2009 was enacted following the insertion of Article 21A by the Constitution (Eighty-Sixth Amendment) Act, 2002. Article 21A provides for free and compulsory education to the children of the age 6 to 14 years and casts an obligation on the State to provide and ensure admission, attendance and completion of elementary education in such a manner that the State may by law determine.

The present writ petitions were filed questioning the constitutional validity of the Act and in particular validity of ss. 3, 12 (1) (b) and 12 (1) (c) and some other related provisions of the Act which cast obligation on all elementary educational institutions to admit children of the age 6 to 14 years from their neighbourhood, on the principle of social inclusiveness.

Disposing of the petitions, the Court

HELD:

Per Majority [By S.H. Kapadia, CJI. (for himself and Swatanter Kumar, J.]:

1. The Right of Children to Free and Compulsory Education Act, 2009 is constitutionally valid and shall apply to (i) a school established, owned or controlled by the appropriate Government or a local authority; (ii) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority; (iii) a school belonging to specified category; and (iv) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority. However, the Act and in particular Sections 12(1)(c) and 18(3) infringes the fundamental freedom guaranteed to unaided minority schools under Article 30(1) and, consequently, applying the principle of severability, the Act shall not apply to such schools. [Para 20]

2. There is a power in the Act coupled with the duty of the State to ensure that only such Government funded schools, who fulfill the norms and standards, are allowed to continue with the object of providing free and compulsory education to the children in the neighbourhood school. [Para 8]

3.1. While determining that whether a law transgresses any constitutional limitation, the first and foremost principle which has to be kept in mind is that what is enjoined by the directive principles (in this case Articles 41, 45 and 46) must be upheld as a "reasonable restriction" under Articles 19(2) to 19(6). Thus, the fundamental rights needs to be interpreted in the light of the directive principles. [Para 9]

3.2. Fundamental rights have two aspects – they act

as fetter on plenary legislative powers and, secondly, they provide conditions for fuller development of the people including their individual dignity. Right to live in Article 21 covers access to education. But unaffordability defeats that access. It defeats the State's endeavour to provide free and compulsory education *for* all children of the specified age. To provide *for* free and compulsory education in Article 45 is not the same thing as to provide free and compulsory education. The word "for" in Article 45 is a preposition. The word "education" was read into Article 21 by the judgments of Supreme Court. However, Article 21 merely declared "education" to fall within the contours of right to live. To provide for right to access education, Article 21A was enacted to give effect to Article 45 of the Constitution. Under Article 21A, right is given to the State to provide by law "free and compulsory education". Article 21A contemplates making of a law by the State. [Para 9]

3.3. Thus, Article 21A contemplates right to education flowing from the law to be made which is the Act, which is child centric and not institution centric. Thus, Article 21A provides that the State shall provide free and compulsory education to all children of the specified age in such manner as the State may, by law, determine. The manner in which this obligation will be discharged by the State has been left to the State to determine by law. The Act is thus enacted in terms of Article 21A. It has been enacted primarily to remove all barriers (including financial barriers) which impede access to education. If education is an activity which is charitable, the unaided non-minority educational institution cannot say that the intake of 25% children belonging to weaker section and disadvantaged group only in class I as provided for in Section 12(1)(c) would constitute violation of Article 19(1)(g). [Para 9]

3.4. Though subject-wise, Article 21A deals with access to education as against right to establish and administer educational institution in Article 19(1)(g), it cannot be said that the law relating to right to access education within Article 21A does not have to meet the requirement of Article 14 or Article 19 for its reasonableness. [Para 10]

3.5. All other fundamental rights in Part III would be dependent upon right to life in Article 21 as interpreted by Supreme Court to include right to live with dignity, right to education, etc. Whether one adopts the pith and substance test or the nature and character of the legislation test or the effect test, one finds that all these tests have evolved as rules of interpretation only as a matter of reasonableness. They help to correlate Article 21 with Article 14, Article 19 and, so on. Applying the above principle of reasonableness, though the right to access education falls as a subject matter under Article 21A and though to implement the said Article, Parliament has enacted the Act, one has to judge the validity of the said Act in the light of the principle of reasonableness in Article 19(6), particularly, when in ****T.M.A. Pai Foundation* **and in *****P.A. Inamdar*****, it has been held that right to establish and administer an educational institution falls under Article 19(1)(g) of the Constitution. [Para 10]**

Khudiram Das v. State of West Bengal **(1975) 2 SCR 832;** *Maneka Gandhi v. Union of India* **(1978) 1 SCC 248 : 1978 (2) SCR 621;** *Glanrock Estate Private Limited v. State of Tamil Nadu* **(2010) 10 SCC 96: 2010 (12) SCR 597;** **T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors.* **(2002) 8 SCC 481 : 2002 (3) Suppl. SCR 587;** ***P.A. Inamdar v. State of Maharashtra* **(2005) 6 SCC 537 : 2005 (2) Suppl. SCR 603– referred to.**

3.6. It is true that, as held in *T.M.A. Pai Foundation* **as**

well as *P.A. Inamdar,* the right to establish and administer an educational institution is a fundamental right, as long as the activity remains charitable under Article 19(1)(g), however, in the said two decisions the correlation between Articles 21 and 21A, on the one hand, and Article 19(1)(g), on the other, was not under consideration. Further, the content of Article 21A flows from Article 45 (as it then stood). The Act has been enacted to give effect to Article 21A. Since Article 19(1)(g) right is not an absolute right as Article 30(1), the Act cannot be termed as unreasonable. To put an obligation on the unaided non-minority school to admit 25% children in class I under Section 12(1)(c) cannot be termed as an unreasonable restriction. Such a law cannot be said to transgress any constitutional limitation. The object of the Act is to remove the barriers faced by a child who seeks admission to class I and not to restrict the freedom under Article 19(1)(g). [Para 10]

3.7. Every citizen has a right to establish and administer educational institution under Article 19(1)(g) so long as the activity remains charitable. Such an activity undertaken by the private institutions supplements the primary obligation of the State. Thus, the State can regulate by law the activities of the private institutions by imposing reasonable restrictions under Article 19(6). After the commencement of the Act, by virtue of Section 12(1)(c) r/w. s. 2(n)(iv), the State, while granting recognition to the private unaided non-minority school, may specify permissible percentage of the seats to be earmarked for children who may not be in a position to pay their fees or charges. Such a condition in Section 12(1)(c) imposed while granting recognition to the private unaided non-minority school cannot be termed as unreasonable. Such a condition would come within the principle of reasonableness in Article 19(6). By virtue of Section 12(2)

read with Section 2(n)(iv), private unaided school would be entitled to be reimbursed with the expenditure incurred by it in providing free and compulsory education to children belonging to the above category to the extent of per child expenditure incurred by the State in a school specified in Section 2(n)(i) or the actual amount charged from the child, whichever is less. Such a restriction is in the interest of the general public. It is also a reasonable restriction. Such measures address two aspects, viz., upholding the fundamental right of the private management to establish an unaided educational institution of their choice and, at the same time, securing the interests of the children in the locality, in particular, those who may not be able to pursue education due to inability to pay fees or charges of the private unaided schools. [Para 10]

4. It is also not correct to say that Section 12(1)(c) violates Article 14. Section 12(1)(c) *inter alia* provides for admission to class I, to the extent of 25% of the strength of the class, of the children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education to them till its completion. The emphasis is on "free and compulsory education". Earmarking of seats for children belonging to a specified category who face financial barrier in the matter of accessing education satisfies the test of classification in Article 14. Further, Section 12(1)(c) provides for level playing field in the matter of right to education to children who are prevented from accessing education because they do not have the means or their parents do not have the means to pay for their fees. Hence, Section 12(1)(c) also satisfies the test of reasonableness, apart from the test of classification in Article 14. [Para 10]

5. It is true that the judgments in **TMA Pai Foundation* and ***P.A. Inamdar* have held that all citizens have a right to establish and administer educational institutions under Article 19(1)(g), however, the question as to whether the provisions of the Act constituted a restriction on that right and if so whether that restriction was a reasonable restriction under Article 19(6) was not in issue in those cases. Moreover, the controversy in **T.M.A. Pai Foundation* arose in the light of the scheme framed in #*Unni Krishnan's* case and the judgment in ***P.A. Inamdar* was almost a sequel to the directions in ##*Islamic Academy* in which the entire focus was Institution centric and not child centric and that too in the context of higher education and professional education where the level of merit and excellence have to be given a different weightage than the one which is to be given in the case of Universal Elementary Education for strengthening social fabric of democracy through provision of equal opportunities to all and for children of weaker section and disadvantaged group who seek admission not to higher education or professional courses but to Class I. On reading **T.M.A. Pai Foundation* and ***P.A. Inamdar* in proper perspective, it becomes clear that the said principles have been applied in the context of professional/ higher education where merit and excellence have to be given due weightage and which tests do not apply in cases where a child seeks admission to class I and when the impugned Section 12(1)(c) seeks to remove the financial obstacle. Thus, if one reads the Act including Section 12(1)(c) in its application to unaided non-minority school(s), the same is saved as reasonable restriction under Article 19(6). [Paras 11 and 12]

T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors.* **(2002) 8 SCC 481 : 2002 (3) Suppl. SCR 587; ***P.A.*

Inamdar v. State of Maharashtra **(2005) 6 SCC 537 : 2005 (2) Suppl. SCR 603 – distinguished.**

#Unni Krishnan, J.P. v. State of Andhra Pradesh **(1993) 1 SCC 645 :1993 (1) SCR 594;** *##Islamic Academy of Education v. State ofKarnataka* **(2003) 6 SCC 697 : 2003 (2) Suppl. SCR 474 – referred to.**

6.1. The intention of the Parliament as is evident from Constitution (Ninety-Third) Amendment Act, 2005 whereby Article 15 was amended is that the minority educational institution referred to in Article 30(1) is a separate category of institutions which needs protection of Article 30(1) and viewed in that light, the unaided minority school(s) needs special protection under Article 30(1). Article 30(1) is not conditional as Article 19(1)(g). In a sense, it is absolute as the Constitution framers thought that it was the duty of the Government of the day to protect the minorities in the matter of preservation of culture, language and script via establishment of educational institutions for religious and charitable purposes. Reservations of 25% in such unaided minority schools result in changing the character of the schools if right to establish and administer such schools flows from the right to conserve the language, script or culture, which right is conferred on such unaided minority schools. Thus, the Act including Section 12(1)(c) violates the right conferred on such unaided minority schools under Article 30(1). [Para 19]

6.2. However, so far as aided minority schools are concerned, Article 29(2) has to be kept in mind. Article 30(1) is subject to Article 29(2). The said Article confers right of admission upon every citizen into a State-aided educational institution. Article 29(2) refers to an individual right. It is not a class right. It applies when an individual is denied admission into an educational institution

maintained or aided by the State. The Act is enacted to remove barriers such as financial barriers which restrict his/her access to education. It is enacted pursuant to Article 21A. Applying the above tests, it is held that the Act is constitutionally valid qua aided minority schools. [Para 19]

7. There are boarding schools and orphanages in several parts of India. In those institutions, there are day scholars and boarders. The Act could only apply to day scholars. It cannot be extended to boarders. To put the matter beyond doubt, it is recommended that appropriate guidelines be issued under Section 35 of the Act clarifying the above position. [Para 13]

Rev. Sidhajbhai Sabhai v. State of Bombay **(1963) SCR 837 – relied on.**

State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga **(1952) SCR 889 – referred to.**

Dennis v. United States **(1950) 341 US 494;** *R. v. Burah* **(1878) 5 I.A. 178 – referred to.**

<u>Per Minority</u> (by K.S. Radhakrishnan, J.)

1.1. Article 21A of the Constitution casts an obligation on the State to provide free and compulsory education to children of the age of 6 to 14 years and not on unaided non-minority and minority educational institutions. [Para 148 (1)]

1.2. Rights of children to free and compulsory education guaranteed under Article 21A and Right of Children to Free and Compulsory Education Act, 2009 can be enforced against the schools defined under Section 2(n) of the Act, except unaided minority and non-minority schools not receiving any kind of aid or grants

to meet their expenses from the appropriate Governments or local authorities. [Para 148 (2)]

1.3. Section 12(1)(c) is read down so far as unaided non-minority and minority educational institutions are concerned, holding that it can be given effect to only on the principles of voluntariness, autonomy and consensus and not on compulsion or threat of non-recognition or non-affiliation. [Para 148 (3)]

1.4. No distinction or difference can be drawn between unaided minority and non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1)(c) of the Act. Such an appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. [Para 148 (4)]

1.5. The Appropriate Government and local authority have to establish neighbourhood schools as provided in Section 6 read with Sections 8 and 9, within the time limit prescribed in the statute. [Para 148 (5)]

1.6. In the jurisdictions where socio-economic rights have been given the status of constitutional rights, those rights are available only against State and not against private state actors, like the private schools, private hospitals etc., unless they get aid, grant or other concession from the State. Equally important principle is that in enjoyment of those socio-economic rights, the beneficiaries should not make an inroad into the rights guaranteed to other citizens. [Para 57]

1.7. Articles 21A, 45, 51A(k) of the Constitution and Section 12 of the Act and various International Conventions deal with the obligations and

responsibilities of State and non-state actors for realization of children's rights. Social inclusiveness is stated to be the motto of the Act which was enacted to accomplish the State's obligation to provide free and compulsory education to children of the age 6 to 14 years, in that process, compulsorily co-opting, private educational institutions as well. A shift in State's functions, to non-state actors in the field of health care, education, social services etc. has been keenly felt due to liberalization of economy and privatization of State functions. [Para 89]

1.8. Article 29 of the Constitution and other provisions of International Conventions indicate that the rights have been guaranteed to the children and those rights carry corresponding State obligations to respect, protect and fulfill the realization of children's rights. The obligation to protect implies the horizontal right which casts an obligation on the State to see that it is not violated by non-state actors. For non-state actors to respect children's rights cast a negative duty of non-violation to protect children's rights and a positive duty on them to prevent the violation of children's rights by others, and also to fulfill children's rights and take measures for progressive improvement. [Para 93]

1.9. Primary responsibility for children's rights lies with the State and the State has to respect, protect and fulfill children's rights and has also got a duty to regulate the private institutions that care for children, to protect children from violence or abuse, to protect children from economic exploitation, hazardous work and to ensure human treatment of children. Non-State actors exercising the State functions like establishing and running private educational institutions are also expected to respect and protect the rights of the child, but they are, not expected

to surrender their rights constitutionally guaranteed. [Para 95]

1.10. Article 21A requires non-State actors to achieve the socio-economic rights of children in the sense that they shall not destroy or impair those rights and also owe a duty of care. The State, however, cannot free itself from obligations under Article 21A by offloading or outsourcing its obligation to private State actors like unaided private educational institutions or to coerce them to act on the State's dictate. [Para 96]

1.11. Article 21A has used the expression "State shall provide" not "provide for" hence the constitutional obligation to provide education is on the State and not on non-State actors, the expression is clear and unambiguous and to interpret that expression to mean that constitutional obligation or responsibility is on private unaided educational institutions also would be doing violence to the language of that expression. The obligation of the State to provide free and compulsory education is without any limitation. Parliament in its wisdom has not used the expression "provide for". If the preposition "for" has been used then the duty of the State would be only to provide education to those who require it but to provide for education or rather to see that it is provided. [Para 101]

1.12. Article 21A has used the expression "such manner" wshich means the manner in which the State has to discharge its constitutional obligation and not offloading those obligations on unaided educational institutions. If the Constitution wanted that obligation to be shared by private unaided educational institutions the same would have been made explicit in Article 21A. Further, unamended Article 45 has used the expression "state shall endeavour…..for" and when Article 21A was

inserted, the expression used therein was that the "State shall provide" and not "provide for" the duty, which was directory earlier made mandatory so far as State is concerned. Article 21 read with 21A, therefore, cast an obligation on the State and State alone. [Para 102]

1.13. The purpose and object of the Act is laudable, that is, social inclusiveness in the field of elementary education but the means adopted to achieve that objective is faulty and constitutionally impermissible. Possibly, the object and purpose of the Act could be achieved by limiting or curtailing the fundamental rights guaranteed to the unaided non-minority and minority educational institutions under Article 19(1)(g) and Article 30(1) or imposing a positive obligation on them under Article 21A, but this has not been done in the instant case. [Para 106]

1.14. Going by the ratio laid down by ****Pai Foundation* **and *****Inamdar,* **to compel the unaided non minority and minority private educational institutions, to admit 25% of the students on the fee structure determined by the State, is nothing but an invasion as well as appropriation of the rights guaranteed to them under Article 19(1)(g) and Article 30(1) of the Constitution. Legislature cannot under the guise of interest of general public "arbitrarily cast burden or responsibility on private citizens running a private school, totally unaided". Section 12(1)(c) was enacted not only to offload or outsource the constitutional obligation of the State to the private unaided educational institutions, but also to burden them with duties which they do not constitutionally owe to children included in Section 2(d) or (e) of the Act or to their parents. [Para 112]

1.15. Right to establish and administer and run a

private unaided educational institution is the very openness of personal freedom and opportunity which is constitutionally protected, which right cannot be robbed or coerced against his will at the threat of non-recognition or non-affiliation. Right to establish a private unaided educational institution and to make reasonable profit is recognized by Article 19(1)(g) so as to achieve economic security and stability even if it is for charity. Rights protected under Article 19(1)(g) are fundamental in nature, inherent and are sacred and valuable rights of citizens which can be abridged only to the extent that is necessary to ensure public peace, health, morality etc. and to the extent of the constitutional limitation provided in that Article. Reimbursement of fees at the Government rate is not an answer when the unaided private educational institutions have no constitutional obligation and their Constitutional rights are invaded. [Para 113]

1.16. Considerable money by way of capital investment and overhead expenses would go into for establishing and maintaining a good quality unaided educational institution. Section 12(1)(c) would amount to appropriation of one's labour and makes an inroad into the autonomy of the institution. Unaided educational institutions, over a period of time, might have established their own reputation and goodwill, a quantifiable asset. Nobody can be allowed to rob that without their permission, not even the State. Section 12(1)(c) is not a restriction which falls under Article 19(6) but cast a burden on private unaided educational institutions to admit and teach children at the State dictate, on a fee structure determined by the State which would abridge and destroy the freedom guaranteed to them under Article 19(1)(g) of the Constitution. [Para 114]

1.17. Parliament can enact a social legislation to give effect to the Directive Principles of the State Policy, but

so far as the present case is concerned, neither the Directive Principles of the State Policy nor Article 21A cast any duty or obligation on the unaided private educational institutions to provide free and compulsory education to children of the age of 6 to 14. Section 12(1)(c) has, therefore, no foundation either on the Directive Principles of the State Policy or Article 21A of the Constitution, so as to rope in unaided educational institutions. Directive Principles of the State Policy as well as Article 21A cast the constitutional obligation on the State and State alone. State, cannot offload or outsource that Constitutional obligation to the private unaided educational institutions and the same can be done only by a constitutional provision and not by an ordinary legislation. Section 12(1)(c) has neither the constitutional support of Article 21A, nor the support of Articles 41, 45 or 46, since those provisions cast duty only on the State and State alone. [Paras 115 and 116]

1.18. The Statute enacted to protect socio-economic rights is always subject to the rights guaranteed to other non-State actors under Articles 19(1)(g), 30(1), 15(1), 16(1) etc. Parliament has faced many obstacles in fully realizing the socio-economic rights enshrined in Part IV of the Constitution and the Fundamental Rights guaranteed to other citizens were often found to be the obstacles. Parliament has on several occasions imposed limitations on the enjoyment of the rights guaranteed under Part III of the Constitution, through constitutional amendments. [Para 58]

1.19. The State in order to achieve socio-economic rights, can remove obstacles by limiting the fundamental rights through constitutional amendments. Whenever the Parliament wanted to remove obstacles so as to make affirmative action to achieve socio-economic justice

constitutionally valid, the same has been done by carrying out necessary amendments in the Constitution, not through legislations, lest they may make an inroad into the fundamental rights guaranteed to the citizens. Rights guaranteed to the unaided non-minority and minority educational institutions under Article 19(1)(g) and Article 30(1) as explained in ****Pai Foundation* **and reiterated in *****Inamdar* **have now been limited, restricted and curtailed so as to impose positive obligation on them under Section 12(1)(c) of the Act and under Article 21A of the Constitution, which is permissible only through constitutional amendment. [Paras 71 and 81]

1.20. Constitutional principles laid down by ****Pai Foundation* **and *****Inamdar* **on Articles 19(1)(g), 29(2) and 30(1) so far as unaided private educational institutions are concerned, whether minority or non-minority, cannot be overlooked and Article 21A, Sections 12(1)(a), (b) and 12(1)(c) have to be tested in the light of those constitutional principles laid down by ****Pai Foundation* **and *****Inamdar* **because ******Unnikrishnan* **was the basis for the introduction of the proposed Article 21A and the deletion of clause (3) from that Article. Interpretation given by the courts on any provision of the Constitution gets inbuilt in the provisions interpreted, that is, Articles 19(1)(g), 29(2) and 30. [Para 82]

1.21. The principles laid down in judgments in ****Pai Foundation* **and *****Inamdar* **still hold good and are not whittled down by Article 21A, nor any constitutional amendment was effected to Article 19(1)(g) or Article 30(1). Article 21A was inserted in the Constitution on 12.12.2002 and the judgment in ****Pai Foundation* **was delivered by this Court on 31.10.2002 and 25.11.2002. Parliament is presumed to be aware of the law declared by the Constitutional Court, especially on the rights of the

unaided non-minority and minority educational institutions, and in its wisdom thought if fit not to cast any burden on them under Article 21A, but only on the State. [Para 83]

1.22. Principles laid down by ****Pai Foundation* **and in *****Inamdar* **while interpreting Articles 19(1)(g), 29(2) and 30(1) in respect of unaided non-minority and minority educational institutions like schools upto the level of under-graduation are all weighty and binding constitutional principles which cannot be undone by statutory provisions like Section 12(1)(c), since those principles get in-built in Article 19(1)(g), Article 29(2) and Article 30(1) of the Constitution. Further, Parliament, while enacting Article 21A, never thought it fit to undo those principles and thought it fit to cast the burden on the State. [Para 88]

1.23. Section 12(1)(c) seeks to achieve what cannot be achieved directly especially after the interpretation placed by ****Pai Foundation* **and *****Inamdar* **on Article 19(1)(g) and Article 30(1) of the Constitution. ****Inamdar* **has clearly held that right to set up, and administer a private unaided educational institution is an unfettered right, but 12(1)(c) impose fetters on that right which is constitutionally impermissible going by the principles laid down by ****Pai Foundation* **and *****Inamdar.* **Section 12(1)(c) can be given effect to, only on the basis of principles of voluntariness and consensus laid down in ****Pai Foudnation* **and *****Inamdar* **or else, it may violate the rights guaranteed to unaided minority and non-minority institutions. [Para 117]

1.24. Constitution of India has expressly conferred the power of judicial review on courts and the legislature cannot disobey the constitutional mandate or the constitutional principle laid down by courts under the

guise of social inclusiveness. Smaller inroad like Section 12(1)(c) may lead to larger inroad, ultimately resulting in total prohibition of the rights guaranteed under Articles 19(1)(g), 29(2) and 30(1) as interpreted by the ****Pai Foundation* **and *****Inamdar,* **Court, in such situations, owe a duty to lift the veil of the form and appearance to discover the true character and nature of the legislation and if it has the effect of bypassing or ignoring the constitutional principles laid down by the Constitutional Courts and violate fundamental rights, the same has to be nullified. [Para 118]

1.25. Constitutional principles laid by courts get assimilated in Articles 19(1)(g), 29(2) and 30(1) and can be undone not by legislation, but only by constitutional amendments. The object to be achieved by the legislation may be laudable, but if it is secured by a method which offends fundamental rights and constitutional principles, the law must be struck down as unconstitutional. Section 12(1)(c), if upheld would resurrect ******Unni Krishnan* **scheme which was nullified by ****Pai Foundation* **and *****Inamdar.* **[Para 119]

1.26. So far as unaided educational institutions both minority and non-minority are concerned, the obligation cast under Section 12(1)(c) is only directory and the said provision is accordingly read down holding that it is open to the private unaided educational institutions, both minority and non-minority, at their volition to admit children who belong to the weaker sections and disadvantaged group in the neighbourhood in their educational institutions as well as in pre-schools. [Para 120]

1.27. Not only Section 12(1)(c), but rest of the provisions in the Act are only directory so far as private unaided institutions are concerned, but they are bound

by the declaration of law by ****Pai Foundation* **and *****Inamdar*, **like there shall be no profiteering, no maladministration, no demand for capitation fee and so on and they have to follow the general laws of the land like taxation, public safety, sanitation, morality, social welfare etc. [Para 128]

1.28. Article 51A(k) of the Constitution states that it shall be the duty of every citizen of India, who is a parent or guardian, to provide opportunities for education to his child. Parents have no constitutional obligation under Article 21A of the Constitution to provide free and compulsory education to their children, but only a constitutional duty, then one fails to see how that obligation can be offloaded to unaided private educational institutions against their wish, by law, when they have neither a duty under the Directive Principles of State policy nor a constitutional obligation under Article 21A, to those 25% children, especially when their parents have no constitutional obligation. [Para 103]

T.M.A. Pai Foundation and Ors.* v. *State of Karnataka and Ors.* **(2002) 8 SCC 481: 2002 (3) Suppl. SCR 587; ***P.A. Inamdar andOrs. v. State of Maharashtra and Ors.* **(2005) 6 SCC 537: 2005 (2) Suppl. SCR 603 – followed**

Ashok Kumar Thakur v. *Union of India and Ors.* **(2008) 6 SCC 1: 2008 (4) SCR 1;** *S.P. Gupta* v. *President of India and Ors.* **1981 SCC Supp. (1) 87 – relied on.**

Indian Medical Association v. *Union of India and Ors.* **(2011) 7 SCC 179;** *Ahmedabad St. Xavier's College Society and Anr.* v. *Stateof Gujarat and Anr.* **(1974) 1 SCC 717 : 1975 (1) SCR 173;** *Rev. Sidhajbhai Sabhai and Ors.* v. *State of Bombay and Anr.* **(1963) 3 SCR 837;** *People's Union for Democratic Rights and Ors. v. Union of India and Ors.* **(1982) 3 SCC 235 : 1983 (1) SCR 456 ;** *Vishaka and Ors.* v. *State*

of Rajasthan **(1997) 6 SCC 241: 1997 (3) Suppl. SCR 404;** *Consumer Education and Research Centre and Ors. v. Union of India and Ors.* **1995 (3) SCC 42 : 1995 (1) SCR 626;** *Paschim Banga Khet Majdoor Samity and Ors.* v. *State of WestBengal and Anr.* **1996 (4) SCC 37 : 1996 (2) Suppl. SCR 331;** *Stateof Punjab and Ors. v. Ram Lubhaya Bagga and Ors.* **1998 (4) SCC 117 : 1998 (1) SCR 1120;** *Social Jurist, A Lawyers Group v.Government of NCT of Delhi and Ors.* **(140) 2007 DLT 698;** *Dharamshila Hospital and Research Centre* v. *Social Jurist and Ors.* **Judgment of Supreme Court in SLP (C) No.18599 of 2007 decided on 25.07.2011;** *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.* **1985 (3) SCC 545 : 1985 (2) Suppl. SCR 51;** *Municipal Corporation of Delhi* v. *Gurnam Kaur* **(1989) 1 SCC 101 : 1988 (2) Suppl. SCR 929;** *Sodan Singh and Ors. v. New Delhi Municipal Committee and Ors.* **1989 (4) SCC 155 : 1989 (3) SCR 1038;** *Ahmedabad Municipal Corporation* v. *Nawab Khan Gulab Khan and Ors.* **1997 (11) SCC 121 : 1996 (7) Suppl. SCR 548;** *Bandhua Mukti Morcha* v. *Union of India and Ors.* **1984 (3) SCC161: 1984 (2) SCR 67;** *I.R. Coelho (Dead) by LRs v. State of Tamil Nadu and Ors.* **2007 (2) SCC 1 : 2007 (1) SCR 706;** *State of Madras v. Shrimati Champakam Dorairajan* **1951 (2) SCR 525;** *Indra Sawhney* v. *Union of India and Ors.* **(1992) Supp. 3 SCC 212;** *Jagdish Lal and Ors. v. State of Haryana and Ors.* **(1997) 6 SCC 538;** *Ajit Singh and Ors.* v. *State of Punjab and Ors.* **(1999) 7 SCC 209: 1999 (2) Suppl. SCR 521;** *M. Nagaraj and Ors.* v. *Union of India* **(2006) 8 SCC 212 : 2006 (7) Suppl. SCR 336;** *Bengal Immunity Company Limited* v. *State of Bihar and Ors.* **AIR 1955 SC 661: 1955 SCR 603;** *People's Union for Civil Liberties (PUCL) and Anr.* v. *Union of India (UOI) and Anr.* **2003 (4) SCC 399: 2003 (2) SCR 1136 ;** *Avinash Mehrotra* v. *Union of India and Ors.* **2009 (6) SCC 398: 2009 (5) SCR 913 – referred to.**

Soobramoney v. *Minister of Health (KwaZulu-Natal)* **1998**

(1) SA 765(CC); *Government of the Republic of South Africa and Ors. v. Grootboom and Ors.* **2001 (1) SA 46 (CC);** *Minister of Health and Ors. v. Treatment Action Campaign and Ors. (TAC)* **2002 (5) SA 721 (CC);** *Ex parte Chairperson of the Constitution of the Republic of South Africa* **1996 (4) SA 744 (CC);** *Minister of Public Works and Ors. v. Kyalami Ridge Environmental Association and Ors.* **2001 (7) BCLR 652 (CC);** *President of the Republic of South Africa* v. *Modderklip Boerdery (Pty). Ltd.* **2005 (5) SA 3 (CC);** *Brown* v. *Board of Education* **347 U.S. 483;** *Cruz del Valle Balle Bermudez* v.*Ministry of Health and Social Action* **- Case No.15.789 Decision No.916 (1999);** *Wilson* v. *Medical Services Commission of British Columbia* **(53) D.L.R. (4th) 171;** *Smit* v. *Allwright* **321 U.S. 649 (1944);** *Governing Body of the Juma Musjid Primary School* v. *Minister for Education* **(2011) ZACC 13;** *Crowley* v. *Ireland* **(1980)IR 102 – referred to.**

2.1. Applying the principle laid down in ****Pai Foundation, *****Inamdar, #**St. Stephen* **and** ***in ##Re. Kerala Education Bill,* clause 12(1)(b) directing the aided educational institutions minority and non-minority to provide admission to the children of the age group of 6 to14 years would not affect the autonomy or the rights guaranteed under Article 19(1)(g) or Article 30(1) of the Constitution of India. Therefore, the challenge against the validity of Section 12(1)(b) is rejected and it is held that the provision is constitutionally valid. [Para 122]**

2.2. So far as the rest of the schools are concerned, including aided minority and non-minority educational institutions, they have necessarily to follow the various provisions in the Act since the validity of Section 12(1)(b) of the Act has been upheld. [Para 129]

**T.M.A. Pai Foundation and Ors.* v. *State of Karnataka*

and Ors. **(2002) 8 SCC 481: 2002 (3) Suppl. SCR 587;** ***P.A. Inamdar and Ors. v. State of Maharashtra and Ors.* **(2005) 6 SCC 537: 2005 (2) Suppl. SCR 603;** #*St. Stephen's College* v. *University of Delhi* **(1992) 1 SCC 558 : 1991 (3) Suppl. SCR 121;** ##*Re. Kerala Education Bill,* **1959 SCR 995 – referred to.**

3. The provisions of Section 21 of the Act, as provided, would not be applicable to the schools covered under sub-Section (iv) of clause (n) of Section 2. They shall also not be applicable to minority institutions, whether aided or unaided. The apprehension, of aided minority community that Sections 21 and 22 of the Act, read with Rule 3, which cast an obligation on those schools to constitute a School Management Committee consisting of elected representatives of the local authority would amount to taking away the rights guaranteed to the aided minority schools under Article 30(1) of the Constitution, is unfounded in view of the Bill, proposing amendment to Section 21, adding a provision stating that the School Management Committee constituted under sub-section (1) of Section 21 in respect of a school established and administered by minority whether based on religion or language, shall perform advisory functions only. [Paras 148 (8) and 129]

4.1. Sections 4, 10, 14, 15 and 16 are held to be directory in their content and application. The concerned authorities shall exercise such powers in consonance with the directions/guidelines laid down by the Central Government in that behalf. [Para 148 (7)]

4.2. Duty imposed on parents or guardians under Section 10 is directory in nature and it is open to them to admit their children in the schools of their choice, not invariably in the neighbourhood schools, subject to availability of seats and meeting their own expenses. [Para 148 (6)]

4.3. The object of the provisions of Section 13(1) r/w. Section 2(d) is to ensure that schools adopt an admission procedure which is non-discriminatory, rational and transparent and the schools do not subject children and their parents to admission tests and interviews so as to deny admission. There is no infirmity in Section 13, which has nexus with the object sought to be achieved, that is access to education. [Para 130]

4.4. The object and purpose of Section 14 is that the school shall not deny access to education due to lack of age proof. There is no legal infirmity in that provision, considering the overall purpose and object of the Act. Section 15 states that a child shall not be denied admission even if the child is seeking admission subsequent to the extended period. A child who evinces an interest in pursuing education shall never be discouraged, so that the purpose envisaged under the Act could be achieved. There is no legal infirmity in that provision. [Para 131]

4.5. Holding back in a class or expulsion may lead to large number of drop outs from the school, which will defeat the very purpose and object of the Act, which is to strengthen the social fabric of democracy and to create a just and humane society. Provision has been incorporated in the Act to provide for special tuition for the children who are found to be deficient in their studies, the idea is that failing a child is an unjust mortification of the child personality, too young to face the failure in life in his or her early stages of education. Duty is cast on everyone to support the child and the child's failure is often not due the child's fault, but several other factors.

No legal infirmity is found in that provision, hence the challenge against Section 16 is rejected. [Para 132]

4.6. There is infirmity in the curriculum or evaluation procedure laid down in Section 29 of the Act. Requiring the minority and non-minority institutions to follow the National Curriculum Framework or a Curriculum Framework made by the State, would not abrogate the right under Article 19(1)(g) or Article 30(1) of the Constitution. Requirement that the curriculum adopted by a minority institution should comply with certain basic norms is in consonance with the values enshrined in the Constitution and cannot be considered to be violative of the rights guaranteed to them under Article 30(1). Further, the curriculum framework contemplated by Section 29(1) does not subvert the freedom of an institution to choose the nature of education that it imparts, as well as the affiliation with the CBSE or other educational boards. Over and above, what has been prescribed by those affiliating or recognizing bodies is that these schools have also to follow the curriculum framework contemplated by Section 29(1) so as to achieve the object and purpose of the Act. [Para 135]

4.7. The object and purpose of Section 30 is to see that a child shall not be held back in any class so that the child would complete his elementary education. The Legislature noticed that there are a large number of children from the disadvantaged groups and weaker sections who drop out of the schools before completing the elementary education, if promotion to higher class is subject to screening. Past experience shows that many of such children have dropped out of the schools and are being exploited physically and mentally. Universal Elementary Education eluded those children due to various reasons and it is in order to curb all those

maladies that the Act has provided for free and compulsory education. Therefore, there is no merit in the challenge against s. 30 which are enacted to achieve the goal of universal elementary education for strengthening the social fabric of the society. [Para 136]

5. *Madrasas, Vedic Pathshalas* etc. which predominantly provide religious instructions and do not provide for secular education stand outside the purview of the Act. The Act, does not interfere with the protection guaranteed under Articles 25 and 26 of the Constitution and the provisions in the Act in no way prevent the giving of religious education to students who wish to take religious education in addition to primary education. Article 25 makes it clear that the State reserves the right to regulate or restrict any economic, financial, political or other secular activities which are associated with religious practice and also states that the State can legislate for social welfare and reform, even though by doing so it would interfere with the religious practices. The Central Government has now issued Guidelines dated 23.11.2010 under Section 35(1) of the Act clarifying the above position. [Paras 137 and 148 (13)]

6.1. Positive steps should be taken by the State Governments and the Central Government to supervise and monitor how the schools which are functioning and providing quality education to the children function. Responsibility is much more on the State, especially when the statute is against holding back or detaining any child from standard I to VIII. [Para 144]

"Education: Free and Compulsory" by Murray N. Rothbard, ***1999*****,Ludurg von Mises Institute, Auburn, Aliana – referred to.**

6.2. The legislation, in its present form, has got many

drawbacks. There is necessity of constituting a proper Regulatory Body was also raised so that it can effectively supervise and monitor the functioning of these schools and also examine whether the children are being provided with not only free and compulsory education, but quality education. The Regulatory authority can also plug the loopholes, take proper steps for effective implementation of the Act and can also redress the grievances of the children. [Para 147]

6.3. In exercise of the powers conferred upon the appropriate Government under Section 38 of the RTE Act, the Government shall frame rules for carrying out the purposes of this Act and in particular, the matters stated under sub-Section (2) of Section 38 of the Act. [Para 148 (9)]

6.4. The directions, guidelines and rules shall be framed by the Central Government, appropriate Government and/or such other competent authority under the provisions of the Act, as expeditiously as possible and, in any case, not later than six months from the date of pronouncement of this judgment. [Para 148 (10)]

6.5. All the State Governments which have not constituted the State Advisory Council in terms of Section 34 of the Act shall so constitute the Council within three months from the date of the judgment. The Council so constituted shall undertake its requisite functions in accordance with the provisions of Section 34 of the Act and advise the Government in terms of clauses (6), (7) and (8) of this order immediately thereafter. [Para 148 (11)]

6.6. Central Government and State Governments may set up a proper Regulatory Authority for supervision and

effective functioning of the Act and its implementation. [Para 148 (12)]

Mohini Jain v. *State of Karnataka and Ors.* **(1992) 3 SCC 666 : 1992(3) SCR 658;** ******Unni Krishnan, J.P. and Ors. v. State of A.P. and Ors.* **(1993) 1 SCC 645 : 1993 (1) SCR 594;** *Mithilesh Kumari and Anr. v. Prem Behari Khare* **(1989) 2 SCC 95 : 1989 (1) SCR 621;** *Dr. Baliram Waman Hiray* v. *Justice B. Lentin and Ors.* **(1988) 4 SCC 419 : 1988 (2) Suppl. SCR 942;** *Santa Singh v. State of Punjab* **(1976) 4 SCC 190 : 1977 (1) SCR 229;** *Ravinder Kumar Sharma v. State of Assam* **(1999) 7 SCC 435 : 1999 (2) Suppl. SCR 339;** *Islamic Academy of Education and Anr.* v. *State of Karnataka and Ors.* **(2003) 6 SCC 697 : 2003 (2) Suppl. SCR 474 – referred to.**

Herron v. *Rathmines and Rathgar Improvement Commissioners* **(1892) AC 498 at p. 502 – referred to.**

Case Law Reference:

In the Judgment of S.H. Kapadia, CJI:

(1952) SCR 889	**Referred to.**	**Para 9**
2005 (2) Suppl. SCR 603	**Referred to.**	**Para 9**
	Distinguished.	**Para 11**
(1975) 2 SCR 832	**Referred to.**	**Para 10**
1978 (2) SCR 621	**Referred to.**	**Para 10**
2010 (12) SCR 597	**Referred to.**	**Para 10**
2002 (3) Suppl. SCR 587	**Referred to.**	**Para 10**
	Distinguished.	**Para 11**
1993 (1) SCR 594	**Referred to.**	**Para11**

2003 (2) Suppl. SCR 474	**Referred to.**	**Para 11**
(1963) SCR 837	**Referred to.**	**Para 18**

In the Judgment of K.S. Radhakrishnan, J:

1992 (3) SCR 658	**Referred to.**	**Para 5**
1993 (1) SCR 594	**Referred to.**	**Para 5**
(1892) AC 498	**Referred to.**	**Para 16**
1989 (1) SCR 621	**Referred to.**	**Para 16**
1988 (2) Suppl. SCR 942	**Referred to.**	**Para 16**
1977 (1) SCR 229	**Referred to.**	**Para 16**
1999 (2) Suppl. SCR 339	**Referred to.**	**Para 16**
1991 (3) Suppl. SCR 121	**Referred to.**	**Para 19**
2003 (2) Suppl. SCR 474	**Referred to.**	**Para 26**
2011 (7) SCC 179	**Referred to.**	**Para 36**
1975 (1) SCR 173	**Referred to.**	**Para 36**
(1963) SCR 837	**Referred to.**	**Para 36**
1983 (1) SCR 456	**Referred to.**	**Para 38**
1997 (3) Suppl. SCR 404	**Referred to.**	**Para 38**
1995 (1) SCR 626	**Referred to.**	**Para 46**
1996 (2) Suppl. SCR 331	**Referred to.**	**Para 46**
1998 (1) SCR 1120	**Referred to.**	**Para 46**
(140) 2007 DLT 698	**Referred to.**	**Para 46**
1985 (2) Suppl. SCR 51	**Referred to.**	**Para 47**
1988 (2) Suppl. SCR 929	**Referred to.**	**Para 47**
1989 (3) SCR 1038	**Referred to.**	**Para 47**

1996 (7) Suppl. SCR 548	**Referred to.**	**Para 47**
1984 (2) SCR 67	**Referred to.**	**Para 48**
1998 (1) SA 765 (CC)	**Referred to.**	**Para 49**
2001 (1) SA 46 (CC)	**Referred to.**	**Para 50**
2002 (5) SA 721 (CC)	**Referred to.**	**Para 51**
1996 (4) SA 744 (CC)	**Referred to.**	**Para 52**
2001 (7) BCLR 652 (CC)	**Referred to.**	**Para 53**
2005 (5) SA 3 (CC)	**Referred to.**	**Para 53**
347 U.S. 483	**Referred to.**	**Para 55**
(53) D.L.R. (4th) 171	**Referred to.**	**Para 56**
2007 (1) SCR 706	**Referred to.**	**Para 60**
1951 (2) SCR 525	**Referred to.**	**Para 68**
2008 (4) SCR 1	**Relied on.**	**Para 71**
	Referred to.	**Para 72**
(1992) Supp. 3 SCC 212	**Referred to.**	**Para 77**
(1997) 6 SCC 538	**Referred to.**	**Para 78**
1999 (2) Suppl. SCR 521	**Referred to.**	**Para 78**
2006 (7) Suppl. SCR 336	**Referred to.**	**Para 80**
2002 (3) Suppl. SCR 587	**Followed**	**Para 83**
2005 (2) Suppl. SCR 603	**Followed.**	**Para 83**
1981 SCC Supp. (1) 87	**Relied on.**	**Para 84**
1955 SCR 603	**Referred to.**	**Para 84**
2003 (2) SCR 1136	**Referred to.**	**Para 85**
321 U.S. 649 (1944)	**Referred to.**	**Para 86**

(2011) ZACC 13	**Referred to.**	**Para 86**
(1980) IR 102	**Referred to.**	**Para 86**
2009 (5) SCR 913	**Referred to.**	**Para 104**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 95 of 2010 etc.

Under Article 32 of the constitution of India.

WITH

W.P. (C) Nos. 98, 126, 137, 228, 269, 310, 364, 384 of 2010, 22, 24, 21, 47, 59, 50, 83, 88, 99, 102, 104, 86, 101, 115, 154, 126, 118, 186, 148, 176, 205, 238 & 239 of 2011.

Goolam E. Vahanvati, AG, Indira, Jaisingh, ASG, Dr. Rajeev Dhavan, Harish N. Salve, T.R. Andhyarujina, M. Chandrasekharan, Ashok Desai, Chander Uday Singh, K. Parasaran, R. Balasubramanian, Shekhar Nephade, Arvind P. Datar, Manjit Singh, AAG, Shobha, Bijoylaxmi Das, Hema Shekhawat, Indira Ramesh, Raghav Shankar, Vendanta Kumar, Abeer Kumar, Amit Mittal, Romy Chacko, Ambar Qamaruddin, Pukhrambam Ramesh Kumar, Rahul Dhawan, Shobana Masters, Vishesh Issar, Anant Bhushan, Basava Raj, P.I. Jose, Anupam Mishra, B.K. Mishra, Vivek Kandari, Achintya Dvivedi, Neeraj Shekhar, Anupam Lal Das, Arpit Gupta, Madhvi Divan, Sanjeev K. Kapoor, Nitin Massey, Saman Ahsan (for Khaitan and Co.), Sushil D. Salwan D. Salwan, Vedanta Verma, Abeer Kumar (for Karanjawala and Co.) Naveen R. Nath, Darpan K.M., Lalit Mohini Bhat, Amrita Sharma, VInay Navare, Keshav Ranjan, Abha R. Sharma, Vijay Kumar, Vishwajit Singh, Kamal Gupta, Gagan Gupta, Sachin J. Patil, Chandan Ramamurthi, Soumya Chakraborty, K.K. Jairpuriar, Anuj Puri, Kunal Verma, V. Balaji, C. Kannan, Pravesh Thakur, A. Subba Rao, Rakesh K. Sharma, C. Rshmikant, Gaurav Joshi, Mahesh Agarwal, Rishi Agarwal, E.C. Agrawala, Piyush Raheja, Radhika Gautam, Ankit Shah, Narendra Kumar, K.M.

Joseph, Amit Pawan, B.D. Das, Manoj V. George, Shilpam George, N. Neyyappam, Rauf Rahim, P. Ramesh Kumar, Rahul Dhawan, Shobana Masters, Vishesh Issar, Anant Bhushan, Xavier Arulraj, C. Kannan, Rakesh K. Sharma, Aniruddha P. Mayee, S. Ravi Shankar, R. Yamunah Nachiar, Sharath, Vikramjit Banerjee, Shally Bhasin Maheshwari, Rishi Maheshwari, Dr. M.P. Raju, K.K. Mishra, Dr. Ashwai Bhardwaj, Prabha Swami, C. Rashmikant, Gaurav Joshi, Mahesh Agarwal, Maneka Guruswamy, Bipin Aspatwar, Mohit Kumar Shah, Huzefa Ahmadi, Pradhuman Gohil, VIkas Sinfh, S. Hari Haran, Charu Mathur, Nikhil Nayyar, T.V.S. Raghavendra Sreyas, Divya Jyoti Jaipuriar, Jyoti Mendiratta, Puja Sharma, Amar Dave, Garima Parshad, K. Gautham, Radhika Gautam, E.C. Agrawala, Aneesh Kumar Gupta, Gopal Sankaranarayanan, Rohit Bhat, Senthil Jagadeesan, Sanjay Kumar Visen, K.N. Mishra, Raman Kumar, Srivastava, Ashish Wad, J.S. Wad and Co., Rohit Sharma, Anoopam N. Prasad, Nishanth Patil, Naila Jung, Anandha Kannan, Supriya Jain, S.S. Rawat, Rekha Pandey, I.J. Singh, D.S. Mahra, Sanjay V. Kharde, Asha G. Nair, Gopal Singh, Manish Kumar, V.G. Pragasam, S. Thananjayan, G.N. Reddy, C. Kannan, Tarjit Singh, Kamal Mohan Gupta for the appearing parties.

The Judgment of the Court was delivered by

K. S. RADHAKRISHNAN, J. 1. We are, in these cases, concerned with the constitutional validity of the Right of Children to Free and Compulsory Education Act 2009 (35 of 2009) [in short, the Act], which was enacted following the insertion of Article 21A by the Constitution (Eighty-sixth Amendment) Act, 2002. Article 21A provides for free and compulsory education to all children of the age 6 to 14 years and also casts an obligation on the State to provide and ensure admission, attendance and completion of elementary education in such a manner that the State may by law determine. The Act is, therefore, enacted to provide for free and compulsory education to all children of the age 6 to 14 years and is anchored in the

belief that the values of equality, social justice and democracy and the creation of just and humane society can be achieved only through a provision of inclusive elementary education to all the children. Provision of free and compulsory education of satisfactory quality to the children from disadvantaged groups and weaker sections, it was pointed out, is not merely the responsibility of the schools run or supported by the appropriate government, but also of schools which are not dependant on government funds.

2. Petitioners in all these cases, it may be mentioned, have wholeheartedly welcomed the introduction of Article 21A in the Constitution and acknowledged it as a revolutionary step providing universal elementary education for all the children. Controversy in all these cases is not with regard to the validity of Article 21A, but mainly centers around its interpretation and the validity of Sections 3, 12(1)(b) and 12(1)(c) and some other related provisions of the Act, which cast obligation on all elementary educational institutions to admit children of the age 6 to 14 years from their neighbourhood, on the principle of social inclusiveness. Petitioners also challenge certain other provisions purported to interfere with the administration, management and functioning of those institutions. I have dealt with all those issues in Parts I to V of my judgment and my conclusions are in Part VI.

3. Part I of the judgment deals with the circumstances and background for the introduction of Article 21A and its scope and object and the interpretation given by the Constitution Benches of this Court on right to education. Part II of the judgment deals with various socio-economic rights recognized by our Constitution and the impact on other fundamental rights guaranteed to others and the measures adopted by the Parliament to remove the obstacles for realization of those rights, in cases where there is conflict. In Part III of the judgment, I have dealt with the obligations and responsibilities of the non-state actors in realization of children's rights guaranteed under

Article 21A and the Act. In Part IV, I have dealt with the constitutional validity of Section 12(1)(b), 12(1)(c) of the Act and in Part V, I have dealt with the challenge against other provisions of the Act and my conclusions are in Part VI.

4. Senior lawyers - Shri Rajeev Dhavan, Shri T.R. Andhyarujina, Shri Ashok H. Desai, Shri Harish S. Salve, Shri N. Chandrasekharan, Shri K. Parasaran, Shri Chander Uday Singh, Shri Shekhar Naphade, Shri Vikas Singh, Shri Arvind P. Dattar and large number of other counsel also presented their arguments and rendered valuable assistance to the Court. Shri Goolam E. Vahanvati, learned Attorney General and Mrs. Indira Jaising, learned Additional Solicitor General appeared for the Union of India.

PART I

5. In *Mohini Jain v. State of Karnataka and others* [(1992) 3 SCC 666], this Court held that the right to education is a fundamental right guaranteed under Article 21 of the Constitution and that dignity of individuals cannot be assured unless accompanied by right to education and that charging of capitation fee for admission to educational institutions would amount to denial of citizens' right to education and is violative of Article 14 of the Constitution. The ratio laid down in *Mohini Jain* was questioned in *Unni Krishnan, J.P. and Others v. State of A.P. and Others* [(1993) 1 SCC 645] contending that if the judgment in Mohini Jain was given effect to, many of the private educational institutions would have to be closed down. *Mohini Jain* was affirmed in *Unni Krishnan* to the extent of holding that the right to education flows from Article 21 of the Constitution and charging of capitation fee was illegal. The Court partly overruled *Mohini Jain* and held that the right to free education is available only to children until they complete the age of 14 years and after that obligation of the State to provide education would be subject to the limits of its economic capacity and development. Private unaided recognized/affiliated educational institutions running professional courses were held entitled to

charge the fee higher than that charged by government institutions for similar courses but that such a fee should not exceed the maximum limit fixed by the State. The Court also formulated a scheme and directed every authority to impose that scheme upon institutions seeking recognition/affiliation, even if they are unaided institutions. *Unni Krishnan* introduced the concept of "free seats" and "payment seats" and ordered that private unaided educational institutions should not add any further conditions and were held bound by the scheme. *Unni Krishnan* also recognized the right to education as a fundamental right guaranteed under Article 21 of the Constitution and held that the right is available to children until they complete the age of 14 years.

6. The Department of Education, Ministry of Human Resources Development, Government of India after the judgment in *Unni Krishnan* made a proposal to amend the Constitution to make the right to education a fundamental right for children up to the age of 14 years and also a fundamental duty of citizens of India so as to achieve the goal of universal elementary education. The Department also drafted a Bill [Constitution (Eighty-third Amendment) Bill, 1997] so as to insert a new Article 21A in the Constitution which read as follows:

"21A. Right to education.

21A(1) The State shall provide free and compulsory education to all citizens of the age of six to fourteen years.

Clause(2) The Right to Free and Compulsory Education referred to in clause (1) shall be enforced in such manner as the State may, by law, determine.

Clause (3) The State shall not make any law, for free and compulsory education under Clause(2), in relation to the educational institutions not maintained by the State or not receiving aid out of State funds."

7. The draft Bill was presented before the Chairman, Rajya

Sabha on 28.07.1997, who referred the Bill to a Committee for examination and report. The Committee called for suggestions/ views from individuals, organisations, institutions etc. and ultimately submitted its report on 4.11.1997. The Committee in its Report referred to the written note received from the Department of Education and stated as follows:

> "Department in its written note stated that the Supreme Court in its judgment in *Unni Krishnan J.P. v. Andhra Pradesh,* has held that children of this country have a Fundamental Right to free education until they complete the age of 14 years. This right flows from Article 21 relating to personal liberty and its content, parameters have to be determined in the light of Article 41 which provides for right to work, to education and to public assistance in certain cases and Article 45 which provides for free and compulsory education to children up to the age of 14 years. The apex Court has observed that the obligations created by these Articles of the Constitution can be discharged by the State either by establishing institutions of its own or by aiding recognising and granting affiliation to educational institutions. On clause (3) of the proposed Article 21, the report stated as follows:
>
> "11. Clause (3) of the proposed Article 21 provides that the State shall not make any law for free and compulsory education under clause (2), in relation to the educational institutions not maintained by the State or not receiving aid out of State funds. However, strong apprehensions were voiced about clause (3) of the proposed new Article 21A. Many of the people in the written memoranda and also educational experts in the oral evidence have expressed displeasure over keeping the private educational institutions outside the purview of the fundamental right to be given to the children. The Secretary stated that the Supreme Court in the

Unni Krishnan judgment said that wherever the State is not providing any aid to any institution, such an institution need not provide free education. The Department took into account the Supreme Court judgment in the *Unni Krishnan* case which laid down that no private institution, can be compelled to provide free services. Therefore, they provided in the Constitutional amendment that this concept of free education need not be extended to schools or institutions which are not aided by the Government, the Secretary added. He, however, stated that there was no intention, to exclude them from the overall responsibility to provide education."

8. The Committee specifically referred to the judgment in *Unni Krishnan* in paragraph 15.14 of the Report. Reference was also made to the dissenting note of one of the members. Relevant portion of the report is extracted below:

"15.14. Clause (3) of the proposed Article 21(A) prohibits the State from making any law for free and compulsory education in relation to educational institutions not maintained by the State or not receiving aid out of State funds. This issue was discussed by the Members of the Committee at length. The members were in agreement that even though the so called private institutions do not receive any financial aid, the children studying in those institutions should not be deprived of their fundamental right. As regards the interpretation as to whether the private institutions should provide free education or not, the Committee is aware of the Supreme Court judgment given in the *Unni Krishnan* case. This judgment provides the rule for application and interpretation. In view of the judgment, it is not necessary to make a clause in the Constitution. *It would be appropriate to leave the interpretation to the courts instead of making a specific provision in black and white.* Some members, however, felt that the private institutions which do not get any financial aid, provide

quality education. Therefore, it would be inappropriate to bring such institutions under the purview of free education. Those members, accordingly, felt that clause (3) should not be deleted.

15.15. The Committee, however, after a thorough discussion feels that this provision need not be there. The Committee recommends that clause (3) of the proposed Article 21(A) may be deleted. Smt. Hedwig Michael Rego, M.P. a Member of the Committee gave a Minute of Dissent. It is appended to the report.

15.16. The Committee recommends that the Bill be passed subject to the recommendations made in the preceding paragraphs.

MINUTES OF DISSENT

I vehemently oppose the State wanting to introduce free and compulsory education in private, unaided schools.

Clause 21A (3) must be inserted as I do not wish the State to make laws regarding free and compulsory education in relation to educational institutions not maintained by the State or not receiving aid out of State funds.

A Committee of State Education Ministers have already considered the issue in view of the Unni Krishnan case, and found it not feasible to bring unaided private educational institutions within the purview of the Bill.

Hence, I state once again that the proposed clause "21A(3") must be inserted in the Bill.

Yours sincerely,

Sd/'
(SMT. HEDWIG MICHAEL REGO)"
(emphasis supplied)

9. Report referred to above was adopted by the Parliamentary Standing Committee on Human Resource Development and submitted the same to the Rajya Sabha on 24.11.1997 and also laid on the Table of the Lok Sabha on 24.11.1997. The Lok Sabha was however dissolved soon thereafter and elections were declared and that Bill was not further pursued.

10. The Chairman of the Law Commission who authored *Unni Krishnan* judgment took up the issue suo moto. Following the ratio in *Unni Krishnan*, the Law Commission submitted its 165th Report to the Ministry of Law, Justice and Company Affairs, Union of India vide letter dated 19.11.1998. Law Commission in that letter stated as follows: *"Law Commission had taken up the aforesaid subject suo moto having regard to the Directive Principle of the Constitution of India as well as the decision of the Supreme Court of India."*

11. Referring to the Constitution (Eighty-third Amendment) Bill, 1997, Law Commission in its report in paragraph 6.1.4 stated as under:

> **"6.1.4 (page 165.35):** *The Department of Education may perhaps be right in saying that as of today the private educational institutions which are not in receipt of any grant or aid from the State, cannot be placed under an obligation to impart free education to all the students admitted into their institutions. However, applying the ratio of Unnikrishnan case, it is perfectly legitimate for the State or the affiliating Board, as the case may be, to require the institution to admit and impart free education to fifty per cent of the students as a condition for affiliation or for permitting their students to appear for the Government/Board examination.* To start with, the percentage can be prescribed as twenty. Accordingly, twenty per cent students could be selected by the concerned institution in consultation with the local authorities and the parent-teacher association. This

> proposal would enable the unaided institutions to join the national endeavour to provide education to the children of India and to that extent will also help reduce the financial burden upon the State." (emphasis supplied)

12. The Law Commission which had initiated the proceedings suo moto in the light of *Unni Krishnan* suggested deletion of clause (3) from Article 21A stating as follows: "So far as clause (3) is concerned, the Law Commission states that it should be totally recast on the light of the basic premise of the decision in *Unni Kirshnan* which has been referred to hereinabove. It would neither be advisable nor desirable that the unaided educational institutions are kept outside the proposed Article altogether while the sole primary obligation to provide education is upon the State, the educational institutions, whether aided or unaided supplement this effort."

Para 6.6.2 of the report reads as under:

> **"6.6.2.** The unaided institutions should be made aware that recognition, affiliation or permission to send their children to appear for the Government/Board examination also casts a corresponding social obligation upon them towards the society. The recognition/affiliation/permission aforesaid is meant to enable them to supplement the effort of the State and not to enable them to make money. Since they exist and function effectively because of such recognition/affiliation/permission granted by public authorities, they must and are bound to serve the public interest. For this reason, the unaided educational institutions must be made to impart free education to 50% of the students admitted to their institutions. This principle has already been applied to medical, engineering and other colleges imparting professional education and there is no reason why the schools imparting primary/elementary education should not be placed under the same obligation. Clause (3) of proposed Article 21A may accordingly be recast to give effect to the above concept and obligation."

Reference may also be made to the following paragraphs of the Report:

> "6.8. The aforesaid bill was referred by the Chairman, Rajya Sabha to the Department-Related Parliamentary Standing Committee on Human Resources Development. A press communiqué inviting suggestions/views was issued on 18th August, 1997. The Committee considered the Bill in four sittings and heard oral evidence. It adopted the draft report at its meeting held on 4th November, 1997. The report was then presented to the Rajya Sabha on 24th November, 1997 and laid on the table of the Lok Sabha on the same day. Unfortunately, the Lok Sabha was dissolved soon thereafter and elections were called.
>
> 6.8.1. The Budget Session after the new Lok Sabha was constituted is over. There is, however, no indication whether the Government is inclined to pursue the pending bill.
>
> 6.9. The question is debatable whether it is at all necessary to amend the Constitution when there is an explicit recognition of the right to education till the age of fourteen years by the Supreme Court in *Unni Krishnan's* case. As the said judgment can be overruled by a larger Bench in another case, thus making this right to education vulnerable, it would appear advisable to give this right constitutional sanctity."

13. Law Commission was giving effect to the ratio of *Unni Krishnan* and made suggestions to bring in Article 21A mainly on the basis of the scheme framed in *Unni Krishnan* providing "free seats" in private educational institutions.

14. The Law Commission report, report of the Parliamentary Standing Committee, judgment in Unni Krishnan etc. were the basis on which the Constitution (Ninety-third Amendment) Bill, 2001 was prepared and presented. Statement

of objects and reasons of the Bill given below would indicate that fact:

> "2. With a view to making right to education free and compulsory education a fundamental right, the Constitution (Eighty-third Amendment) Bill, 1997 was introduced in the Parliament to insert a new article, namely, Article 21A conferring on all children in the age group of 6 to14 years the right to free and compulsory education. The said Bill was scrutinized by the Parliamentary Standing Committee on Human Resource Development and the subject was also dealt with in its 165th Report by the Law Commission of India.
>
> 3. After taking into consideration the report of the Law Commission of India and the recommendations of the Standing Committee of Parliament, the proposed amendments in Part III, Part IV and Part IVA of the Constitution are being made which are as follows:
>
> (a) to provide for free and compulsory education to children in the age group of 6 to 14 years and for this purpose, a legislation would be introduced in parliament after the Constitution (Ninety-third Amendment) Bill, 2001 is enacted;
>
> (b) to provide in article 45 of the Constitution that the State shall endeavour to provide early childhood care and education to children below the age of six years; and
>
> (c) to amend article 51A of the Constitution with a view to providing that it shall be the obligation of the parents to provide opportunities for education to their children.
>
> 4. The Bill seeks to achieve the above objects."

15. The above Bill was passed and received the assent of the President on 12.12.2002 and was published in the Gazette of India on 13.12.2002 and the following provisions

were inserted in the Constitution; by the Constitution (Eighty-sixth Amendment) Act, 2002.

Part III - Fundamental Rights

"21A. Right to Education.- The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Part IV - Directive Principles of State Policy

45. Provision for early childhood care and education to children below the age of six years.- The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Part IVA - Fundamental Duties

51A. Fundamental duties - It shall be the duty of every citizen of India -

xxx xxx xxx

(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

16. Reference was earlier made to the Parliamentary Standing Committee Report, 165th Law Commission Report, 1998 and the opinion expressed by the Department of Education so as to understand the background of the introduction of Article 21A which is also necessary to properly understand the scope of the Act. In *Herron v. Rathmines and Rathgar Improvement Commissioners* [1892] AC 498 at p. 502, the Court held that the subject-matter with which the Legislature was dealing, and the facts existing at the time with respect to which the Legislature was legislating are legitimate topics to consider in ascertaining what was the object and

purpose of the Legislature in passing the Act. In *Mithilesh Kumari and Another v. Prem Behari Khare* [(1989) 2 SCC 95], this Court observed that "where a particular enactment or amendment is the result of recommendation of the Law Commission of India, it may be permissible to refer to the relevant report." (See also *Dr. Baliram Waman Hiray v. Justice B. Lentin and Others* [(1988) 4 SCC 419], *Santa Singh v. State of Punjab* [(1976) 4 SCC 190], *Ravinder Kumar Sharma v. State of Assam* [(1999) 7 SCC 435].

UNNI KRISHNAN:

17. *Unni Krishnan* had created mayhem and raised thorny issues on which the Law Commission had built up its edifice, suo moto. The Law Commission had acknowledged the fact that but for the ratio in *Unni Kirshnan* the unaided private educational institutions would have no obligation to impart free and compulsory education to the children admitted in their institutions. Law Commission was also of the view that the ratio in *Unni Krishnan* had legitimized the State or the affiliating Board to require unaided educational institutions to provide free education, as a condition for affiliation or for permitting the students to appear for the Government/Board examination.

18. *Unni Krishnan* was questioned contending that it had imposed unreasonable restrictions under Article 19(6) of the Constitution on the administration of the private educational institutions and that the rights of minority communities guaranteed under Article 29 and Article 30 were eroded. *Unni Krishnan* scheme which insisted that private unaided educational institutions should provide for "free seats" as a condition for recognition or affiliation was also questioned contending that the same would amount to nationalisation of seats.

PAI FOUNDATION

19. *T.M.A. Pai Foundation and others v. State of*

Karnataka and others [(2002) 8 SCC 481] examined the correctness of the ratio laid down in *Unni Krishnan* and also the validity of the scheme. The correctness of the rigid percentage of reservation laid down in *St. Stephen's College v. University of Delhi* [(1992) 1 SCC 558] in the case of minority aided educational institutions and the meaning and contents of Articles 30 and 29(2) were also examined.

20. *Pai Foundation* acknowledged the right of all citizens to practice any profession, trade or business under Article 19(1)(g) and Article 26 and held those rights would be subject to the provisions that were placed under Article 19(6) and 26(a) and the rights of minority to establish and administer educational institutions under Article 30 was also upheld.

21. *Unni Krishnan* scheme was held unconstitutional, but it was ordered that there should be no capitation fee or profiteering and reasonable surplus to meet the cost of expansion and augmentation of facilities would not mean profiteering. Further, it was also ordered that the expression "education" in all the Articles of the Constitution would mean and include education at all levels, from primary education level up to post graduate level and the expression "educational institutions" would mean institutions that impart education as understood in the Constitution.

22. *Pai Foundation* has also recognised that the expression "occupation" in Article 19(1)(g) is an activity of a person undertaken as a means of livelihood or a mission in life and hence charitable in nature and that establishing and running an educational institution is an occupation, and in that process a reasonable revenue surplus can be generated for the purpose of development of education and expansion of the institutions. The right to establish and administer educational institutions, according to *Pai Foundation*, comprises right to admit students, set up a reasonable fee structure, constitute a governing body, appoint staff, teaching and non-teaching and to take disciplinary action. So far as private unaided

educational institutions are concerned, the Court held that maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fee to be charged etc. and that the authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation but those conditions must pertain broadly to academic and educational matters and welfare of students and teachers. The Court held that the right to establish an educational institution can be regulated but such regulatory measures must be in general to ensure proper academic standards, atmosphere and infrastructure and prevention of maladministration. The necessity of starting more quality private unaided educational institutions in the interest of general public was also emphasised by the Court by ensuring autonomy and non-regulation in the school administration, admission of students and fee to be charged. *Pai Foundation* rejected the view that if a private school is allowed to charge fee commensurate with the fee affordable, the degrees would be purchasable as unfounded since the standards of education can be and are controllable through recognition, affiliation and common final examination. Casting burden on other students to pay for the education of others was also disapproved by *Pai Foundation* holding that there should be no cross-subsidy.

23. *Pai Foundation* has also dealt with the case of private aided professional institutions, minority and non-minority, and also other aided institutions and stated that once aid is granted to a private professional educational institution, the government or the state agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. *Pai Foundation* also acknowledged that there are large number of educational institutions, like schools and non-professional colleges, which cannot operate without the support of aid from the state and the Government in such cases, would be entitled to make regulations relating to the terms and conditions of employment

of the teaching and non-teaching staff. In other words, autonomy in private aided institutions would be less than that of unaided institutions.

24. *Pai Foundation* also acknowledged the rights of the religious and linguistic minorities to establish and administer educational institutions of their choice under Article 30(1) of the Constitution and held that right is not absolute as to prevent the government from making any regulation whatsoever. The Court further held that as in the case of a majority run institution, the moment a minority institution obtains a grant or aid, Article 28 of the Constitution comes into play.

25. *Pai Foundation* further held that the ratio laid down in *St. Stephen* is not correct and held that even if it is possible to fill up all the seats with students of the minority group, the moment the institution is granted aid, the institution will have to admit students of the non-minority group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time, the rights of the citizen engrafted under Article 29(2) are not subverted. The judgment in *Pai Foundation* was pronounced on 31.10.2002, 25.11.2002 and Article 21A, new Article 45 and Article 51A(k) were inserted in the Constitution on 12.12.2002, but the basis for the introduction of Article 21A and the deletion of original clause (3) from Article 21A, was due to the judgment of Unnikrishnan. Parliament, it may be noted, was presumed to be aware of the judgment in *Pai Foundation*, and hence, no obligation was cast on unaided private educational institutions but only on the State, while inserting Article 21A.

26. The judgment in *Pai Foundation*, after the introduction of the above mentioned articles, was interpreted by various Courts, State Governments, educational institutions in different perspectives leading to the enactment of various statutes and regulations as well, contrary to each other. A Bench of five Judges was, therefore, constituted to clarify certain doubts generated out of the judgment in *Pai Foundation* and its

application. Rights of unaided minority and non-minority institutions and restrictions sought to be imposed by the State upon them were the main issues before the Court and not with regard to the rights and obligations of private aided institutions run by minorities and non-minorities. The five Judges' Bench rendered its judgment on 14.8.2003 titled *Islamic Academy of Education and another v. State of Karnataka and others* [(2003) 6 SCC 697]. Unfortunately, *Islamic Academy* created more problems and confusion than solutions and, in order to steer clear from that predicament, a seven Judges Bench was constituted and the following specific questions were referred for its determination:

> "(1) To what extent the State can regulate the admissions made by unaided (minority or non- minority) educational institutions? *Can the State enforce its policy of reservation and/or appropriate to itself any quota in admissions to such institutions*?
>
> (emphasis supplied)
>
> (2) Whether unaided (minority and non-minority) educational institutions are free to devise their own admission procedure or whether direction made in *Islamic Academy* for compulsorily holding entrance test by the State or association of institutions and to choose therefrom the students entitled to admission in such institutions, can be sustained in light of the law laid down in *Pai Foundation*?
>
> (3) Whether *Islamic Academy* could have issued guidelines in the matter of regulating the fee payable by the students to the educational institutions?
>
> (4) Can the admission procedure and fee structure be regulated or taken over by the Committees ordered to be constituted by *Islamic Academy*?"

27. Above mentioned questions were answered in *P.A. Inamdar and others v. State of Maharashtra and others* [(2005) 6 SCC 537] and the Court cleared all confusion and doubts, particularly insofar as unaided minority and non-minority educational institutions are concerned.

28. *Inamdar* specifically examined the inter-relationship between Articles 19(1)(g), 29(2) and 30(1) of the Constitution and held that the right to establish an educational institution (which evidently includes schools as well) for charity or a profit, being an occupation, is protected by Article 19(1)(g) with additional protection to minority communities under Article 30(1). *Inamdar*, however, reiterated the fact that, once aided, the autonomy conferred by protection of Article 30(1) is diluted, as the provisions of Articles 29(2) will be attracted and certain conditions in the nature of regulations can legitimately accompany the State aid. Reasonable restrictions pointed out by *Inamdar* may be indicated on the following subjects: (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business; (ii) the carrying on by the State, or by a corporation owned or controlled by the State of any trade, business, industry or service whether to the exclusion, complete or partial of citizens or otherwise.

29. Referring to the judgments in *Kerala Education Bill* , In Re. 1959 SCR 995 and *St. Stephen,* the Court took the view that once an educational institution is granted aid or aspires for recognition, the State may grant aid or recognition accompanied by certain restrictions or conditions which must be followed as essential to the grant of such aid or recognition. *Inamdar, as I have already indicated, was mainly concerned with the question whether the State can appropriate the quota of unaided educational institutions both minority and non-minority*. Explaining *Pai Foundation*, the Court in *Inamdar* held as follows:

"119. A minority educational institution may choose not to take any aid from the State and *may also not seek any recognition or affiliation*. It may be imparting such instructions and may have students learning such knowledge that do not stand in need of any recognition. Such institutions would be those where instructions are imparted for the sake of instructions and learning is only for the sake of learning and acquiring knowledge. Obviously, such institutions would fall in the category of those who would exercise their right under the protection and privilege conferred by Article 30(1) "to their hearts' content" unhampered by any restrictions excepting those which are *in national interest based on considerations such as public safety, national security and national integrity or are aimed at preventing exploitation of students or the teaching community.* Such institutions cannot indulge in any activity which is violative of any law of the land.

120. They are free to admit all students of their own minority community if they so choose to do. (Para 145, Pai Foundation)

(ii) Minority unaided educational institutions asking for affiliation or recognition

121. Affiliation or recognition by the State or the Board or the university competent to do so, cannot be denied solely on the ground that the institution is a minority educational institution. However, the urge or need for affiliation or recognition brings in the concept of regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing maladministration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of studies and curricula. The existence of infrastructure sufficient for its growth can be

stipulated as a prerequisite to the grant of recognition or affiliation. However, there cannot be interference in the day-to-day administration. *The essential ingredients of the management, including admission of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated.* (Para 55, Pai Foundation)

122. Apart from the generalised position of law that the right to administer does not include the right to maladminister, an additional source of power to regulate by enacting conditions accompanying affiliation or recognition exists. A balance has to be struck between the two objectives: (i) that of ensuring the standard of excellence of the institution, and (ii) that of preserving the right of the minority to establish and administer its educational institution. Subject to a reconciliation of the two objectives, any regulation accompanying affiliation or recognition must satisfy the triple tests: (i) the test of reasonableness and rationality, (ii) the test that the regulation would be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it, and (iii) that there is no inroad into the protection conferred by Article 30(1) of the Constitution, that is, by framing the regulation the essential character of the institution being a minority educational institution, is not taken away. (Para 122, Pai Foundation)

(iii) Minority educational institutions receiving State aid

123. Conditions which can normally be permitted to be imposed on the educational institutions receiving the grant must be related to the proper utilisation of the grant and fulfilment of the objectives of the grant without diluting the minority status of the educational institution, as held in Pai Foundation (see para 143 thereof). As aided institutions are not before us and we are not called upon

to deal with their cases, we leave the discussion at that only.

124. So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of a difference between non-minority and minority unaided educational institutions. *We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat-sharing in unaided private professional educational institutions by fixing a quota of seats between the management and the State.* The State cannot insist on private educational institutions which receive no aid from the State to implement the State's policy on reservation for granting admission on lesser percentage of marks i.e. on any criterion except merit.

125. As per our understanding, neither in the judgment of *Pai Foundation* nor in the Constitution Bench decision in *Kerala Education Bill* which was approved by *Pai Foundation is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats which has been specifically disapproved in Pai Foundation.* Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a *regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.* Merely because the

resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit." (emphasis supplied)

Pai Foundation, it was pointed out by *Inamdar*, merely permitted the unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat sharing with the State or adopting selection based on common entrance test of the State. Further, it was also pointed that unaided educational institutions can frame their own policy to give free-ships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the state to cater to the educational needs of weaker and poorer sections of the society not out of compulsion, but on their own volition. *Inamdar* reiterated that no where in *Pai Foundation,* either in the majority or in the minority opinion, have they found any justification for imposing seat sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota seats or management seats. Further, it was pointed that the fixation of percentage of quota is to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State. State regulations, it was pointed out, should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees. *Inamdar, disapproved the scheme evolved in Islamic Academy to the extent it allowed States to fix quota for seat sharing between management and the States on the basis of local needs of each State, in the unaided private educational institutions of both minority and non-minority categories. Inamdar held that to admit students*

being one of the components of right to establish and administer an institution, the State cannot interfere therewith and upto the level of undergraduate education, the minority unaided educational institutions enjoy "total freedom". Inamdar emphasised the fact that minority unaided institutions can legitimately claim "unfettered fundamental right" to choose the students to be allowed admissions and the procedure therefore subject to its being fair, transparent and non-exploitative and the same principle applies to non-minority unaided institutions as well. *Inamdar* also found foul with the judgment in Islamic with regard to the fixation of quota and for seat sharing between the management and the State on the basis of local needs of each State in unaided private educational institutions, both minority and non-minority. *Inamdar* noticed that *Pai Foundation* also found foul with the judgment in Unni Krishnan and held that admission of students in unaided minority educational institutions/schools where scope for merit based is practically nil cannot be regulated by the State or University except for providing the qualification and minimum condition of eligibility in the interest of academic standards.

30. *Pai Foundation* as well as *Inamdar* took the view that laws of the land including rules and regulations must apply equally to majority as well as minority institutions and minority institutions must be allowed to do what majority institutions are allowed to do. *Pai Foundation* examined the expression "general laws of the land" in juxtaposition with "national interest" and stated in Para 136 of the judgment that general laws of land applicable to all persons have been held to be applicable to the minority institutions also, for example, laws relating to taxation, sanitation, social welfare, economic regulations, public order and morality.

31. While examining the scope of Article 30, this fact was specifically referred to in *Inamdar* (at page 594) and took the view that, in the context of Article 30(1), no right can be absolute and no community can claim its interest above national interest.

The expression "national interest" was used in the context of respecting "laws of the land", namely, while imposing restrictions with regard to laws relating to taxation, sanitation, social welfare, economic legislation, public order and morality and not to make an inroad into the fundamental rights guaranteed under Article 19(1)(g) or Article 30(1) of the Constitution.

32. Comparing the judgments in *Inamdar* and *Pai Foundation,* what emerges is that so far as unaided educational institutions are concerned, whether they are established and administered by minority or non-minority communities, they have no legal obligation in the matter of seat sharing and upto the level of under-graduate education they enjoy total freedom. State also cannot compel them to give up a share of the available seats to the candidates chosen by the State. Such an appropriation of seats, it was held, cannot be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution since they have unfettered fundamental right and total freedom to run those institutions subject to the law relating to taxation, sanitation, social welfare, economic legislation, public order and morality.

33. *Pai Foundation* was examining the correctness of the ratio in *Unni Krishnan,* which I have already pointed out, was the basis for the insertion of Article 21A and the deletion of clause (3) of the proposed Article 21A. *Inamdar* also noticed that *Pai Foundation* had struck down ratio of *Unni Krishnan* which invaded the rights of unaided educational institutions by framing a scheme. Article 21A envisaged a suitable legislation so as to achieve the object of free and compulsory education to children of the age 6 to 14 years and imposed obligation on the State, and not on unaided educational institutions.

34. Parliament, in its wisdom, brought in a new legislation Right to Education Act to provide free and compulsory education to children of the age 6 to 14 years, to discharge the

constitutional obligation of the State, as envisaged under Article 21A. Provisions have also been made in the Act to cast the burden on the non-state actors as well, to achieve the goal of Universal Elementary Education. The statement of objects and reasons of the Bill reads as follows:

> "4. The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds."

35. The Bill was introduced in the Rajya Sabha which passed the Bill on 20.7.2009 and in Lok Sabha on 4.8.2009 and received the assent of the President on 26.8.2009 and was published in the Gazette of India on 27.8.2009.

36. Learned Attorney General of India submitted that the values of equality, social justice and democracy and the creation of just and humane society can be achieved only through a provision of inclusive elementary education by admitting children belonging to disadvantaged group and weaker sections of the society which is not only the responsibility of the state and institutions supported by the state but also schools which are not dependent on government funds. Learned Attorney General also submitted that the state has got an obligation and a duty to enforce the fundamental rights guaranteed to children of the age of 6 to 14 years for free and compulsory education and is to achieve that objective, the Act was enacted. Learned Attorney General submitted that Article 21A is a socio-economic right which must get priority over rights under Article 19(1)(g) and Article 30(1), because unlike other rights it does not operate merely as a limitation on the powers

of the state but it requires affirmative state action to protect and fulfil the rights guaranteed to children of the age of 6 to 14 years for free and compulsory education. Reference was also made to the judgments of this Court in *Indian Medical Association v. Union of India and others* [(2011) 7 SCC 179] (in short Medical Association case), *Ahmedabad St. Xavier's College Society and Another v. State of Gujarat and Another* [(1974) 1 SCC 717], *Rev. Sidhajbhai Sabhai and Others v. State of Bombay and Another* [(1963) 3 SCR 837] and *In re. Kerala Education Bill* (supra).

37. Learned Additional Solicitor General in her written as well as oral submissions stated that Article 21A must be considered as a stand alone provision and not subjected to Article 19(1)(g) and Article 30(1) of the Constitution. Article 19(1)(g) and Article 30(1), it was submitted, dealt with the subject of right to carry on occupation of establishing and administering educational institutions, while Article 21A deals exclusively with a child's right to primary education. Article 21A, it was pointed out, has no saving clause which indicates that it is meant to be a complete, standalone clause on the subject matter of the right to education and is intended to exclude the application of Article 19(1)(g) and Article 30(1). Learned Additional Solicitor General submitted that omission of clause (3) in the original proposed Article 21A would indicate that the intention of the Parliament was to apply the mandate of Article 21A to all the educational institutions, public or private, aided or unaided, minority or non-minority.

38. Mrs. Menaka Guruswamy and Mrs. Jayna Kothari, appearing for the intervener namely The Azim Premji Foundation, in I.A. No. 7 in W.P. (C) No. 95/2010, apart from other contentions, submitted that Article 21A calls for horizontal application of sanction on state actors so as to give effect to the fundamental rights guaranteed to the people. Learned counsels submitted that Sections 15(2), 17, 18, 23 and 24 of the Constitution expressly impose constitutional obligations on

non-state actors and incorporate the notion of horizontal application of rights. Reference was also made to the judgment of this Court in *People's Union for Democratic Rights and Others v. Union of India and Others* [(1982) 3 SCC 235] and submitted that many of the fundamental rights enacted in Part III, such as Articles 17, 23 and 24, among others, would operate not only against the State but also against other private persons. Reference was also made to the judgment of this Court *Vishaka and Others v. State of Rajasthan* [(1997) 6 SCC 241], in which this Court held that all employees, both public and private, would take positive steps not to infringe the fundamental rights guaranteed to female employees under Articles 14, 15, 21 and 19(1)(g) of the Constitution. Reference was also made to Article 15(3) and submitted that the Constitution permits the State to make special provisions regarding children. Further, it was also contended that Articles 21A and 15(3) provide the State with Constitutional instruments to realize the object of the fundamental right to free and compulsory education even through non-state actors such as private schools.

39. Shri Rajeev Dhavan, learned senior counsel appearing on behalf of some of the petitioners, submitted that Article 21A casts an obligation on the state and state alone to provide free and compulsory education to children upto the age of 6 to 14 years, which would be evident from the plain reading of Article 21A read with Article 45. Learned senior counsel submitted that the words "state shall provide" are express enough to reveal the intention of the Parliament. Further, it was stated that the constitutional provision never intended to cast responsibility on the private educational institutions along with the State, if that be so like Article 15(5), it would have been specifically provided so in Article 21A. Article 21A or Article 45 does not even remotely indicate any idea of compelling the unaided educational institutions to admit children from the neighbourhood against their wish and in violation of the rights guaranteed under the Constitution. Learned senior counsel submitted that since no constitutional obligation is cast on the

private educational institutions under Article 21A, the State cannot through a legislation transfer its constitutional obligation on the private educational institutions. Article 21A, it was contended, is not subject to any limitation or qualification so as to offload the responsibility of the State on the private educational institutions so as to abridge the fundamental rights guaranteed to them under Article 19(1)(g), Article 26(a), Article 29(1) and Article 30(1) of the Constitution.

40. Learned senior counsel submitted that Article 21A is not meant to deprive the above mentioned core rights guaranteed to the petitioners and if the impugned provisions of the Act do so, to that extent, they may be declared unconstitutional. Learned senior counsel submitted that the "core individual rights" always have universal dimension and thus represent universal value while "socio-economic rights" envisaged the sectional interest and the core individual right, because of its universal nature, promote political equality and human dignity and hence must promote precedence over the socio-economic rights. Learned senior counsel also submitted that constitutional concept and the constitutional interpretation given by *Pai Foundation* and *Inamdar* cannot be undone by legislation. Learned counsel also submitted that the concept of social inclusiveness has to be achieved not by abridging or depriving the fundamental rights guaranteed to the citizens who have established and are administering their institutions without any aid or grant but investing their own capital. The principles stated in Part IV of the Constitution and the obligation cast on the State under Article 21A, it was contended, are to be progressively achieved and realised by the State and not by non-state actors and they are only expected to voluntarily support the efforts of the state.

41. Shri T.R. Andhyarujina, learned senior counsel appearing for some of the minority institutions submitted that the object of Articles 25 to 30 of the Constitution is to preserve the rights of religious and linguistic minorities and to place them

on a secure pedestal and withdraw them from the vicissitudes of political controversy. Learned senior counsel submitted that the very purpose of incorporating those rights in Part-III is to afford them guarantee and protection and not to interfere with those rights except in larger public interest like health, morality, public safety, public order etc. Learned senior counsel extensively referred to various provisions of the Act, and submitted that they would make serious inroad into the rights guaranteed to the minority communities. Learned counsel further submitted that Section 12(1)(b) and 12(1)(c) in fact, completely take away the rights guaranteed to minority communities, though what was permitted by this Court was only "sprinkling of outsiders" that is members of all the communities. Counsel submitted that the mere fact that some of the institutions established and administered by the minority communities have been given grant or aid, the State cannot take away the rights guaranteed to them under Article 30(1) of the Constitution of India. Learned counsel submitted that Article 21A read with Article 30(1) also confers a right on a child belonging to minority community for free and compulsory education in an educational institution established and administered by the minority community for their own children and such a constitutionally guaranteed right cannot be taken away or abridged by law.

PART II

Article 21A and RTE Act

42. Right to education, so far as children of the age 6 to 14 years are concerned, has been elevated to the status of fundamental right under Article 21A and a corresponding obligation has been cast on the State, but through Sections 12(1)(b) and 12(1)(c) of the Act the constitutional obligation of the State is sought to be passed on to private educational institutions on the principle of social inclusiveness. Right to Education has now been declared as a fundamental right of children of the age 6 to 14 years and other comparable rights

or even superior rights like the Right to food, healthcare, nutrition, drinking water, employment, housing, medical care may also get the status of fundamental rights, which may be on the anvil. Right guaranteed to children under Article 21A is a socio-economic right and the Act was enacted to fulfil that right. Let us now examine how these rights have been recognized and given effect to under our Constitution and in other countries.

43. Rights traditionally have been divided into civil rights, political rights and socio-economic rights; the former rights are often called the first generation rights and the latter, the second generation rights. First generation rights have also been described as negative rights because they impose a duty and restraint on the state and generally no positive duties flow from them with some exceptions. Over lapping of both the rights are not uncommon. It is puerile to think that the former rights can be realised in isolation of the latter or that one overrides the others.

44. Socio-economic rights generally serve as a vehicle for facilitating the values of equality, social justice and democracy and the state is a key player in securing that goal. The preamble of the Indian Constitution, fundamental rights in Part III and the Directive Principles of State Policy in Part IV are often called and described as "conscience of the Constitution" and they reflect our civil, political and socio-economic rights which we have to protect for a just and humane society.

45. Supreme Court through various judicial pronouncements has made considerable headway in the realization of socio-economic rights and made them justiciable despite the fact that many of those rights still remain as Directive Principles of State Policy. Civil, political and socio-economic rights find their expression in several international conventions like U.N. Convention on Economic, Social and Cultural Rights 1966 (ICESCR), International Covenant on Civil and Political Rights 1966 (ICCPR), Universal Declaration of

Human Rights 1948 (UDHR), United Nations Convention on Rights of Child 1989 (UNCRC)etc. Reference to some of the socio-economic rights incorporated in the Directive Principles of the State Policy in this connection is useful. Article 47 provides for duty of the State to improve public health. Principles enshrined in Articles 47 and 48 are not pious declarations but for guidance and governance of the State policy in view of Article 37 and it is the duty of the State to apply them in various fact situations.

46. Supreme Court has always recognized Right to health as an integral part of right to life under Article 21 of the Constitution. In *Consumer Education & Research Centre and Others v. Union of India and others* [(1995) 3 SCC 42], this Court held that the right to life meant a right to a meaningful life, which is not possible without having right to healthcare. This Court while dealing with the right to healthcare of persons working in the asbestos industry read the provisions of Articles 39, 41 and 43 into Article 21. In *Paschim Banga Khet Majdoor Samity and Others v. State of West Bengal and Another* [(1996) 4 SCC 37], this Court not only declared Right to health as a Fundamental Right but enforced that right by asking the State to pay compensation for the loss suffered and also to formulate a blue-print for primary health care with particular reference to the treatment of patients during emergency. A note of caution was however struck in *State of Punjab and Others v. Ram Lubhaya Bagga and Others* [(1998) 4 SCC 117] stating that no State or country can have unlimited resources to spend on any of its projects and the same holds good for providing medical facilities to citizens. In *Social Jurist, A Lawyers Group v. Government Of NCT Of Delhi and Others* [(140) 2007 DLT 698], a Division Bench of Delhi High Court, of which one of us, Justice Swatanter Kumar was a party, held that the wider interpretations given to Article 21 read with Article 47 of the Constitution of India are not only meant for the State but they are equally true for all, who are placed at an advantageous situation because of the help or allotment of vital

assets. *Dharamshila Hospital & Research Centre v. Social Jurist & Ors.;* SLP (C) No.18599 of 2007 decided on 25.07.2011 filed against the judgment was dismissed by this Court directing that petitioners' hospitals to provide medical care to a specified percentage of poor patients since some of the private hospitals are situated on lands belonging to the State or getting other concessions from the State.

47. Right to shelter or housing is also recognized as a socio-economic right which finds its expression in Article 11 of the ICESCR but finds no place in Part-III or Part-IV of our Constitution. However, this right has been recognized by this Court in several judgments by giving a wider meaning to Article 21 of the Constitution. In *Olga Tellis and Others v. Bombay Municipal Corporation and Others* [(1985) 3 SCC 545], this Court was considering the claims of evictees from their slums and pavement dwellings on the plea of deprivation of right to livelihood and right to life. Their claim was not fully accepted by this Court holding that no one has the right to use a public property for private purpose without requisite authorization and held that it is erroneous to contend that pavement dwellers have the right to encroach upon the pavements by constructing dwellings thereon. In *Municipal Corporation of Delhi v. Gurnam Kaur* [(1989) 1 SCC 101], this Court held that Municipal Corporation of Delhi has no legal obligation to provide pavement squatters alternative shops for rehabilitation as the squatters had no legally enforceable right. In *Sodan Singh and Others v. New Delhi Municipal Committee and Others* [(1989) 4 SCC 155], this Court negated the claim of citizens to occupy a particular place on the pavement to conduct a trade, holding the same cannot be construed as a fundamental right. Socio-economic compulsions in several cases did not persuade this Court to provide reliefs in the absence of any constitutional or statutory right. A different note was however struck in *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan and Others* [(1997) 11 SCC 121] in the context of eviction of encroachers from the city of Ahmedabad. This Court held

though Articles 38, 39 and 46 mandate the State, as its economic policy, to provide socio-economic justice, no person has a right to encroach and erect structures otherwise on foot-paths, pavements or public streets. The Court has however opined that the State has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful.

48. Right to work does not oblige the State to provide work for livelihood which has also been not recognized as a fundamental right. Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005) guarantees at least 100 days of work in every financial year to every household whose adult members volunteer manual work on payment of minimum wages. Article 41 of the Constitution provides that State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, which right is also reflected in Article 6 of ICESCR. Article 38 of Part-IV states that the State shall strive to promote the welfare of the people and Article 43 states that it shall endeavour to secure a living wage and a decent standard of life to all workers. In *Bandhua Mukti Morcha v. Union of India and Others* [(1984) 3 SCC 161], a Public Interest Litigation, an NGO highlighted the deplorable condition of bonded labourers in a quarry in Haryana. It was pointed out that a host of protective and welfare oriented labour legislations, including Bonded Labour (Abolition) Act, 1976 and the Minimum Wages Act, 1948were not followed. This Court gave various directions to the State Government to enable it to discharge its constitutional obligation towards bonded labourers. This Court held that right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy, particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and held that it must include protection of the health and strength of workers, men and

women and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.

49. The Constitutional Court of South Africa rendered several path-breaking judgments in relation to socio-economic rights. *Soobramoney v. Minister of Health (KwaZulu-Natal)* [1998 (1) SA 765 (CC)] was a case concerned with the right of emergency health services. Court held that the State owes no duty to provide the claimant, a diabetic sufferer, with kidney dialysis on a plea of socio-economic right. Petitioner was denied dialysis by a local hospital on the basis of a prioritization policy based on limited resources. The Court emphasised that the responsibility of fixing the health care budget and deciding priorities lay with political organization and medical authorities, and that the court would be slow to interfere with such decisions if they were rational and "taken in good faith".

50. In *Government of the Republic of South Africa and Others v. Grootboom and others* [2001 (1) SA 46 (CC)] was a case where the applicants living under appalling conditions in an informal settlement, had moved into private land from which they were forcibly evicted. Camping on a nearby sports field, they applied for an order requiring the government to provide them with basic shelter. The Constitutional Court did not recognize a directly enforceable claim to housing on the part of the litigants, but ruled that the State is obliged to implement a reasonable policy for those who are destitute. The Court, however, limited its role to that of policing the policy making process rather than recognizing an enforceable individual right to shelter, or defining a minimum core of the right to be given absolute priority.

51. Another notable case of socio-economic right dealt with by the South African Court is *Minister of Health and others v. Treatment Action Campaign and others* (TAC) [2002 (5) SA

721 (CC)]. The issue in that case was whether the state is obliged under the right of access to health care (Sections 27(1) and (2) of 1996 Constitution) to provide the anti-retroviral drug Nevirapine to HIV-positive pregnant women and their new born infants. Referring the policy framed by the State, the Court held that the State is obliged to provide treatment to the patients included in the pilot policy. The decision was the closest to acknowledging the individual's enforceable right.

52. In *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* [1996 (4) SA 744 (CC)], the Court made it clear that socio-economic rights may be negatively protected from improper invasion, breach of the obligation, occurs directly when there is a failure to respect the right or indirectly when there is a failure to prevent the direct entrenchment of the right of another, or a failure to respect the existing protection of the right, by taking measures that diminish the protection of private parties obligation, is not to interfere with or diminish the enjoyment of the right constitutionally protected. Equally important, in enjoyment of that right, the beneficiary shall also not obstruct, destroy, or make an inroad on the right guaranteed to others like non-state actors.

53. Few of the other notable South African Constitutional Court judgments are: *Minister of Public Works and others v. Kyalami Ridge Environmental Association and others* [2001 (7) BCLR 652 (CC)] and *President of the Republic of South Africa v. Modderklip Boerdery (Pty). Ltd.* [2005 (5) SA 3 (CC)].

54. South African Constitution, unlike many other constitutions of the world, has included socio-economic rights, health services, food, water, social security and education in the Constitution to enable it to serve as an instrument of principled social transformation enabling affirmative action and horizontal application of rights. To most of the social rights, the State's responsibility is limited to take reasonable legislative and other measures within its available resources to achieve

the progressive realisation of those rights [Sections 26(2), and 27(2)]. Few exceptions, however, give rise to directly enforceable claims, namely, right not to be evicted [Section 26(3)]; not to be refused emergency medical treatment [Section 27(3)]; the rights of prisoners to adequate nutrition and medical treatment [Section 35(2)] and rights of Children (defined as those under 18 years) to basic nutrition, shelter, basic health care and social services.

55. Social economic rights have also been recognized by the constitutional courts of various other countries as well. In *Brown v. Board of Education* [347 U.S. 483], the U.S. Constitutional Court condemned the policy of segregation of blacks in the American educational system. The Court held that the private schools for black and white children are inherently unequal and deprived children of equal rights.

56. In a *Venenzuelan case Cruz del Valle Balle Bermudez v. Ministry of Health and Social Action* - Case No.15.789 Decision No.916 (1999); the Court considered whether those with HIV/AIDS had the right to receive the necessary medicines without charge and identifying a positive duty of prevention at the core of the right to health, it ordered the Ministry to conduct an effective study into the minimum needs of those with HIV/AIDS to be presented for consideration in the Government's next budget. Reference may also be made a judgment of the Canadian Constitution Court in *Wilson v. Medical Services Commission of British Columbia* [(53) D.L.R. (4th) 171].

57. I have referred to the rulings of India and other countries to impress upon the fact that even in the jurisdictions where socio-economic rights have been given the status of constitutional rights, those rights are available only against State and not against private state actors, like the private schools, private hospitals etc., unless they get aid, grant or other concession from the State. Equally important principle is that in enjoyment of those socio-economic rights, the beneficiaries

should not make an inroad into the rights guaranteed to other citizens.

REMOVAL OF OBSTACLES TO ACHIEVE SOCIO-ECONOMIC RIGHTS

58. Socio-economic rights, I have already indicated, be realized only against the State and the Statute enacted to protect socio-economic rights is always subject to the rights guaranteed to other non-state actors under Articles 19(1)(g), 30(1), 15(1), 16(1) etc. Parliament has faced many obstacles in fully realizing the socio-economic rights enshrined in Part IV of the Constitution and the fundamental rights guaranteed to other citizens were often found to be the obstacles. Parliament has on several occasions imposed limitations on the enjoyment of the rights guaranteed under Part III of the Constitution, through constitutional amendments.

59. Parliament, in order to give effect to Article 39 and to remove the obstacle for realization of socio-economic rights, inserted Article 31A vide Constitution (First Amendment) Act, 1951 and later amended by the Constitution (Fourth Amendment) Act, 1955 and both the amendments were given retrospective effect from the commencement of the Constitution. The purpose of the first amendment was to eliminate all litigations challenging the validity of legislation for the abolition of proprietary and intermediary interests in land on the ground of contravention of the provisions of Articles 14, 19 and 31. Several Tenancy and Land Reforms Acts enacted by the State also stood protected under Article 31A from the challenge of violation of Articles 14 and 19.

60. Article 31B also saves legislations coming under it from inconsistency with any of the fundamental rights included in Part III for example Article 14, Article 19(1)(g) etc. Article 31B read with Ninth Schedule protects all laws even if they are violative of fundamental rights. However, in *I.R. Coelho (Dead) by LRs v. State of Tamil Nadu and Others* [(2007) 2 SCC 1],

it was held that laws included in the Ninth Schedule can be challenged, if it violates the basic structure of the Constitution which refer to Articles 14, 19, 21 etc.

61. Article 31C was inserted by the Constitution (Twenty-fifth Amendment) Act, 1971 which gave primacy to Article 39(b) and (c) over fundamental rights contained under Article 14 and 19. Article 31C itself was amended by the Constitution (Forty-second Amendment) Act, 1976 and brought in all the provisions in Part-IV, within Article 31C for protecting laws from challenge under article 14 and 19 of the Constitution.

62. I have referred to Articles 31A to 31C only to point out how the laws giving effect to the policy of the State towards securing all or any of the principles laid down in Part-IV stood saved from the challenge on the ground of violation or infraction of the fundamental rights contained in Articles 14 and 19. The object and purpose of those constitutional provisions is to remove the obstacles which stood in the way of enforcing socio-economic rights incorporated in Part-IV of the Constitution and also to secure certain rights, guaranteed under Part III of the Constitution.

63. Rights guaranteed under Article 19(1)(g) can also be restricted or curtailed in the interest of general public imposing reasonable restrictions on the exercise of rights conferred under Article 19(1)(g). Laws can be enacted so as to impose regulations in the interest of public health, to prevent black marketing of essential commodities, fixing minimum wages and various social security legislations etc., which all intended to achieve socio-economic justice. Interest of general public, it may be noted, is a comprehensive expression comprising several issues which affect public welfare, public convenience, public order, health, morality, safety etc. all intended to achieve socio-economic justice for the people.

64. The law is however well settled that the State cannot travel beyond the contours of Clauses (2) to (6) of Article 19 of

the Constitution in curbing the fundamental rights guaranteed by Clause (1), since the Article guarantees an absolute and unconditional right, subject only to reasonable restrictions. The grounds specified in clauses (2) to (6) are exhaustive and are to be strictly construed. The Court, it may be noted, is not concerned with the necessity of the impugned legislation or the wisdom of the policy underlying it, but only whether the restriction is in excess of the requirement, and whether the law has over-stepped the Constitutional limitations. Right guaranteed under Article 19(1)(g), it may be noted, can be burdened by constitutional limitations like sub-clauses (i) to (ii) to Clause (6).

65. Article 19(6)(i) enables the State to make law relating to professional or technical qualifications necessary for practicing any profession or to carry on any occupation, trade or business. Such laws can prevent unlicensed, uncertified medical practitioners from jeopardizing life and health of people. Sub clause (ii) to Article 19(6) imposes no limits upon the power of the State to create a monopoly in its favour. State can also by law nationalize industries in the interest of general public. Clause (6)(ii) of Article 19 serves as an exception to clause (1)(g) of Article 19 which enable the State to enact several legislations in nationalizing trades and industries. Reference may be made to Chapter-4 of the Motor Vehicles Act, 1938, The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, General Insurance Business (Nationalization) Act, 1972 and so on. Sub-clause 6(ii) of Article 19 exempts the State, on the conditions of reasonableness, by laying down that carrying out any trade, business, industry or services by the State Government would not be questionable on the ground that it is an infringement on the right guaranteed under Article 19(1)(g).

66. I have referred to various provisions under sub-clauses (i) and (ii) of Article 19(6) to impress upon the fact that it is possible to amend the said Article so that socio-economic

rights could be realized by carving out necessary constitutional limitations abrogating or abridging the right guaranteed under Article 19(1)(g).

67. Constitutional amendments have also been made to Articles 15 and 16 so as to achieve socio-economic justice. Articles 15 and 16 give power to the State to make positive discrimination in favour of the disadvantaged and particularly, persons belonging to Scheduled Castes and Scheduled Tribes. Socio-economic empowerment secures them dignity of person and equality of status, the object is to achieve socio-economic equality.

68. Faced with many obstacles to achieve the above objectives and the Directive Principles of the State Policy, Articles 15 and 16 of the Constitution had to be amended on several occasions so as to get over the obstacles in achieving the socio-economic justice. In *State of Madras v. Shrimati Champakam Dorairajan* [(1951) 2 SCR 525], this Court laid down the law that Article 29(2) was not controlled by Article 46 of the Directive Principles of the State Policy and that the Constitution did not intend to protect the interest of the backward classes in the matter of admission to educational institutions. In order to set right the law and to achieve social justice, Clause (4) was added to Article 15 by the Constitutional (First Amendment) Act, 1951 enabling the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The object of Clause (4) was to bring Articles 15 and 29 in line with Articles 16(4), 46 and 340 of the Constitution, so as to make it constitutional for the State to reserve seats for backward classes citizens, Scheduled Castes and Scheduled Tribes in the public educational institutions, as well as to make special provisions, as may be necessary, for the advancement, e.g. to provide housing accommodation for such classes. In other words, Article 15(4) enables the State to do what would otherwise have been

unconstitutional. Article 15(4) has to be read as a proviso or an exception to Article 29(2) and if any provision is defined by the provisions of Article 15(4), its validity cannot be questioned on the ground that it violates Article 29(2). Under Article 15(4), the State is entitled to reserve a minimum number of seats for members of the backward classes, notwithstanding Article 29(2) and the obstacle created under Article 29(2) has been removed by inserting Article 15(4).

69. The Parliament noticed that the provisions of Article 15(4) and the policy of reservation could not be imposed by the State nor any quota or percentage of admission be carved out to be appropriated by the State in minority or non-minority unaided educational institution, since the law was clearly declared in *Pai Foundation* and *Inamdar* cases. It was noticed that the number of seats available in aided or State maintained institutions particularly in respect of professional educational institutions were limited in comparison to those in private unaided institutions. Article 46 states that the State shall promote, with special care, the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice. Access to education was also found to be an important factor and in order to ensure advancement of persons belonging to Scheduled Castes, Scheduled Tribes, socially and economically backward classes, it was proposed to introduce Clause (5) to Article 15 to promote educational advancement of socially and educationally backward classes of citizens i.e. OBCs, Scheduled Castes and Scheduled Tribes and the weaker sections of the society by securing admission in unaided educational institutions and other minority educational institutions referred to in Clause (1) of Article 30 of the Constitution.

70. The Parliament has, therefore, removed the obstacles created by the law as ruled by the Court in *Pai Foundation* and *Inamdar* so as to carry out the obligation under the Directive

Principles of the State Policy laid down under Article 46. Later, the Parliament enacted the Central Educational Institutions (Reservation and Admission) Act, 2006 (for short 'the CEI Act'), but the Act never intended to give effect to the mandate of the newly introduced Clause (5) to Article 15 dealing with admissions in both aided and unaided private educational institutions.

71. Constitutional validity of Clause (5) to Article 15 and the CEI Act came up for consideration before a Constitutional Bench of this Court in *Ashoka Kumar Thakur v. Union of India and Others* [(2008) 6 SCC 1]. CEI Act was enacted by the Parliament under Article 15(5), for greater access to higher education providing for 27 per cent reservation for "Other Backward Classes" to the Central Government controlled educational institutions, but not on privately managed educational institutions. Constitutional validity of Article 15(5) was challenged stating that it had violated the basic structure doctrine. The majority of the Judges in *Ashok Kumar Thakur's* case declined to pronounce on the question whether the application of Article 15(5) to private unaided institutions violated the basic structure of the Constitution, in my view, rightly because that issue did not arise for consideration in that case. Justice Dalveer Bhandari, however, examined the validity of Article 15(5) with respect to private unaided institutions and held that an imposition of reservation of that sort would violate Article 19(1)(g) and thus the basic structure doctrine. Article 19(1)(g), as such, it may be pointed out, is not a facet of the basic structure of the Constitution, and can be constitutionally limited in its operation, with due respect, Justice Bhandari has overlooked this vital fact. *Pai Foundation* as well as Inamdar held that Article 19(1)(g) prevents the State from creating reservation quotas or policy in private unaided professional educational institutions and, as indicated earlier, it was to get over that obstacle that Clause (5) was inserted in Article 15. In Ashok Kumar Thakur, the majority held that Clause (5) to Article 15 though, moderately abridges or alters the equality principle

or the principles under Article 19(1)(g), insofar as it dealt with State maintained and aided institutions, it did not violate the basic structure of the Constitution. I have referred to Articles 15(4) and 15(5) and the judgment in *Ashok Kumar Thakur* to highlight the fact that the State in order to achieve socio-economic rights, can remove obstacles by limiting the fundamental rights through constitutional amendments.

72. Applicability of Article 15(5), with regard to private unaided non-minority professional institutions, came up for consideration in Medical Association case. A two judges Bench of this Court has examined the constitutional validity of Delhi Act 80 of 2007 and the notification dated 14.8.2008 issued by the Government of NCT, Delhi permitting the Army College of Medical Sciences to allocate 100% seats to the wards of army personnel. The Court also examined the question whether Article 15(5) has violated the basic structure of the Constitution. The Court proceeded on the basis that Army Medical College is a private non-minority, unaided professional institution. Facts indicate that the College was established on a land extending to approximately 25 acres, leased out by the Ministry of Defence, Government of India for a period of 30 years extendable to 99 years. Ministry of Defence also offered various facilities like providing clinical training at Army Hospital, NCT, Delhi and also access to the general hospitality. The constitutional validity of Article 15(5) was upheld holding that Clause (5) of Article 15 did not violate the basic structure of the Constitution. While reaching that conclusion, Court also examined the ratio in Pai Foundation as well as in Inamdar. Some of the findings recorded in Medical Association case, on the ratio of Pai Foundation and Inamdar, in my view, cannot be sustained.

73. Medical Association case, it is seen, gives a new dimension to the expression "much of difference" which appears in paragraph 124, page 601 of Inamdar. Learned Judges in Medical Association case concluded in Para 80 of

that judgment that the expression "much of a difference" gives a clue that there is an "actual difference" between the rights of the minority unaided institutions under clause (1) of Article 30 and the rights of non-minority unaided institutions under sub-clause (g) of Clause (1) of Article 19. Let us refer to paragraph 124 of Inamdar to understand in which context the expression "much of difference" was used in that judgment, which is extracted below:

> *"So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of a difference* between non-minority and minority unaided educational institutions. We find great force in the submission made on behalf of the petitioners that the states have no power to insist on seat-sharing in unaided private professional educational institutions by fixing the quota of seats between the Management and the State." (emphasis supplied)

Inamdar was expressing the view that so far as "appropriation of quota by the State" and "enforcement of its reservation policy" is concerned, they do not see much of difference between non-minority and minority unaided educational institutions. *Medical Association* case, on the other hand, in my view, has gone at a tangent and gave a new dimension and meaning to paragraph 124 of *Inamdar*, which is evident from the following paragraph of that judgment:

> "81. xxx xxx
>
> xxx xxx
>
> (i) that there is not much of a difference in terms, between the two kinds of institutions under consideration, *based on an overall quantitative assessment of all the rights put together, with a few differences that would still have operational significance*; or

> (ii) that in all respects the two classes of educational institutions are *more or less the same, with the differences being minor and not leading to any operational significance.*"
>
> (emphasis supplied)

Medical Association case concluded that the expression "much of a difference" could be understood only in the way they have stated in paragraph 81(i) which, with due respect, is virtually re-writing paragraph 124 of *Inamdar,* a seven Judges' Judgment which is impermissible. Final conclusion reached by the learned judges in paragraph 123 for inclusion of Clause (5) to Article 15 reads as follows:

> "123. Clause (5) of Article 15 is an enabling provision and inserted by the Constitution (Ninety-third Amendment) Act, 2005 by use of powers of amendment in Article 368. The Constitution (Ninety-third Amendment) Act, 2005 was in response to this Court's explanation, in P.A. Inamdar, of the ratio in T.M.A. Pai, that imposition of reservations on non-minority unaided educational institutions, covered by sub-clause (g) of clause (1) of Article 19, to be unreasonable restrictions and not covered by clause (6) of Article 19. The purpose of the amendment was to clarify or amend the Constitution in a manner that what was held to be unreasonable would now be reasonable by virtue of the constitutional status given to such measures."

74. *Referring to Pai Foundation case, the Court also stated, having allowed the private sector into the field of education including higher education, it would be unreasonable, pursuant to clause (6) of Article 19, for the State to fix the fees and also impose reservations on private unaided educational institutions.* Nevertheless, the Court opined that taking into consideration the width of the original powers under Clause (6) of Article 19, one would necessarily have to find the State would at least have the power to make

amendments to resurrect some of those powers that it had possessed to control the access to higher education and achieve the goals of egalitarianism and social justice.

75. Article 15(5), it may be noted, gives no protection to weaker sections of the society, except members belonging to Scheduled Castes/Scheduled Tribes and members of Other Backward Community.

76. Constitutional amendments carried out to Article 16 in securing social justice may also be examined in this context. Clause (1) of Article 16 guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16(4) is a special provision confined to the matters of employment in the services under the State which states that nothing in Article 16(1) shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which is not adequately represented in the services under the State. Article 46 obliges the State to take steps for promoting the economic interests of the weaker sections and, in particular, of the Scheduled Castes and Scheduled Tribes. The expression 'weaker sections' in Article 46 is wider than 'backward class'. The backward citizens in Article 16(4) do not comprise of all the weaker sections of the people but only those which are socially, educationally and economically backward, and which are not adequately represented in the services under the State. Further, the expression 'weaker sections' can also take within its compass individuals who constitute weaker sections or weaker parts of the society.

77. In *Indra Sawhney v. Union of India and Others* [(1992) Supp. 3 SCC 212], this Court held that, as the law stood then, there could be no reservation in promotion. It was held that reservation of appointments or posts under Article 16(4) is confined to initial appointments only. To set right the law and to advance social justice by giving promotions to Scheduled Castes and Scheduled Tribes Clause (4A) was added to

Article 16 by the Constitution (Seventy-seventh Amendment) Act, 1995. Consequently, the hurdle or obstacle which stood in the way was removed by the Constitutional amendment.

78. The scope of the above provision came up for consideration in *Jagdish Lal and Others v. State of Haryana and Others* [(1997) 6 SCC 538], where this Court held that the principle of seniority according to length of continuous service on a post or service will apply and that alone will have to be looked into for the purpose of seniority even though they got promotion ignoring the claim of seniors. It was said that reserved candidates who got promotion ignoring the claim of services in general category will be seniors and the same cannot affect the promotion of general candidates from the respective dates of promotion and general candidates remain junior in higher echelons to the reserved candidates. The above position was, however, overruled in *Ajit Singh and Others v. State of Punjab and Others* [(1999) 7 SCC 209], wherein it was decided that the reserved category candidates cannot count seniority in the promoted category from the date of continuous officiation vis-à-vis the general candidates who were senior to them in the lower category and who were later promoted. Ajit Singh case was declaring the law as it stood. Consequently, the Parliament, in order to give continuous appreciation in promotion, inserted the words "with consequential seniority" in Clause (4A) to Article 16 by Constitution (Eighty-fifth Amendment) Act, 2001 (which was made effective from 17.6.1995). In the light of Article 16(4A), the claims of Scheduled Castes and Scheduled Tribes for promotion shall be taken into consideration in making appointment or giving promotion.

79. Constitution (Eighty-first Amendment) Act, 2000, which came into effect on 9.6.2000, inserted Clause (4B) to Article 16, which envisaged that the unfilled reserved vacancies in a year to be carried forward to subsequent years and that these vacancies are to be treated as distinct and separate from the

current vacancies during any year, which means that 50% rule is to be applied only to normal vacancies and not to the posts of backlog of reserved vacancies. Inadequacy and representation of backward classes, Scheduled Castes and Scheduled Tribes are the circumstances which enabled the State Government to enact Articles 16(4), 16(4A) and 16(4B).

80. The constitutional validity of Article 16(4A) substituted by the Constitution (Eighty-fifth Amendment) Act, 2001 came up for consideration before this Court in *M. Nagaraj & Ors. v. Union of India* [(2006) 8 SCC 212]. The validity of the Constitution (Seventy-seventh Amendment) Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001 were also examined and held valid. This Court held that they do not infringe either the width of the Constitution amending power or alter the identity of the Constitution or its basic structure. This Court held that the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

81. I have referred extensively to the constitutional amendments effected to Articles 31A to 31C, Articles 15, 16 and 19 to show that whenever the Parliament wanted to remove obstacles so as to make affirmative action to achieve socio-economic justice constitutionally valid, the same has been done by carrying out necessary amendments in the Constitution, not through legislations, lest they may make an inroad into the fundamental rights guaranteed to the citizens. Rights guaranteed to the unaided non-minority and minority educational institutions under Article 19(1)(g) and Article 30(1) as explained in *Pai Foundation* and reiterated in *Inamdar* have now been limited, restricted and curtailed so as to impose positive obligation on them under Section 12(1)(c) of the Act

and under Article 21A of the Constitution, which is permissible only through constitutional amendment.

82. Constitutional principles laid down by *Pai Foundation* and *Inamdar* on Articles 19(1)(g), 29(2) and 30(1) so far as unaided private educational institutions are concerned, whether minority or non-minority, cannot be overlooked and Article 21A, Sections 12(1)(a), (b) and 12(1)(c) have to be tested in the light of those constitutional principles laid down by *Pai Foundation* and *Inamdar* because Unnikrishnan was the basis for the introduction of the proposed Article 21A and the deletion of clause (3) from that Article. Interpretation given by the courts on any provision of the Constitution gets inbuilt in the provisions interpreted, that is, Articles 19(1)(g), 29(2) and 30.

83. We have to give due respect to the eleven Judges judgment in *Pai Foundation* and the seven Judges judgment in *Inamdar*, the principles laid down in those judgments still hold good and are not whittled down by Article 21A, nor any constitutional amendment was effected to Article 19(1)(g) or Article 30(1). Article 21A, it may be noted was inserted in the Constitution on 12.12.2002 and the judgment in *Pai Foundation* was delivered by this Court on 31.10.2002 and 25.11.2002. Parliament is presumed to be aware of the law declared by the Constitutional Court, especially on the rights of the unaided non-minority and minority educational institutions, and in its wisdom thought if fit not to cast any burden on them under Article 21A, but only on the State. Criticism of the judgments of the Constitutional Courts has to be welcomed, if it is healthy. Critics, it is seen often miss a point which is vital, that is, Constitutional Courts only interpret constitutional provisions and declare what the law is, and not what law ought to be, which is the function of the legislature. Factually and legally, it is not correct to comment that many of the amendments are necessitated to overcome the judgments of the Constitutional Courts. Amendments are necessitated not to get over the judgments of the Constitutional Courts, but to make law constitutional. In other words, a law which is otherwise unconstitutional is

rendered constitutional. An unconstitutional statute is not a law at all, whatever form or however solemnly it is enacted. When legislation is declared unconstitutional by a Constitutional Court, the legislation in question is not vetoed or annulled but declared never to have been the law. People, acting solemnly in their sovereign capacity bestow the supreme dominion on the Constitution and, declare that it shall not be changed except through constitutionally permissible mode. *When courts declare legislative acts inconsistent with constitutional provisions, the court is giving effect to the will of the people not due to any judicial supremacy, a principle which squarely applies to the case on hand*.

84. In *S.P. Gupta v. President of India and Others* [1981 SCC Supp. (1) 87] [para 195], Justice Fazal Ali pointed out as follows:

> "The position so far as our country is concerned is similar to that of America and if any error of interpretation of a constitutional provision is committed by the Supreme Court or any interpretation which is considered to be wrong by the Government can be rectified only by a constitutional amendment which is a very complicated, complex, delicate and difficult procedure requiring not merely a simple majority but two-third majority of the Members present and voting. Apart from the aforesaid majority, in most cases the amendment has to be ratified by a majority of the States. In these circumstances, therefore, this Court which lays down the law of the land under Article 141 must be extremely careful and circumspect in interpreting statutes, more so constitutional provisions, so to obviate the necessity of a constitutional amendment every time which, as we have already mentioned, is an extremely onerous task."

Reference may also be made to the judgment in *Bengal Immunity Company Limited v. State of Bihar and Others* [AIR 1955 SC 661].

85. In *People's Union for Civil Liberties (PUCL) and Anr. v. Union of India (UOI) and Anr.* [2003 (4) SCC 399] in para 112 this Court has held *"It is a settled principle of constitutional jurisprudence that the only way to render a judicial decision ineffective is to enact a valid law by way of amendment……."*

86. In *Smit v. Allwright* [321 U.S. 649 (1944)], the Court held *"In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice and this practice has continued to this day."*

87. Constitutional interpretation given by this Court as to what the law is, led to bringing in several amendments either to set right the law or abridge the constitutional rights guaranteed in Part III of the Constitution, some of which I have already referred to in the earlier part of this judgment.

88. Principles laid down by *Pai Foundation* and in *Inamdar* while interpreting Articles 19(1)(g), 29(2) and 30(1) in respect of unaided non-minority and minority educational institutions like schools upto the level of under-graduation are all weighty and binding constitutional principles which cannot be undone by statutory provisions like Section 12(1)(c), since those principles get in-built in Article 19(1)(g), Article 29(2) and Article 30(1) of the Constitution. Further Parliament, while enacting Article 21A, never thought if fit to undo those principles and thought it fit to cast the burden on the State.

PART III

OBLIGATIONS/RESPONSIBILITIES OF NON-STATE ACTORS IN REALIAZATION OF CHILDREN'S RIGHTS:

89. We may, however, also examine whether the private unaided educational institutions have any obligations/ responsibilities in realization of children's rights. Articles 21A,

45, 51A(k), Section 12 of the Act and various International Conventions deal with the obligations and responsibilities of state and non-state actors for realization of children's rights. Social inclusiveness is stated to be the motto of the Act which was enacted to accomplish the State's obligation to provide free and compulsory education to children of the age 6 to 14 years, in that process, compulsorily co-opting, private educational institutions as well. A shift in State's functions, to non-state actors in the field of health care, education, social services etc. has been keenly felt due to liberalization of economy and privatization of state functions.

90. The Universal Declaration of Human Rights, 1948 (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), UN Convention on the Rights of the Child (UNCRC), 1989 throw considerable light on the duties and responsibilities of State as well as non-state actors for the progressive realization of children rights. Article 6(1) of ICCPR states: "Every human being has the inherent right to life … No one shall be arbitrarily deprived of this right", meaning thereby that the arbitrary deprivation of a person's life will be a violation of international human rights norm whether it is by the State or non-state actors. UDHR, ICCPR, ICESCR, UNCRC and other related international covenants guarantee children civil, political, economical, social and cultural rights. Article 4 of the UNCRC requires the State to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention.

91. Article 2.1 of the ICESCR, has also approved the above obligation of the State, which reads as follows:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

Non-state actor's obligation is also reflected in preamble of ICCPR and ICESCR which is as follows:

> "The individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."

Preamble of UDHR also reads as follows:

> "… every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education, to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance…"

Non-state actor's "duty to the community" and to the "individuals in particular" are accordingly highlighted.

Article 30 of UDHR highlights the necessity to protect and safeguard the right of others which reads as follows :-

> "Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

92. In this connection reference may be made to Article 28(1)(a) of UNCRC which reads as follows: *"States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: make primary education compulsory and available free to all"*;

Article 29 is also relevant for our purpose which reads as follow:-

2. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

93. Provisions referred to above and other provisions of International Conventions indicate that the rights have been

guaranteed to the children and those rights carry corresponding State obligations to respect, protect and fulfill the realization of children's rights. *The obligation to protect implies the horizontal right which casts an obligation on the State to see that it is not violated by non-state actors. For non-state actors to respect children's rights cast a negative duty of non-violation to protect children's rights and a positive duty on them to prevent the violation of children's rights by others, and also to fulfill children's rights and take measures for progressive improvement.* In other words, in the spheres of non-state activity there shall be no violation of children's rights.

94. Article 24 of the Indian Constitution states that no child below the age of 14 years shall be employed to work in any factory or be engaged in any hazardous employment. The Factories Act, 1948 prohibits the employment of children below the age of 14 years in any factory. Mines Act, 1952 prohibits the employment of children below 14 years. Child Labour (Prohibition and Regulation) Act, 1986 prohibits employment of children in certain employments. Children Act, 1960 provides for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children. Juvenile Justice (Care and Protection of Children) Act, 1986 (the Amendment Act 33 of 2006) provide for the care, protection, development and rehabilitation of neglected and delinquent juveniles. There are also other legislations enacted for the care and protection of children like Immoral Trafficking Prevention Act, 1956, Prohibition of Child Marriage Act, 2006 and so on. *Legislations referred to above cast an obligation on non-state actors to respect and protect children's rights and not to impair or destroy the rights guaranteed to children, but no positive obligation to make available those rights*.

95. Primary responsibility for children's rights, therefore, lies with the State and the State has to respect, protect and fulfill children's rights and has also got a duty to regulate the private institutions that care for children, to protect children from

violence or abuse, to protect children from economic exploitation, hazardous work and to ensure human treatment of children. *Non-state actors exercising the state functions like establishing and running private educational institutions are also expected to respect and protect the rights of the child, but they are, not expected to surrender their rights constitutionally guaranteed.*

96. Article 21A requires non-state actors to achieve the socio-economic rights of children in the sense that they shall not destroy or impair those rights and also owe a duty of care. The State, however, cannot free itself from obligations under Article 21A by offloading or outsourcing its obligation to private State actors like unaided private educational institutions or to coerce them to act on the State's dictate. Private educational institutions have to empower the children, through developing their skills, learning and other capacities, human dignity, self-esteem and self-confidence and to respect their constitutional rights.

97. I have in the earlier part of the judgment referred to Article 28(1) and Article 29 of UNCRC which cast an obligation on the State to progressively achieve the rights of children and also to make primary education compulsory and available free to all but all the same make it clear that no part of Articles 28 and 29 be construed to interfere with the liberty of non-state actors. They are expected to observe the principles set forth in Para 1 of Article 29 and also to conform to such minimum standards as laid down by the state.

98. South African Constitution Bench in *Governing Body of the Juma Musjid Primary School v. Minister for Education* [[2011] ZACC 13] dealt with the interplay between private rights and the State's obligation to provide right to education. In that case, the Court held that the primary positive obligation to provide the right to education resides on the Government and the purpose of Section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of

the state in protecting the Bill of Rights. That was a case involving balancing of proprietary rights of a trust seeking to evict a public school in order to establish an independent school. One of the pleas raised by the evictees was that the evictor trust also had an obligation towards the right to education of the learners which it could not ignore. The Constitutional Court held that the only obligation of a private party as regards socio-economic rights, like right to education, is a negative obligation i.e. not to unreasonably interfere with the realization of the right and that there is no positive obligation cast on them to protect the right by surrendering their rights.

99. *Pai Foundation* and *Inamdar* also cast a negative obligation on the private educational institutions in the sense that there shall be no profiteering, no demand of excessive fee, no capitation fee, no maladministration, no cross subsidy etc. Further, this Court, while interdicting the State in appropriating seats in private educational institutions, restrained them from interfering with the autonomy of those institutions and adopted a balancing approach laying down the principle of voluntariness, co-operation, concession, and so on.

100. *Pai Foundation* and *Inamdar* have categorically held that any action of the State to regulate or control admissions in the unaided professional educational institutions, so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions, would amount to nationalization of seats. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions, it was held, are acts constituting serious encroachment on the right and autonomy of private unaided professional educational institutions and such appropriation of seats cannot be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution, so far as the unaided minority institutions are concerned.

PART IV

101. Article 21A has used the expression "State shall provide" not "provide for" hence the constitutional obligation to provide education is on the State and not on non-state actors, the expression is clear and unambiguous and to interpret that expression to mean that constitutional obligation or responsibility is on private unaided educational institutions also, in my view, doing violence to the language of that expression. The obligation of the State to provide free and compulsory education is without any limitation. Parliament in its wisdom has not used the expression "provide for". If the preposition "for" has been used then the duty of the State would be only to provide education to those who require it but to provide for education or rather to see that it is provided. In this connection it is useful to refer to the judgment of the Supreme Court of Ireland in *Crowley v. Ireland* [(1980) IR 102], where the expression "provide for" came up for interpretation. It was held that the use of the preposition "for" keeps the State at one remove from the actual provision of education indicating that once the State has made an arrangement for the provision of education - provided the buildings, pay teachers and set the curriculum - it is absolved of the responsibility when the education is not actually delivered. The absence of the preposition "for" in Article 21A makes the duty on the State imperative. State has, therefore, to "provide" and "not provide for" through unaided private educational institutions.

102. Article 21A has used the expression "such manner" which means the manner in which the State has to discharge its constitutional obligation and not offloading those obligations on unaided educational institutions. If the Constitution wanted that obligation to be shared by private unaided educational institutions the same would have been made explicit in Article 21A. Further, unamended Article 45 has used the expression "state shall endeavour.....for" and when Article 21A was inserted, the expression used therein was that the "State shall

provide" and not "provide for" the duty, which was directory earlier made mandatory so far as State is concerned. Article 21 read with 21A, therefore, cast an obligation on the State and State alone.

103. The State has necessarily to meet all expenses of education of children of the age 6 to 14 years, which is a constitutional obligation under Article 21A of the Constitution. Children have also got a constitutional right to get free and compulsory education, which right can be enforced against the State, since the obligation is on the State. Children who opt to join an unaided private educational institution cannot claim that right as against the unaided private educational institution, since they have no constitutional obligation to provide free and compulsory education under Article 21A of the Constitution. Needless to say that if children are voluntarily admitted in a private unaided educational institution, children can claim their right against the State, so also the institution. Article 51A(k) of the Constitution states that it shall be the duty of every citizen of India, who is a parent or guardian, to provide opportunities for education to his child. Parents have no constitutional obligation under Article 21A of the Constitution to provide free and compulsory education to their children, but only a constitutional duty, then one fails to see how that obligation can be offloaded to unaided private educational institutions against their wish, by law, when they have neither a duty under the Directive Principles of State policy nor a constitutional obligation under Article 21A, to those 25% children, especially when their parents have no constitutional obligation.

104. In *Avinash Mehrotra v. Union of India & Others* [{2009} 6 SCC 398], this Court held that Article 21A imposes a duty on the State, while Article 51A(k) places burden on the parents to provide free and compulsory education to the children of the age 6 to 14 years. There exists a positive obligation on the State and a negative obligation on the non-state actors, like private educational institutions, not to unreasonably interfere

with the realization of the children's rights and the state cannot offload their obligation on the private unaided educational institutions.

105. I am, therefore, of the considered view that Article 21A, as such, does not cast any obligation on the private unaided educational institutions to provide free and compulsory education to children of the age 6 to 14 years. Article 21A casts constitutional obligation on the State to provide free and compulsory education to children of the age 6 to 14 years.

CONSTITUTIONALLY IMPERMISSIBLE PROCEDURE ADOPTED TO ACHIEVE SOCIAL INCLUSIVENESS UNDER THE ACT.

106. I may endorse the view that the purpose and object of the Act is laudable, that is, social inclusiveness in the field of elementary education but the means adopted to achieve that objective is faulty and constitutionally impermissible. Possibly, the object and purpose of the Act could be achieved by limiting or curtailing the fundamental rights guaranteed to the unaided non-minority and minority educational institutions under Article 19(1)(g) and Article 30(1) or imposing a positive obligation on them under Article 21A, but this has not been done in the instant case. I have extensively dealt with the question - how the socio economic rights could be achieved by making suitable constitutional amendments in Part II of this judgment.

107. Sections 12(1)(b) and 12(1)(c) are vehicles through which the concept of social inclusiveness is sought to be introduced into the private schools both aided and unaided including minority institutions, so as to achieve the object of free and compulsory education of the satisfactory quality to the disadvantaged groups and weaker sections of the society. The purpose, it is pointed out, is to move towards composite classrooms with children from diverse backgrounds, rather than homogenous and exclusive schools and it was felt that heterogeneity in classrooms leads to greater creativity. In order

to understand the scope of the above mentioned provisions and the object sought to be achieved, it is necessary to refer to those and other related provisions:-

> Section 12:- Extent of School's responsibility for free and compulsory education -
>
> (1) For the purposes of this Act, a school, -
>
> (a) specified in sub-clause(i) of clause (n) of section 2 shall provide free and compulsory elementary education to all children admitted therein ;
>
> (b) specified in sub-clause(ii) of clause (n) of section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent.;
>
> (c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:
>
> Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.
>
> (2) The school specified in sub-clause (iv) of clause (n) of section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such

manner as may be prescribed:

Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified n sub-clause (i) of clause(n) of section 2:

Provided further where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

(3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be.

Reference may be also be made to definition clauses.

2(d) "child belonging to disadvantaged group" means a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification;

2(e) "child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower that the minimum limit specified by the appropriate Government, by notification;

2(n) "school" means any recognized school imparting elementary education and includes -

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet

whole or part of its expenses from the appropriate Government or the local authority.

(iii) a school belonging to specified category; and

(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.

(A) Unaided Educational Institutions, minority and non-minority:

108. First, I may deal with the challenge against Section 12(1)(c), which casts an obligation on the unaided private educational institutions both non-minority and minority to admit to class 1 at least 25% of the strength of those children falling under Sections 2(d) and 2(e), and also in the pre-school, if there is one. State also has undertaken re-imbursement of the fees of those children to the extent of per-child expenditure incurred by the State.

109. Right of a citizen to establish and run an educational institution investing his own capital is recognized as a fundamental right under Article 19(1)(g) and the right of the State to impose reasonable restrictions under Article 19(6) is also conceded. Citizens of this country have no constitutional obligation to start an educational institution and the question is after having started private schools, do they owe a constitutional obligation for seat sharing with the State on a fee structure determined by the State. Pai Foundation and Inamdar took the view that the State cannot regulate or control admission in unaided educational institutions so as to compel them to give up a share of available seats which according to the court would amount to nationalization of seats and such an appropriation of seats would constitute serious encroachment on the right and autonomy of the unaided educational institutions. *Both Pai Foundation and Inamdar are unanimous in their view that such appropriation of seats cannot be held to be a regulatory*

measure in the interest of rights of the unaided minority educational institutions guaranteed under Article 30(1) of the Constitution or a reasonable restriction within the meaning of Article 19(6) in the case of unaided non-minority educational institution. Inamdar has also held that to admit students being an unfettered fundamental right, the State cannot make fetters upto the level of under graduate education. Unaided educational institutions enjoy total freedom and they can legitimately claim 'unfettered fundamental rights' to choose students subject to its being fair, transparent and non-exploitative.

110. Section 12(1)(c) read with Section 2(n)(iv) of the Act never envisages any distinction between unaided minority schools and non-minority schools. Constitution Benches of this Court have categorically held that so far as appropriation of quota by the State and enforcement of reservation policy is concerned, there is not much difference between unaided minority and non-minority educational institutions (Refer Paras 124, 125 of *Inamdar*). Further, it was also held that both unaided minority and non-minority educational institutions enjoy "total freedom" and can claim "unfettered fundamental rights" in the matter of appropriation of quota by the State and enforcement of reservation policy. This Court also held that imposition of quota or enforcing reservation policy are acts constituting serious encroachment on the right and autonomy of such institutions both minority (religious and linguistic) and non-minority and cannot be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Therefore, no distinction or difference can be drawn between unaided minority schools and unaided non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1)(c) of the Act.

111. I am of the view, going by the ratio laid down by *Pai Foundation* and *Inamdar,* to compel the unaided non minority and minority private educational institutions, to admit 25% of

the students on the fee structure determined by the State, is nothing but an invasion as well as appropriation of the rights guaranteed to them under Article 19(1)(g) and Article 30(1) of the Constitution. Legislature cannot under the guise of interest of general public "arbitrarily cast burden or responsibility on private citizens running a private school, totally unaided". Section 12(1)(c) was enacted not only to offload or outsource the constitutional obligation of the State to the private unaided educational institutions, but also to burden them with duties which they do not constitutionally owe to children included in Section 2(d) or (e) of the Act or to their parents.

112. *Pai Foundation,* in paragraph 57 of the judgment has stated that in as much as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Further, it was also pointed out that in the establishment of an educational institution, the object should not be to make profit, inasmuch as education is essentially charitable in nature. However, there can be a reasonable revenue surplus, which may be generated by the educational institutions for the purpose of development of education and their expansion. *Consequently, the mere fact that education in one sense, is regarded as charitable, the Government cannot appropriate 25% of the seats of the unaided private educational institutions on the ground that providing education is charity. Pai Foundation* and *Inamdar* after holding that occupation of education can be regarded as charitable held that the appropriation of seats in an unaided private educational institution would amount to nationalization of seats and an inroad into their autonomy. The object and purpose of Section 12(1)(c), it may be noted, is not to reduce commercialization. *Pai Foundation* and *Inamdar* have clearly denounced commercialization of education.

113. Right to establish and administer and run a private

unaided educational institution is the very openness of personal freedom and opportunity which is constitutionally protected, which right cannot be robbed or coerced against his will at the threat of non-recognition or non-affiliation. Right to establish a private unaided educational institution and to make reasonable profit is recognized by Article 19(1)(g) so as to achieve economic security and stability even if it is for charity. Rights protected under Article 19(1)(g) are fundamental in nature, inherent and are sacred and valuable rights of citizens which can be abridged only to the extent that is necessary to ensure public peace, health, morality etc. and to the extent of the constitutional limitation provided in that Article. Reimbursement of fees at the Government rate is not an answer when the unaided private educational institutions have no constitutional obligation and their Constitutional rights are invaded.

114. Private unaided educational institutions are established with lot of capital investment, maybe with loan and borrowings. To maintain high standard of education, well qualified and experienced teachers have to be appointed, at times with hefty salary. Well equipped library, laboratory etc have also to be set up. In other words considerable money by way of capital investment and overhead expenses would go into for establishing and maintaining a good quality unaided educational institution. Section 12(1)(c), in my view, would amount to appropriation of one's labour and makes an inroad into the autonomy of the institution. Unaided educational institutions, over a period of time, might have established their own reputation and goodwill, a quantifiable asset. Nobody can be allowed to rob that without their permission, not even the State. Section 12(1)(c) is not a restriction which falls under Article 19(6) but cast a burden on private unaided educational institutions to admit and teach children at the state dictate, on a fee structure determined by the State which, in my view, would abridge and destroy the freedom guaranteed to them under Article 19(1)(g) of the Constitution.

115. Parliament can enact a social legislation to give effect to the Directive Principles of the State Policy, *but so far as the present case is concerned, neither the Directive Principles of the State Policy nor Article 21A cast any duty or obligation on the unaided private educational institutions to provide free and compulsory education to children of the age of 6 to 14. Section 12(1)(c) has, therefore, no foundation either on the Directive Principles of the State Policy or Article 21A of the Constitution,* so as to rope in unaided educational institutions. Directive Principles of the State Policy as well as Article 21A cast the constitutional obligation on the State and State alone. State, cannot offload or outsource that Constitutional obligation to the private unaided educational institutions and the same can be done only by a constitutional provision and not by an ordinary legislation.

116. Articles 41, 45 and 46 of Part IV of the Constitution cast the duty and constitutional obligations on the State under Article 21A, apart from other constitutional principles laid down by *Pai Foundation* as well as *Inamdar*. Section 12(1)(c) has neither the constitutional support of Article 21A, nor the support of Articles 41, 45 or 46, since those provisions cast duty only on the State and State alone. The policies laid down under Articles 41, 45 and 46 can always be achieved by carrying out necessary amendment to the fundamental rights. However, so far as the present case is concerned, Article 21A has been enacted to cast a constitutional obligation on the state and a duty upon the State under Articles 41, 45 and 46. I have pointed out that it is to get over such situations and for the removal of such obstacles several constitutional amendments were necessitated which I have extensively dealt with in Part II of my judgment.

117. Section 12(1)(c) seeks to achieve what cannot be achieved directly especially after the interpretation placed by *Pai Foundation* and *Inamdar* on Article 19(1)(g) and Article 30(1) of the Constitution. *Inamdar* has clearly held that right to

set up, and administer a private unaided educational institution is an unfettered right, but 12(1)(c) impose fetters on that right which is constitutionally impermissible going by the principles laid down by *Pai Foundation* and *Inamdar*. Section 12(1)(c), in my view, can be given effect to, only on the basis of principles of voluntariness and consensus laid down in *Pai Foudnation* and *Inamdar* or else, it may violate the rights guaranteed to unaided minority and non-minority institutions.

118. Constitution of India has expressly conferred the power of judicial review on Courts and the Legislature cannot disobey the constitutional mandate or the constitutional principle laid down by Courts under the guise of social inclusiveness. Smaller inroad like Section 12(1)(c) may lead to larger inroad, ultimately resulting in total prohibition of the rights guaranteed under Articles 19(1)(g), 29(2) and 30(1) as interpreted by the *Pai Foundation* and *Inamdar*. Court, in such situations, owe a duty to lift the veil of the form and appearance to discover the true character and nature of the legislation and if it has the effect of bypassing or ignoring the constitutional principles laid down by the Constitutional Courts and violate fundamental rights, the same has to be nullified.

119. *Pai Foundation* and *Inamdar* have not laid down any new constitutional principle, but only declared what the law is. Constitutional principles laid by courts get assimilated in Articles 19(1)(g), 29(2) and 30(1) and can be undone not by legislation, but only by constitutional amendments. The object to be achieved by the legislation may be laudable, but if it is secured by a method which offends fundamental rights and constitutional principles, the law must be struck down as unconstitutional. The constitutional provision like Article 19(1)(g) is a check on the exercise of legislative power and it is the duty of the constitutional court to protect the constitutional rights of the citizens against any encroachment, as it is often said, "smaller inroad may lead to larger inroad and ultimately resulting into nationalization or even total prohibition." Section

12(1)(c), if upheld would resurrect *Unni Krishnan* scheme which was nullified by *Pai Foundation* and *Inamdar*.

120. I am, therefore, of the view that so far as unaided educational institutions both minority and non-minority are concerned the obligation cast under Section 12(1)(c) is only directory and the said provision is accordingly read down holding that it is open to the private unaided educational institutions, both minority and non-minority, at their volition to admit children who belong to the weaker sections and disadvantaged group in the neighbourhood in their educational institutions as well as in pre-schools.

(B) <u>Aided Educational Institutions, minority and non-minority:</u>

121. Section 12(1)(b) deals with the schools receiving aid or grants to meet whole or part of its expenses from the appropriate government or local authority. Those schools are bound to provide free and compulsory elementary education to such proportion of children subject to a minimum of 25% depending upon its annual recurring aid or grants so received. *Pai Foundation* has clearly drawn a distinction between aided private educational institutions and unaided private educational institutions both minority and non-minority. So far as private aided educational institutions, both minority and non-minority are concerned, it has been clearly held in Pai Foundation that once aid is provided to those institutions by the Government or any state agency, as a condition of grant or aid, they can put fetters on the freedom in the matter of administration and management of the institution. Aided institutions cannot obtain the extent of autonomy in relation to the management and administration as would be available to a private unaided institution. *Pai Foundation* after referring to *St. Stephen* judgment and Articles 29 and 30 held that even if it is possible to fill up all the seats with minority group the moment the institution is granted aid the institution will have to admit students from non-minority group to a reasonable extent without

annihilating the character of the institution. In St. Stephen case which I have already dealt with in the earlier paragraphs of the judgment, the Court held that the State may regulate intake in a minority aided educational institution with due regard to the need of the community of that area where the institution is intending to serve. However, it was held in no case such intake shall exceed 50% of the annual admission. Minority aided educational institutions, it was held, shall make available at least 50% of the annual admission to the members of the communities other than minority community. The Court also held by admitting a member of a non minority into a minority institution, it does not shed its character and cease to be a minority institution and such "sprinkling of outsiders" would enable the distinct language, script and culture of a minority to be propagated amongst non members of a particular community and would indeed better serve the object of serving the language, religion and culture of that minority. I may also add that Section 12(1)(b) equally safeguards the rights of the members of religious and linguistic minority communities. Section 2(e) deals with the 'child belonging to weaker section' of the minority communities, religious or linguistic, who would also get the benefit of Section 12(1)(b) and, therefore, the contention that Section 12(1)(b), as such, would stand against the interest of the religious and linguistic minority communities is unfounded.

122. Applying the principle laid down in *Pai Foundation, Inamdar, St. Stephen* and in *Re. Kerala Education Bill,* I am of the view that clause 12(1)(b) directing the aided educational institutions minority and non-minority to provide admission to the children of the age group of 6 to14 years would not affect the autonomy or the rights guaranteed under Article 19(1)(g) or Article 30(1) of the Constitution of India. I, therefore, reject the challenge against the validity of Section 12(1)(b) and hold that the provision is constitutionally valid.

PART V

123. Private unaided educational institutions, apart from challenging Section 12(1)(c), have also raised various objections with regard to other provisions of the Act. Learned senior counsels appearing for them submitted that Sections 3, 6, 7, 8 and 9 read with Sections 4, 5 and 10 impose duties and obligations upon the appropriate government and local authority and those sections completely answer and fulfill the mandate contained in Article 21A as against the State. Section 3 recognizes the right of the child to free and compulsory education in a neighbourhood school. Unaided educational institutions have only a negative duty of not interfering with the right of the child and not to unreasonably interfere with the realization of those rights and there is no obligation to surrender their rights guaranteed under Article 19(1)(g) and Article 30(1), recognized in *Pai Foundation* and *Inamdar*. Children can, therefore, enforce their constitutional and statutory rights against the educational institutions run by the State, local authority qua aided educational institution and not against unaided minority and non-minority educational institutions. It is so declared.

124. Petitioners have not raised any objection with regard to prohibition imposed under Section 13 against collecting the capitation fee which they are bound to follow even on the declaration of law, by *Pai Foundation* and *Inamdar*. Petitioners submitted that a fair and transparent screening procedure is being followed by all the schools. So far as Section 14 is concerned, petitioners have submitted that schools always give opportunity to the child/parent to produce some authentic proof to ascertain the age of the child. Petitioners, referring to Section 15, submitted that the child has to adhere to the academic procedure laid down by the institutions and there will be no denial of admission to the children subject to the availability of seats. With regard to Section 16, it was contended that the prohibition against holding back any student in any class or expelling any student regardless of how grave

the provocation may be, imposes unreasonable and arbitrary restriction which would completely destroy the unique educational system followed by some of the unaided educational institutions.

125. Shri Chander Uday Singh, senior counsel appearing in Writ Petition (Civil) No. 83 of 2011, submitted that they are following the International Baccalaureate system of education; the syllabus, curriculum, method of instructions are totally different from other schools. There are no day scholars, and all the students have to stay in the Boarding and the school fees is also high. Most of the students studying in the school are not from the neighbourhood but from all over the country and abroad. School has its own rules and regulations. Prohibition of holding back and expulsion of students in an unaided private educational institution depends upon the academic and disciplinary procedure laid down by the school and its parent body. Counsel, referring to Section 17 of the Act, submitted that the prohibition of physical punishment and mental harassment is a welcome provision which the schools follow.

126. Learned senior counsel also submitted that some of their schools are not affiliated or recognized by any State Education Board or the Board constituted by the Central Government or the Indian Council of Secondary Education etc. and those schools generally follow the rules laid down by the recognizing body and are, therefore, unable to fulfill the norms and standards specified in the schedule referred to in Section 19.

127. Counsel appearing for the unaided institutions contended that the curriculum and evaluation procedure laid down by the body affiliating or recognizing the institutions are being followed by them and the provisions stipulated in Section 29(2) are generally being adhered to by their schools. With regard to Section 23 of the Act, counsels submitted that some of the unaided private educational institutions employ the teachers from outside the country as it encourages cross-

fertilization of ideas and educational systems and practices and the qualifications provided by the institutions may not be as prescribed under Section 23 of the Act and the qualifications provided therein may not be sufficient for appointment as teachers in the schools affiliated to International Baccalaureate system. Learned counsel appearing for the unaided private educational institutions also referred to Rules 9, 11 to 15 and 23 and explained how it affects their autonomy and status of their institutions.

128. I have extensively dealt with the contentions raised by the unaided private educational institutions and I am of the view that not only Section 12(1)(c), but rest of the provisions in the Act are only directory so far as those institutions are concerned, but they are bound by the declaration of law by *Pai Foundation* and *Inamdar*, like there shall be no profiteering, no maladministration, no demand for capitation fee and so on and they have to follow the general laws of the land like taxation, public safety, sanitation, morality, social welfare etc.

129. I may indicate that so far as the rest of the schools are concerned, including aided minority and non-minority educational institutions, they have necessarily to follow the various provisions in the Act since I have upheld the validity of Section 12(1)(b) of the Act. Certain objections have also been raised by them with regard to some of the provisions of the Act, especially by the aided minority community. Contention was raised that Sections 21 and 22 of the Act, read with Rule 3, cast an obligation on those schools to constitute a School Management Committee consisting of elected representatives of the local authority which amounts to taking away the rights guaranteed to the aided minority schools, under Article 30(1) of the Constitution. Learned Additional Solicitor General has made available a copy of a Bill, proposing amendment to Section 21, adding a provision stating that the School Management Committee constituted under sub-section (1) of Section 21 in respect of a school established and administered

by minority whether based on religion or language, shall perform advisory functions only. The apprehension that the committee constituted under Section 21(1) would replace the minority educational institution is, therefore, unfounded. [Ref. F.No.1-22009-E.E-4 of Government of India (Annexure A-3)].

130. Petitioners have also raised objections against the restrictions imposed in following any screening procedure before admitting children to their schools under Sections 13 or 14 of the Act, which according to the petitioners, takes away the autonomy of the institutions. Several representations were received by the Ministry of Human Resources and Development, Government of India seeking clarification on that aspect and the Ministry issued a notification dated 23.11.2009 under Section 35(1) of the Act laying guidelines to be followed by both unaided and aided educational institutions. It was pointed out that the object of the provisions of Section 13(1) read with Section 2(d) is to ensure that schools adopt an admission procedure which is non-discriminatory, rational and transparent and the schools do not subject children and their parents to admission tests and interviews so as to deny admission. I find no infirmity in Section 13, which has nexus with the object sought to be achieved, that is access to education.

131. Contention was also raised by them against Section 14(2) which provides that no child shall be denied admission in a school for lack of age proof which, according to them, will cause difficulty to the management to ascertain the age of the child. Section 14 stipulates that the age of a child shall be determined on the basis of the birth certificate issued in accordance with the provisions of the Birth, Death and Marriages Registration Act, 1986, or the other related documents. The object and purpose of Section 14 is that the school shall not deny access to education due to lack of age proof. I find no legal infirmity in that provision, considering the overall purpose and object of the Act. Section 15 states that a child shall not be denied admission even if the child is seeking

admission subsequent to the extended period. A child who evinces an interest in pursuing education shall never be discouraged, so that the purpose envisaged under the Act could be achieved. I find no legal infirmity in that provision.

132. Challenge was also made to Section 16 of the Act stating that it will lead to indiscipline and also deteriorate the quality of the education, which I find difficult to agree with looking to the object and purpose of the Act. Holding back in a class or expulsion may lead to large number of drop outs from the school, which will defeat the very purpose and object of the Act, which is to strengthen the social fabric of democracy and to create a just and humane society. Provision has been incorporated in the Act to provide for special tuition for the children who are found to be deficient in their studies, the idea is that failing a child is an unjust mortification of the child personality, too young to face the failure in life in his or her early stages of education. Duty is cast on everyone to support the child and the child's failure is often not due the child's fault, but several other factors. No legal infirmity is found in that provision, hence the challenge against Section 16 is rejected.

133. Petitioners have not raised any objection with regard to Section 17, in my view, rightly. Sections 18 and 19 insist that no school shall be established without obtaining certificate of recognition under the Act and that the norms and standards specified in the schedule be fulfilled, if not already fulfilled, within a stipulated time. There is nothing objectionable in those provisions warranting our interference. Section 23, in my view, would not take away the freedom of aided minority educational institutions for the reasons already stated by us. No infirmity is also found with regard to Sections 24 to 28 of the Act since the object and purpose of those provisions are to provide education of satisfactory quality so that the ultimate object of the Act would be achieved.

134. Learned counsel also submitted that some of the aided minority and non-minority educational institutions are

following the curriculum as laid down by independent recognized Boards such as CBSE, ICSE etc. and they are competent bodies for laying down such procedures and in case those schools are compelled to follow the curriculum and evaluation procedure laid down in Section 29, the schools would be put to considerable inconvenience and difficulties and may affect the quality of education.

135. I am of the view that requiring the minority and non-minority institutions to follow the National Curriculum Framework or a Curriculum Framework made by the State, would not abrogate the right under Article 19(1)(g) or Article 30(1) of the Constitution. Requirement that the curriculum adopted by a minority institution should comply with certain basic norms is in consonance with the values enshrined in the Constitution and cannot be considered to be violative of the rights guaranteed to them under Article 30(1). Further, the curriculum framework contemplated by Section 29(1) does not subvert the freedom of an institution to choose the nature of education that it imparts, as well as the affiliation with the CBSE or other educational boards. Over and above, what has been prescribed by those affiliating or recognizing bodies is that these schools have also to follow the curriculum framework contemplated by Section 29(1) so as to achieve the object and purpose of the Act. I, therefore, find no infirmity in the curriculum or evaluation procedure laid down in Section 29 of the Act.

136. Section 30 of the Act which provides that no child shall be required to pass any Board examination till the completion of elementary education and that on completion of elementary education, the child shall be awarded a certificate. Education is free and compulsory for the children of the age 6 to 14 years and the object and purpose is to see that children should complete elementary education. If they are subjected to any Board Examination and to any screening procedure, then the desired object would not be achieved. The object and purpose of Section 30 is to see that a child shall not be held

back in any class so that the child would complete his elementary education. The Legislature noticed that there are a large number of children from the disadvantaged groups and weaker sections who drop out of the schools before completing the elementary education, if promotion to higher class is subject to screening. Past experience shows that many of such children have dropped out of the schools and are being exploited physically and mentally. Universal Elementary Education eluded those children due to various reasons and it is in order to curb all those maladies that the Act has provided for free and compulsory education. I, therefore, find no merit in the challenge against those provisions which are enacted to achieve the goal of universal elementary education for strengthening the social fabric of the society.

137. Counsel appearing for some of the aided minority institutions raised a doubt as to whether the Act has got any impact on the Freedom of Religion and Conscience guaranteed under Article 25 insofar as it applies to institutions run by a religious denomination. It was clarified by the Union of India that the Act would apply to institutions run by religious denominations in case the institution predominantly offers primary education either exclusively or in addition to religious instruction. It was pointed out that where the institution predominantly provides religious instructions like Madrasas, Vedic Pathshalas etc. and do not provide formal secular education, they are exempted from the applicability of the Act. The Act, therefore, does not interfere with the protection guaranteed under Articles 25 and 26 of the Constitution and the provisions in the Act in no way prevent the giving of religious education to students who wish to take religious education in addition to primary education. Article 25 makes it clear that the State reserves the right to regulate or restrict any economic, financial, political or other secular activities which are associated with religious practice and also states that the State can legislate for social welfare and reform, even though by doing so it would interfere with the religious practices.

Madrasas and Vedic Pathshalas, as I have already indicated, predominantly provide religious instruction and do not provide formal secular education and, hence, they are exempted from the applicability of the Act. The Central Government has now issued Guidelines dated 23.11.2010 under Section 35(1) of the Act clarifying the above position. The operative part of the guidelines reads as under:

> "3. Institutions, including Madrasas and Vedic Pathshalas, especially serving religious and linguistic minorities are protected under Articles 29 and 30 of the Constitution. The RTE Act does not come in the way of continuance of such institutions, or the rights of children in such institutions."

Madrasas, Vedic Pathshalas and similar institutions serving religious and linguistic minorities as such are, therefore, protected under Articles 29 and 30 of the Constitution from the rigour of the Act.

138. The Act has now brought in the concept of public-private partnership for achieving the goal of Universal Elementary Education. It also stresses upon the importance of preparing and strengthening the schools to address all kinds of diversities arising from inequalities of gender, caste, language, culture, religious or other disabilities. The concept of neighbourhood schools has also been incorporated for the first time through a legislation and the right of access of the children to elementary education of satisfactory and equitable quality has also been ensured. The duties and responsibilities of the appropriate government, local authorities, parents, schools and teachers in providing free and compulsory education, a system for protection of the right of children and a decentralized grievance mechanism has been provided by the Legislature. Obligation has also been cast on the State and the local authority to establish neighbourhood schools within a period of three years from the commencement of the Act and the Central Government and the State Governments have concurrent responsibilities for providing funds for carrying out

all the provisions of the Act and the duties and responsibilities cast on the local authorities as well. A provision has also been made in the Act for pre-school education for children above the age of three years. The purpose is to prepare them for elementary education and to provide early childhood care and education for all children until they complete the age of six years and the appropriate government has to take necessary steps for providing free pre-school education for such children. Further, the Act also cast a duty on every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, for an elementary education in the neighbourhood school, which is in conformity with Article 51A(k) of the Constitution.

139. The State has played a dominant role in providing educational services through the Government schools, largely managed by State Governments and local bodies, as well as through privately managed but publicly funded schools called government-aided schools. These aided schools are operated by charitable trusts, voluntary organizations, and religious bodies but receive substantial funding from the government. According to the Indian Human Development Survey (IHDS), 2005 about 67% of students attend government schools, about 5% attend government-aided schools, and 24% attend private schools. Convents and Madrasas account for about 1-2%. The survey conducted by IHDS indicates that in 2005 about 21% of rural and 51% of urban children were enrolled in private schools. Part of this increase in private school enrolment has come about through a decline in enrolment in government-aided schools. In 1994, nearly 22% of rural children were enrolled in government-aided schools. By 2005, this declined to a bare 7% in rural areas and 5% in urban areas. At an all India level, 72% of children are enrolled in government schools, and about 28% are in private schools. The survey further indicates that the children between 6-14 years old, about 40% participated in private sector education either through enrolment in private school (20%), through private tuition (13%), or both (7%). The

growing preference for private schooling and the reliance on private tutoring, has to be seen in the context of differences in admission of children in government and private schools. The quality of education in government schools, due to various reasons, has gone down considerably. The Act is also envisaged on the belief that the schools run by the appropriate government, local authorities, aided and unaided, minority and non-minority, would provide satisfactory quality education to the children, especially children from disadvantaged and weaker sections.

140. Private aided educational institutions, though run on aid and grant provided by the State, generally the payment to such schools is not performance oriented. The State Governments provide 100% salary to the teachers on its roll on monthly basis and some State Governments would provide 90%. Generally, the State Governments do not provide capital cost either for construction or for repair and whenever these schools are aided, the school fee is regulated and is generally equal to the fee prevailing in the government schools. The recruitment of teaches by these schools is also subject to the Government regulation like inclusion of a representative of the Government in the selection committee, or the appointment being subject to the approval of the Government.

141. Currently, all taxes in India are subject to the education cess, which is 3% of the total tax payable. With effect from assessment year 2009-10, Secondary and Higher Secondary Education Cess of 1% is applicable on the subtotal of taxable income. The proceeds of the cess are directed to a separate non lapsable fund called Prarambhik Shiksha Kosh (PSK), setup by Government of India, to exclusively cater to the elementary education in India. This fund is under the control of the Ministry of Human Resource and Development (MoHRD) and is typically utilized for its flagship programmes - Sarva Sikksha Abhiyaan (SSA) and the Mid-day Meal Scheme (MDMS).

142. The statistics would indicate that out of the 12,50,775 schools imparting elementary education in the country in 2007-08, 80.2% were all types of government schools, 5.8 % private aided schools and 13.1% private unaided schools. Almost 87.2% of the schools are located in the rural areas. In the rural areas the proportion of private unaided schools is only 9.3% and that of aided schools is 4.7%. However, in the urban areas, the percentage of private unaided and aided schools are as high as 38.6% and 13.4% respectively.

143. Out of the total students enrolled in primary classes in 2007-08 about 75.4, 6.7 and 17.8% are enrolled in government, aided and unaided schools. The total number of teachers working in these schools in 2007-08 was 56,34,589 of which 69.3, 10.4 and 20.7% are teaching in government, aided and private schools, the average number of teachers per school being 3.9, 8.3 and 6.7% respectively. The statistics would indicate that the Government schools have the highest percentage of teachers who are professionally trained at 43.4%, followed by aided school (27.8%) and unaided private schools (only 2.3%). However, the learning achievements are higher in private schools compared to Government schools. Going through the objects and reasons of the Act, the private unaided educational institutions are roped in not due to lack of sufficient number of schools run by the appropriate Government, local authorities or aided educational institutions, but basically on the principle of social inclusiveness so as to provide satisfactory quality education. Some of the unaided educational institutions provide superior quality education, a fact conceded and it is a constitutional obligation of the appropriate Government, local authority and aided schools not only to provide free and compulsory education, but also quality education.

144. Positive steps should be taken by the State Governments and the Central Government to supervise and monitor how the schools which are functioning and providing quality education to the children function. Responsibility is much

more on the State, especially when the Statute is against holding back or detaining any child from standard I to VIII.

145. Mr. Murray N. Rothbard, an eminent educationist and Professor in Economics, in his Book "Education: Free and Compulsory" [1999, Ludurg von Mises Institute, Auburn, Aliana] cautioned that progressive education may destroy the independent thought in the child and a child has little chance to develop his systematic reasoning powers in the study of definite courses. The Book was written after evaluating the experiences of various countries, which have followed free and compulsory education for children for several years. Prohibition of holding back in a class may, according to the author, result that bright pupils are robbed of incentive or opportunity to study and the dull ones are encouraged to believe that success, in the form of grades, promotion etc., will come to them automatically. The author also questioned that since the State began to control education, its evident tendency has been more and more to act in such a manner so as to promote repression and hindrance of education, rather than the true development of the individual. Its tendency has been for compulsion, for enforced equality at the lowest level, for the watering down of the subject and even the abandonment of all formal teaching, for the inculcation of obedience to the State and to the "group," rather than the development of self-independence, for the deprecation of intellectual subjects.

146. I am of the view that the opinions expressed by the academicians like Rothbard command respect and cannot be brushed aside as such because, much more than anything, the State has got a constitutional responsibility to see that our children are given quality education. Provisions of the statute shall not remain a dead letter, remember we are dealing with the lives of our children, a national asset, and the future of the entire country depends upon their upbringing. Our children in the future have to compete with their counter-parts elsewhere in the world at each and every level, both in curricular and extra-

curricular fields. Quality education and overall development of the child is of prime importance upon which the entire future of our children and the country rests.

147. The legislation, in its present form, has got many drawbacks. During the course of discussion, the necessity of constituting a proper Regulatory Body was also raised so that it can effectively supervise and monitor the functioning of these schools and also examine whether the children are being provided with not only free and compulsory education, but quality education. The Regulatory authority can also plug the loopholes, take proper and steps for effective implementation of the Act and can also redress the grievances of the children.

148. Learned Attorney General for India has favoured the setting up of an Adjudicatory/Regulatory Authority to determine the question whether compliance with Section 12(1)(b) and Section 12(1)(c) will have an adverse impact on the financial viability of the school, and if so, to suggest remedies and to deal with issues like expulsion etc. Learned Attorney General indicated the necessity of a statutory amendment if the Regulatory/Adjudicatory body has to be set up under the Act. Proper adjudication mechanism may also pave the way for a successful and effective public-private partnership for setting up educational institutions of best quality so that our children will get quality education. I am sure that the Government will give serious attention to the above aspect of the matter which are of prime importance since we are dealing with the future of the children of this country.

PART VI

CONCLUSIONS

(1) Article 21A casts an obligation on the State to

provide free and compulsory education to children of the age of 6 to 14 years and not on unaided non-minority and minority educational institutions.

(2) Rights of children to free and compulsory education guaranteed under Article 21A and RTE Act can be enforced against the schools defined under Section 2(n) of the Act, except unaided minority and non-minority schools not receiving any kind of aid or grants to meet their expenses from the appropriate governments or local authorities.

(3) Section 12(1)(c) is read down so far as unaided non-minority and minority educational institutions are concerned, holding that it can be given effect to only on the principles of voluntariness, autonomy and consensus and not on compulsion or threat of non-recognition or non-affiliation.

(4) No distinction or difference can be drawn between unaided minority and non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1)(c) of the Act. Such an appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.

(5) The Appropriate Government and local authority have to establish neighbourhood schools as provided in Section 6 read with Sections 8 and 9, within the time limit prescribed in the Statute.

(6) Duty imposed on parents or guardians under Section 10 is directory in nature and it is open to them to admit their children in the schools of their choice, not invariably in the neighbourhood schools,

subject to availability of seats and meeting their own expenses.

(7) Sections 4, 10, 14, 15 and 16 are held to be directory in their content and application. The concerned authorities shall exercise such powers in consonance with the directions/guidelines laid down by the Central Government in that behalf.

(8) The provisions of Section 21 of the Act, as provided, would not be applicable to the schools covered under sub-Section (iv) of clause (n) of Section 2. They shall also not be applicable to minority institutions, whether aided or unaided.

(9) In exercise of the powers conferred upon the appropriate Government under Section 38 of the RTE Act, the Government shall frame rules for carrying out the purposes of this Act and in particular, the matters stated under sub-Section (2) of Section 38 of the RTE Act.

(10) The directions, guidelines and rules shall be framed by the Central Government, appropriate Government and/or such other competent authority under the provisions of the RTE Act, as expeditiously as possible and, in any case, not later than six months from the date of pronouncement of this judgment.

(11) All the State Governments which have not constituted the State Advisory Council in terms of Section 34 of the RTE Act shall so constitute the Council within three months from today. The Council so constituted shall undertake its requisite functions in accordance with the provisions of Section 34 of the Act and advise the Government in terms of clauses (6), (7) and (8) of this order

immediately thereafter.

(12) Central Government and State Governments may set up a proper Regulatory Authority for supervision and effective functioning of the Act and its implementation.

(13) Madrasas, Vedic Pathshalas etc. which predominantly provide religious instructions and do not provide for secular education stand outside the purview of the Act.

149. The Writ Petitions are disposed of as above. This Judgment would have prospective operation and would apply from the next academic year 2012-13 onwards. However, admissions already granted would not be disturbed. We record our deep appreciation for the valuable assistance rendered by the counsel appearing for the both sides.

S. H. KAPADIA, CJI. 1. We have had the benefit of carefully considering the erudite judgment delivered by our esteemed and learned Brother Radhakrishnan, J. Regretfully, we find ourselves in the unenviable position of having to disagree with the views expressed therein concerning the non-applicability of the Right of Children to Free and Compulsory Education Act, 2009 (for short "the 2009 Act") to the unaided non-minority schools.

2. The judgment of Brother Radhakrishnan, J. fully sets out the various provisions of the 2009 Act as well as the issues which arise for determination, the core issue concerns the constitutional validity of the 2009 Act.

Introduction

3. To say that "a thing is constitutional is not to say that it is desirable" [see *Dennis v. United States,* (1950) 341 US 494].

4. A fundamental principle for the interpretation of a written Constitution has been spelt out in R. v. Burah [reported in (1878) 5 I.A. 178] which reads as under:

> "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the Constitution by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited it is not for any Court to inquire further, or to enlarge constructively those conditions and restrictions".

5. Education is a process which engages many different actors : the one who provides education (the teacher, the owner of an educational institution, the parents), the one who receives education (the child, the pupil) and the one who is legally responsible for the one who receives education (the parents, the legal guardians, society and the State). These actors influence the right to education. The 2009 Act makes the Right of Children to Free and Compulsory Education justiciable. The 2009 Act envisages that each child must have access to a neighbourhood school. The 2009 Act has been enacted keeping in mind the crucial role of Universal Elementary Education for strengthening the social fabric of democracy through provision of equal opportunities to all. The Directive Principles of State Policy enumerated in our Constitution lay down that the State shall provide free and compulsory education to all children upto the age of 14 years. The said Act provides for right (entitlement) of children to free and compulsory admission, attendance and completion of elementary education in a neighbourhood school. The word "Free" in the long title to the 2009 Act stands for removal by the State of any financial

barrier that prevents a child from completing 8 years of schooling. The word "Compulsory" in that title stands for compulsion on the State and the parental duty to send children to school. To protect and give effect to this right of the child to education as enshrined in Article 21 and Article 21A of the Constitution, the Parliament has enacted the 2009 Act.

6. The 2009 Act received the assent of the President on 26.8.2009. It came into force w.e.f. 1.4.2010. The provisions of this Act are intended not only to guarantee right to free and compulsory education to children, but it also envisages imparting of quality education by providing required infrastructure and compliance of specified norms and standards in the schools. The Preamble states that the 2009 Act stands enacted inter alia to provide for free and compulsory education to all children of the age of 6 to 14 years. The said Act has been enacted to give effect to Article 21A of the Constitution.

Scope of the 2009 Act

7. Section 3(1) of the 2009 Act provides that every child of the age of 6 to 14 years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education. Section 3(2) inter alia provides that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education. An educational institution is charitable. Advancement of education is a recognised head of charity. Section 3(2) has been enacted with the object of removing financial barrier which prevents a child from accessing education. The other purpose of enacting Section 3(2) is to prevent educational institutions charging capitation fees resulting in creation of a financial barrier which prevents a child from accessing or exercising its right to education which is now provided for vide Article 21A. Thus, sub-Section (2) provides that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing or completing the elementary education. Section 4 inter alia

provides for special provision for children not admitted to or who have not completed elementary education. Section 5 deals with the situation where there is no provision for completion of elementary education, then, in such an event, a child shall have a right to seek transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of Section 2, for completing his or her elementary education. Chapter III provides for duties of appropriate government, local authority and parents. Section 6 imposes an obligation on the appropriate government and local authority to establish a school within such areas or limits of neighbourhood, as may be prescribed, where it is not so established, within 3 years from the commencement of the 2009 Act. The emphasis is on providing "neighbourhood school" facility to the children at the Gram Panchayat level. Chapter IV of the 2009 Act deals with responsibilities of schools and teachers. Section 12 (1)(c) read with Section 2(n)(iii) and (iv) mandates that every recognised school imparting elementary education, even if it is an unaided school, not receiving any kind of aid or grant to meet its expenses from the appropriate government or the local authority, is obliged to admit in Class I, to the extent of at least 25% of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. As per the proviso, if the School is imparting pre-school education, the same regime would apply. By virtue of Section 12(2) the unaided school which has not received any land, building, equipment or other facilities, either free of cost or at concessional rate, would be entitled for reimbursement of the expenditure incurred by it to the extent of per child expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed. Such reimbursement shall not exceed per child expenditure incurred by a school established, owned or controlled by the appropriate government or a local authority. Section 13 envisages that no school or person shall, while admitting a child, collect any capitation fee and subject the child

or his or her parents to any screening procedure. Section 15 mandates that a child shall be admitted in a school at the commencement of the academic year or within the prescribed extended period. Sections 16 and 17 provide for prohibition of holding back and expulsion and of physical punishment or mental harassment to a child. Section 18 postulates that after the commencement of the 2009 Act no school, other than the excepted category, can be established or can function without obtaining a certificate of recognition from the appropriate authority. The appropriate authority shall be obliged to issue the certificate of recognition within the prescribed period specifying the conditions there for, if the school fulfills the norms and standards specified under Sections 19 and 25 read with the Schedule to the 2009 Act. In the event of contravention of the conditions of recognition, the prescribed authority can withdraw recognition after giving an opportunity of being heard to such school. The order of withdrawal of recognition should provide a direction to transfer the children studying in the de-recognised school to be admitted to the specified neighbourhood school. Upon withdrawal of recognition, the de-recognised school cannot continue to function, failing which, is liable to pay fine as per Section 19(5). If any person establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of the recognition, shall be liable to pay fine as specified in Section 19(5). The norms and standards for establishing or for grant of recognition to a school are specified in Section 19 read with the Schedule to the 2009 Act. All schools which are established before the commencement of the 2009 Act in terms of Section 19(2) are expected to comply with specified norms and standards within 3 years from the date of such commencement. Failure to do so would entail in de-recognition of such school. Section 22 postulates that the School Management Committee constituted under Section 21, shall prepare a School Development Plan in the prescribed manner. Section 22(2) provides that the School Development Plan so prepared shall be the basis for the grants to be made by the appropriate government or local authority, as the case

may be. That plan, however, cannot have any impact on consideration of application for grant of recognition for establishing an unaided school. To ensure that teachers should contribute in imparting quality education in the school itself, Section 28 imposes total prohibition on them to engage in private tuition or private teaching activities. Chapter VI inter alia provides for protection of rights of children. Section 32 thus provides that any person having grievance relating to the right of child under the 2009 Act, may make a written complaint to the local authority having jurisdiction, who in turn is expected to decide it within three months after affording a reasonable opportunity of being heard to the parties concerned. In addition, in terms of Section 31, the Commissions constituted under the provisions of the Commissions for Protection of Child Rights Act, 2005 can monitor the child's right to education, so as to safeguard the right of the child upon receiving any complaint in that behalf relating to free and compulsory education.

8. By virtue of the 2009 Act, all schools established prior to the commencement of the said Act are thus obliged to fulfill the norms and standards specified inter alia in Sections 25, 26 and the Schedule of that Act. [See Section 19(2)]. The State is also expected to first weed out those schools which are non-performing, or under-performing or non-compliance schools and upon closure of such schools, the students and the teaching and non-teaching staff thereof should be transferred to the neighbourhood school. The provision is meant not only to strengthen the latter school by adequate number of students but to consolidate and to impart quality education due to the addition of teaching staff. Needless to observe, that if there is inadequate response to the government funded school, it is but appropriate that either the divisions thereof or the school itself be closed and the students and staff of such schools be transferred to a neighbourhood school by resorting to Section 18(3) of the 2009 Act. Only after taking such decisions could the School Development Plan represent the correct position regarding the need of government aided schools in every

locality across the State. Besides, it will ensure proper and meaningful utilization of public funds. In absence of such exercise, the end result would be that on account of existing non-performing or under-performing or non-compliance schools, the School Development Plan would not reckon that locality for establishment of another school. In our view, even the State Government(s), by resorting to the provision of the 2009 Act, must take opportunity to re-organise its financial outflow at the micro level by weeding out the non-performing or under-performing or non-compliance schools receiving grant-in- aid, so as to ensure that only such government funded schools, who fulfill the norms and standards, are allowed to continue, to achieve the object of the 2009 Act of not only providing free and compulsory education to the children in the neighbourhood school but also to provide quality education. Thus, there is a power in the 2009 Act coupled with the duty of the State to ensure that only such government funded schools, who fulfill the norms and standards, are allowed to continue with the object of providing free and compulsory education to the children in the neighbourhood school.

Validity and applicability of the 2009 Act qua unaided non-minority schools

9. To begin with, we need to understand the scope of Article 21A. It provides that the State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. Thus, under the said Article, the obligation is on the State to provide free and compulsory education to all children of specified age. However, under the said Article, the manner in which the said obligation will be discharged by the State has been left to the State to determine by law. Thus, the State may decide to provide free and compulsory education to all children of the specified age through its own schools or through government aided schools or through unaided private schools. The question is whether such a law transgresses any constitutional limitation?

In this connection, the first and foremost principle we have to keep in mind is that what is enjoined by the directive principles (in this case Articles 41, 45 and 46) must be upheld as a "reasonable restriction" under Articles 19(2) to 19(6). As far back as 1952, in State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga [(1952) SCR 889], this Court has illustrated how a directive principle may guide the Court in determining crucial questions on which the validity of an important enactment may be hinged. Thus, when the courts are required to decide whether the impugned law infringes a fundamental right, the courts need to ask the question whether the impugned law infringes a fundamental right within the limits justified by the directive principles or whether it goes beyond them. For example, the scope of the right of equality of opportunity in matters relating to employment (Article 16) to any office in the State appears more fully defined when read with the obligation of the State to promote with special care the economic and other interests of the weaker sections (Article 46). Similarly, our understanding of the right "to practice any profession or occupation" [Article 19(1)(g)] is clarified when we read along with that right the obligation of the State to see that the health of the workers and the tender age of the children are not abused (Article 39). Thus, we need to interpret the fundamental rights in the light of the directive principles. The above principles are very relevant in this case because the very content of Article 21A comes from reading of Articles 41, 45 and 46 and, more particularly, from Article 45 (as it then stood before the Constitution (Eighty sixth Amendment) Act, 2002). It has been urged before us that Article 45, as it then stood, imposed obligation on the State to provide for free and compulsory education for all children until they complete the age of 14 years and that the said obligation cannot be shifted or passed on to an unaided school, as defined in Section 2(n)(iv) of the 2009 Act. To answer the said contention, one needs to appreciate the scope of Articles 21, 21A, 19(1)(g) and Articles 41, 45 and 46 of the Constitution. At the outset, it may be stated, that fundamental rights have two aspects - they act as

fetter on plenary legislative powers and, secondly, they provide conditions for fuller development of our people including their individual dignity. Right to live in Article 21 covers access to education. But unaffordability defeats that access. It defeats the State's endeavour to provide free and compulsory education for all children of the specified age. To provide for free and compulsory education in Article 45 is not the same thing as to provide free and compulsory education. The word "for" in Article 45 is a preposition. The word "education" was read into Article 21 by the judgments of this Court. However, Article 21 merely declared "education" to fall within the contours of right to live. To provide for right to access education, Article 21A was enacted to give effect to Article 45 of the Constitution. Under Article 21A, right is given to the State to provide by law "free and compulsory education". Article 21A contemplates making of a law by the State. Thus, Article 21A contemplates right to education flowing from the law to be made which is the 2009 Act, which is child centric and not institution centric. Thus, as stated, Article 21A provides that the State shall provide free and compulsory education to all children of the specified age in such manner as the State may, by law, determine. The manner in which this obligation will be discharged by the State has been left to the State to determine by law. The 2009 Act is thus enacted in terms of Article 21A. It has been enacted primarily to remove all barriers (including financial barriers) which impede access to education. One more aspect needs to be highlighted. It is not in dispute that education is a recognised head of "charity" [see *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481]. Therefore, even according to T.M.A. Pai Foundation, if an educational institution goes beyond "charity" into commercialization, it would not be entitled to protection of Article 19(1)(g). This is where the paradox comes in. If education is an activity which is charitable, could the unaided non-minority educational institution contend that the intake of 25% children belonging to weaker section and disadvantaged group only in class I as provided for in Section 12(1)(c) would constitute violation of Article 19(1)(g)? Would

such a provision not be saved by the principle of reasonable restriction imposed in the interest of the general public in Article 19(6) of the Constitution?

10. Coming to the principle of reasonableness, it may be stated, that though subject-wise, Article 21A deals with access to education as against right to establish and administer educational institution in Article 19(1)(g), it is now not open to anyone to contend that the law relating to right to access education within Article 21A does not have to meet the requirement of Article 14 or Article 19 for its reasonableness. [See *Khudiram Das v. State of West Bengal* reported in (1975) 2 SCR 832] After the judgment of this Court in *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248], the principle of reasonableness is applicable to Article 14 of the Constitution. As held by this Court in *Glanrock Estate Private Limited v. State of Tamil Nadu* [(2010) 10 SCC 96], Article 21 (right to life) remains the core of the Constitution around which Article 14, Article 19 and others revolve. In other words, all other fundamental rights in Part III would be dependent upon right to life in Article 21 as interpreted by this Court to include right to live with dignity, right to education, etc. At the end of the day, whether one adopts the pith and substance test or the nature and character of the legislation test or the effect test, one finds that all these tests have evolved as rules of interpretation *only as a matter of reasonableness.* They help us to correlate Article 21 with Article 14, Article 19 and, so on. Applying the above principle of reasonableness, though the right to access education falls as a subject matter under Article 21A and though to implement the said Article, Parliament has enacted the 2009 Act, one has to judge the validity of the said Act in the light of the principle of reasonableness in Article 19(6), particularly, when in *T.M.A. Pai Foundation* and in *P.A. Inamdar v. State of Maharashtra* [(2005) 6 SCC 537], it has been held that right to establish and administer an educational institution falls under Article 19(1)(g) of the Constitution. Thus, the question which arises for determination is - whether Section 12(1)(c) of the

2009 Act is a reasonable restriction on the non-minority's right to establish and administer an unaided educational institution under Article 19(6)? Article 21 says that "no person shall be *deprived* of his life...except according to the procedure established by law" whereas Article 19(1)(g) under the chapter "right to freedom" says that all citizens have the right to practice any profession or to carry on any occupation, trade or business which freedom is not absolute but which could be subjected to social control under Article 19(6) in the interest of general public. By judicial decisions, right to education has been read into right to life in Article 21. A child who is denied right to access education is not only *deprived* of his right to live with dignity, he is also deprived of his right to freedom of speech and expression enshrined in Article 19(1)(a). The 2009 Act seeks to remove all those barriers including financial and psychological barriers which a child belonging to the weaker section and disadvantaged group has to face while seeking admission. It is true that, as held in *T.M.A. Pai Foundation* as well as *P.A. Inamdar,* the right to establish and administer an educational institution is a fundamental right, as long as the activity remains charitable under Article 19(1)(g), however, in the said two decisions the correlation between Articles 21 and 21A, on the one hand, and Article 19(1)(g), on the other, was not under consideration. Further, the content of Article 21A flows from Article 45 (as it then stood). The 2009 Act has been enacted to give effect to Article 21A. For the above reasons, since the Article 19(1)(g) right is not an absolute right as Article 30(1), the 2009 Act cannot be termed as unreasonable. To put an obligation on the unaided non-minority school to admit 25% children in class I under Section 12(1)(c) cannot be termed as an unreasonable restriction. Such a law cannot be said to transgress any constitutional limitation. The object of the 2009 Act is to remove the barriers faced by a child who seeks admission to class I and not to restrict the freedom under Article 19(1)(g). The next question that arises for determination is - whether Section 12(1)(c) of the 2009 Act impedes the right of the non-minority to establish and administer an unaided

educational institution? At the outset, it may be noted that Article 19(6) is a saving and enabling provision in the Constitution as it empowers the Parliament to make a law imposing reasonable restriction on the Article 19(1)(g) right to establish and administer an educational institution while Article 21A empowers the Parliament to enact a law as to the manner in which the State will discharge its obligation to provide for free and compulsory education. If the Parliament enacts the law, pursuant to Article 21A, enabling the State to access the network (including infrastructure) of schools including unaided non-minority schools would such a law be said to be unconstitutional, not saved under Article 19(6)? Answer is in the negative. Firstly, it must be noted that the expansive provisions of the 2009 Act are intended not only to guarantee the right to free and compulsory education to children, but to set up an intrinsic regime of providing right to education to all children by providing the required infrastructure and compliance of norms and standards. Secondly, unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent/ guardian of every child [Article 51A(k)]. The Constitution directs both burdens to achieve one end: the compulsory education of children free from the barriers of cost, parental obstruction or State inaction. Thus, Articles 21A and 51A(k) balance the relative burdens on the parents and the State. Thus, the right to education envisages a reciprocal agreement between the State and the parents and it places an affirmative burden on all stakeholders in our civil society. Thirdly, right to establish an educational institution has now been recognized as a fundamental right within the meaning of Article 19(1)(g). This view is enforced by the opinion of this Court in T.M.A. Pai Foundation and P.A. Inamdar that all citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26 but that right is subject to the provisions of Articles 19(6) and 26(a). The constitutional obligation of the State to provide for free and compulsory education to the specified category of children is co-extensive with the fundamental right guaranteed under Article 19(1)(g) to establish

an educational institution. Lastly, the fundamental right to establish an educational institution cannot be confused with the right to ask for recognition or affiliation. The exercise of a fundamental right to establish and administer an educational institution can be controlled in a number of ways. Indeed, matters relating to the right to grant of recognition and/ or affiliation are covered within the realm of statutory right, which, however, will have to satisfy the test of reasonable restrictions [see Article 19(6)]. Thus, from the scheme of Article 21A and the 2009 Act, it is clear that the primary obligation is of the State to provide for free and compulsory education to children between the age of 6 to 14 years and, particularly, to children who are likely to be prevented from pursuing and completing the elementary education due to inability to afford fees or charges. Correspondingly, every citizen has a right to establish and administer educational institution under Article 19(1)(g) so long as the activity remains charitable. Such an activity undertaken by the private institutions supplements the primary obligation of the State. Thus, the State can regulate by law the activities of the private institutions by imposing reasonable restrictions under Article 19(6). The 2009 Act not only encompasses the aspects of right of children to free and compulsory education but to carry out the provisions of the 2009 Act, it also deals with the matters pertaining to establishment of school (s) as also grant of recognition (see section 18). Thus, after the commencement of the 2009 Act, the private management intending to establish the school has to make an application to the appropriate authority and till the certificate is granted by that authority, it cannot establish or run the school. The matters relevant for the grant of recognition are also provided for in Sections 19, 25 read with the Schedule to the Act. Thus, after the commencement of the 2009 Act, by virtue of Section 12(1)(c) read with Section 2(n)(iv), the State, while granting recognition to the private unaided non-minority school, may specify permissible percentage of the seats to be earmarked for children who may not be in a position to pay their fees or charges. In T.M.A. Pai Foundation, this Court vide para

53 has observed that the State while prescribing qualifications for admission in a private unaided institution may provide for condition of giving admission to small percentage of students belonging to weaker sections of the society by giving them freeships, if not granted by the government. Applying the said law, such a condition in Section 12(1)(c) imposed while granting recognition to the private unaided non-minority school cannot be termed as unreasonable. Such a condition would come within the principle of reasonableness in Article 19(6). Indeed, by virtue of Section 12(2) read with Section 2(n)(iv), private unaided school would be entitled to be reimbursed with the expenditure incurred by it in providing free and compulsory education to children belonging to the above category to the extent of per child expenditure incurred by the State in a school specified in Section 2(n)(i) or the actual amount charged from the child, whichever is less. Such a restriction is in the interest of the general public. It is also a reasonable restriction. Such measures address two aspects, viz., upholding the fundamental right of the private management to establish an unaided educational institution of their choice and, at the same time, securing the interests of the children in the locality, in particular, those who may not be able to pursue education due to inability to pay fees or charges of the private unaided schools. We also do not see any merit in the contention that Section 12(1)(c) violates Article 14. As stated, Section 12(1)(c) inter alia provides for admission to class I, to the extent of 25% of the strength of the class, of the children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education to them till its completion. The emphasis is on "free and compulsory education". Earmarking of seats for children belonging to a specified category who face financial barrier in the matter of accessing education satisfies the test of classification in Article 14. Further, Section 12(1)(c) provides for level playing field in the matter of right to education to children who are prevented from accessing education because they do not have the means or their parents do not have the means to pay for their fees.

As stated above, education is an activity in which we have several participants. There are number of stakeholders including those who want to establish and administer educational institutions as these supplement the primary obligation of the State to provide for free and compulsory education to the specified category of children. Hence, Section 12(1)(c) also satisfies the test of reasonableness, apart from the test of classification in Article 14.

11. The last question which we have to answer under this head is - whether Section 12(1)(c) runs counter to the judgments of this Court in *T.M.A. Pai Foundation* and *P.A. Inamdar* or principles laid down therein? According to the petitioners, *T.M.A. Pai Foundation* defines various rights and has held vide para 50 that right to establish and administer broadly comprises the following:- (i) right to admit students (ii) right to set up a reasonable fee structure etc. (the rest are not important for discussion under this Head). That, *T.M.A. Pai Foundation* lays down the essence and structure of rights in Article 19(1)(g) insofar as they relate to educational institutions in compliance with (a) the Charity Principle (b) the Autonomy Principle (c) the Voluntariness Principle (d) Anti-nationalisation (e) Co-optation Principle. In support, reliance is placed by the petitioners on number of paras from the above two judgments. At the outset, we may reiterate that Article 21A of the Constitution provides that the State shall provide free and compulsory education to all children of the specified age in such manner as the State may, by law, determine. Thus, the primary obligation to provide free and compulsory education to all children of the specified age is on the State. However, the manner in which this obligation will be discharged by the State has been left to the State to determine by law. The State may do so through its own schools or through aided schools or through private schools, so long as the law made in this regard does not transgress any other constitutional limitation. This is because Article 21A vests the power in the State to decide the manner in which it will provide free and compulsory education

to the specified category of children. As stated, the 2009 Act has been enacted pursuant to Article 21A. In this case, we are concerned with the interplay of Article 21, Article 21A, on the one hand, and the right to establish and administer educational institution under Article 19(1)(g) read with Article 19(6). That was not the issue in *T.M.A. Pai Foundation* nor in *P.A. Inamdar.* In this case, we are concerned with the validity of Section 12(1)(c) of the 2009 Act. Hence, we are concerned with the validity of the law enacted pursuant to Article 21A placing restrictions on the right to establish and administer educational institutions (including schools) and not the validity of the Scheme evolved in *Unni Krishnan, J.P. v. State of Andhra Pradesh* [(1993) 1 SCC 645]. The above judgments in *T.M.A. Pai Foundation* and *P.A. Inamdar* were not concerned with interpretation of Article 21A and the 2009 Act. It is true that the above two judgments have held that all citizens have a right to establish and administer educational institutions under Article 19(1)(g), however, the question as to whether the provisions of the 2009 Act constituted a restriction on that right and if so whether that restriction was a reasonable restriction under Article 19(6) was not in issue. Moreover, the controversy in *T.M.A. Pai Foundation* arose in the light of the scheme framed in Unni Krishnan's case and the judgment in *P.A. Inamdar* was almost a sequel to the directions in *Islamic Academy of Education v. State of Karnataka* [(2003) 6 SCC 697] in which the entire focus was Institution centric and not child centric and that too in the context of higher education and professional education where the level of merit and excellence have to be given a different weightage than the one we have to give in the case of Universal Elementary Education for strengthening social fabric of democracy through provision of equal opportunities to all and for children of weaker section and disadvantaged group who seek admission not to higher education or professional courses but to Class I. In this connection, the relevant paras from T.M.A. Pai Foundation make the position clear. They are paras 37, 39, 40, 42, 45, 48, 49 and 50 (read together), 51, 53, 56, 58 - 61, 62, 67, 68, 70

etc., similarly, paras 26, 35, 104, 146 of P.A. Inamdar. We quote the relevant para in support of what we have stated above:

T.M.A. Pai Foundation

Para 48 read with para 50

48. Private education is one of the most dynamic and fastest-growing segments of *post-secondary educatio*n at the turn of the twenty-first century. A combination of unprecedented demand for *access to higher education* and the inability or unwillingness of the Government to provide the necessary support has brought private higher education to the forefront. Private institutions, with a long history in many countries, are expanding in scope and number, and are becoming increasingly important in parts of the world that relied almost entirely on the public sector.

50. The right to establish and administer broadly comprises the following rights:

(a) to admit students;

(b) to set up a reasonable fee structure;

(c) to constitute a governing body;

(d) to appoint staff (teaching and non-teaching); and

(e) to take action if there is dereliction of duty on the part of any employees.

58. For admission into any professional institution, merit must play an important role. *While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated* or put at a disadvantage by

preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.

59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

60. Education is taught at different levels, from primary to professional. It is, therefore, obvious that *government regulations for all levels or types of educational institutions cannot be identical*; so also, the extent of control or regulation could be greater vis-à-vis aided institutions.

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. *At the school level, it is not possible to grant admissions on the basis of merit.* It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that State-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions

at the same level of excellence as private schools. But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide the difference which, therefore, brings us back in a vicious circle to the original problem viz. the lack of State funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations.

P.A. Inamdar

26. These matters have been directed to be placed for hearing before a Bench of seven Judges under orders of the Chief Justice of India pursuant to the order dated 15-7-2004 in P.A. Inamdar v. State of Maharashtra and order dated 29-7-2004 in Pushpagiri Medical Society v. State of Kerala. The aggrieved persons before us are again classifiable in one class, that is, unaided minority and non-minority institutions imparting professional education. The issues arising for decision before us are only three:

(i) the fixation of "quota" of admissions/students in

respect of unaided professional institutions;

(ii) the holding of examinations for admissions to such colleges, that is, who will hold the entrance tests; and

(iii) the fee structure.

104. Article 30(1) speaks of "educational institutions" generally and so does Article 29(2). These articles do not draw any distinction between an educational institution dispensing theological education or professional or non-professional education. However, the terrain of thought as has developed through successive judicial pronouncements culminating in Pai Foundation is that looking at the concept of education, in the backdrop of the constitutional provisions, *professional educational institutions constitute a class by themselves as distinguished from educational institutions imparting non-professional education.* It is not necessary for us to go deep into this aspect of the issue posed before us inasmuch as *Pai Foundation* has clarified *that merit and excellence assume special significance in the context of professional studies.* Though merit and excellence are not anathema to non-professional education, yet at that level and due to the nature of education which is more general, the need for merit and excellence therein is not of the degree as is called for in the context of professional education.

146. Non-minority unaided institutions can also be subjected to similar restrictions which are found reasonable and in the interest of the student community. *Professional education should be made accessible on the criterion of merit and on non-exploitative terms* to all eligible students on a uniform basis. Minorities or non-minorities, in exercise of their educational rights in the field of professional education have an obligation and a duty

to maintain requisite standards of professional education by giving admissions based on merit and making education equally accessible to eligible students through a fair and transparent admission procedure and based on a reasonable fee structure.

12. *P.A. Inamdar* holds that right to establish and administer educational institution falls in Article 19(1)(g). It further holds that seat-sharing, reservation of seats, fixing of quotas, fee fixation, cross-subsidization, etc. imposed by judge-made scheme in professional/ higher education is an unreasonable restriction applying the principles of Voluntariness, Autonomy, Co-optation and Anti-nationalisation, and, lastly, it deals with inter-relationship of Articles 19(1)(g), 29(2) and 30(1) in the context of the minority and non-minority's right to establish and administer educational institutions. The point here is how does one read the above principles of Autonomy, Voluntariness, Co-optation and Anti-nationalisation of seats. On reading T.M.A. Pai Foundation and P.A. Inamdar in proper perspective, it becomes clear that the said principles have been applied in the context of professional/ higher education where merit and excellence have to be given due weightage and which tests do not apply in cases where a child seeks admission to class I and when the impugned Section 12(1)(c) seeks to remove the financial obstacle. Thus, if one reads the 2009 Act including Section 12(1)(c) in its application to unaided non-minority school(s), the same is saved as reasonable restriction under Article 19(6).

13. However, we want the Government to clarify the position on one aspect. There are boarding schools and orphanages in several parts of India. In those institutions, there are day scholars and boarders. The 2009 Act could only apply to day scholars. It cannot be extended to boarders. To put the matter beyond doubt, we recommend that appropriate guidelines be issued under Section 35 of the 2009 Act clarifying the above position.

Validity and applicability of the 2009 Act qua unaided minority schools

14. The inspiring preamble to our Constitution shows that one of the cherished objects of our Constitution is to assure to all its citizens the liberty of thought, expression, belief, faith and worship. To implement and fortify these purposes, Part III has provided certain fundamental rights including Article 26 of the Constitution which guarantees the right of every religious denomination or a section thereof, to establish and maintain institutions for religious and charitable purposes; to manage its affairs in matters of religion; to acquire property and to administer it in accordance with law. Articles 29 and 30 confer certain educational and cultural rights as fundamental rights.

15. Article 29(1) confers on any section of the citizens a right to conserve its own language, script or culture by and through educational institutions and makes it obvious that a minority could conserve its language, script or culture and, therefore, the right to establish institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that right is conferred on all minorities by Article 30(1). That right, however, is subject to the right conferred by Article 29(2).

16. Article 30(1) gives the minorities two rights: (a) to establish and (b) to administer educational institutions of their choice. The real import of Article 29(2) and Article 30(1) is that they contemplate a minority institution with a sprinkle of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution.

17. The key to Article 30(1) lies in the words "of their choice".

18. The right established by Article 30(1) is a fundamental right declared in terms absolute unlike the freedoms

guaranteed by Article 19 which is subject to reasonable restrictions. Article 30(1) is intended to be a real right for the protection of the minorities in the matter of setting up educational institutions of their own choice. However, regulations may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition. However, such regulation must satisfy the test of reasonableness and that such regulation should make the educational institution an effective vehicle of education for the minority community or for the persons who resort to it. Applying the above test in the case of *Rev. Sidhajbhai Sabhai v. State of Bombay* [1963] SCR 837, this Court held the rule authorizing reservation of seats and the threat of withdrawal of recognition under the impugned rule to be violative of Article 30(1).

19. The above well-settled principles have to be seen in the context of the 2009 Act enacted to implement Article 21A of the Constitution. At the very outset, the question that arises for determination is - what was the intention of the Parliament? Is the 2009 Act intended to apply to unaided minority schools? In answer to the above question, it is important to note that in the case of *P.A. Inamdar*, this Court held that there shall be no reservations in private unaided colleges and that in that regard there shall be no difference between the minority and non-minority institutions. However, by the Constitution (Ninety-third Amendment) Act, 2005, Article 15 is amended. It is given Article 15(5). The result is that *P.A. Inamdar* has been overruled on two counts: (a) whereas this Court in *P.A. Inamdar* had stated that there shall be no reservation in private unaided colleges, the Amendment decreed that there shall be reservations; (b) whereas this Court in *P.A. Inamdar* had said that there shall be no difference between the unaided minority and non-minority institutions, the Amendment decreed that there shall be a difference. Article 15(5) is an enabling provision and it is for the respective States either to enact a legislation or issue an executive instruction providing for reservation except in the case of minority educational institutions referred to in

Article 30(1). The intention of the Parliament is that the minority educational institution referred to in Article 30(1) is a separate category of institutions which needs protection of Article 30(1) and viewed in that light we are of the view that unaided minority school(s) needs special protection under Article 30(1). Article 30(1) is not conditional as Article 19(1)(g). In a sense, it is absolute as the Constitution framers thought that it was the duty of the Government of the day to protect the minorities in the matter of preservation of culture, language and script via establishment of educational institutions for religious and charitable purposes [See: Article 26]. Reservations of 25% in such unaided minority schools result in changing the character of the schools if right to establish and administer such schools flows from the right to conserve the language, script or culture, which right is conferred on such unaided minority schools. Thus, the 2009 Act including Section 12(1)(c) violates the right conferred on such unaided minority schools under Article 30(1). However, when we come to aided minority schools we have to keep in mind Article 29(2). As stated, Article 30(1) is subject to Article 29(2). The said Article confers right of admission upon every citizen into a State-aided educational institution. Article 29(2) refers to an individual right. It is not a class right. It applies when an individual is denied admission into an educational institution maintained or aided by the State. The 2009 Act is enacted to remove barriers such as financial barriers which restrict his/her access to education. It is enacted pursuant to Article 21A. Applying the above tests, we hold that the 2009 Act is constitutionally valid qua aided minority schools.

Conclusion (according to majority):

20. Accordingly, we hold that the Right of Children to Free and Compulsory Education Act, 2009 is constitutionally valid and shall apply to the following:

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.

However, the said 2009 Act and in particular Sections 12(1)(c) and 18(3) infringes the fundamental freedom guaranteed to *unaided minority schools* under Article 30(1) and, consequently, applying the *R.M.D. Chamarbaugwalla v. Union of India* [1957 SCR 930] principle of severability, the said 2009 Act shall not apply to such schools.

21. This judgment will operate from today. In other words, this will apply from the academic year 2012-13. However, admissions given by unaided minority schools prior to the pronouncement of this judgment shall not be reopened.

22. Subject to what is stated above, the writ petitions are disposed of with no order as to costs.

K.K.T. Writ Petitions disposed of.

NATIONAL COUNCIL FOR TECH. EDU. & ANR.
v.
VAISHNAV INST. OF TECH. & MGT.
(Civil Appeal No. 3505 of 2012 etc.)

APRIL 12, 2012

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

National Council for Teacher Education Act, 1993 – ss. 13 and 17 – Action u/s. 17 – Whether can be taken directly or by following the route of inspection u/s. 13 – Held: If satisfaction u/s. 17 can be arrived at without inspection, route of inspection u/s. 13 is not required to be followed – But where the competent authority forms the opinion that inspection is necessary, then the inspection and follow-up action u/s. 13 is required – National Council for Teacher Education Rules, 1997 – r. 8.

National Council for Teacher Education, taking action u/s. 17 of National Council for Teacher Education Act, 1993, derecognized various institutions. Applications were filed before Madhya Pradesh High Court as well as Delhi High Court challenging the derecognition. The question for consideration before the High Courts was where an action is contemplated against recognised institution u/s. 17(1) by the Regional Committee and inspection of such recognised institution is found necessary, whether such inspection must proceed u/s. 13 of the Act or the Regional Committee is empowered to carry out inspection independent of Section 13. Madhya Pradesh High Court took the view that it is imperative on the part of the Council to issue notice u/s. 13 to the recognised institution and, if on inspection u/s. 13, contraventions are found, then a notice needs to be given by the Council to the concerned recognised institution pointing out to it the deficiencies noticed

during inspection and, if the institution fails to remove the deficiencies so pointed out, the action u/s. 17 may be taken. The Delhi High Court opined that the power of inspection by the Regional Committee is inherent in exercise of the power u/s. 17 and it is not imperative on the part of the Council to issue notice u/s. 13 before taking action u/s. 17.

Disposing of the appeals, the Court

HELD: 1. Sections 17 and 13 of National Council for Teacher Education Act, 1993 must be harmoniously construed. In exercise of its powers under Section 17, the Regional Committee may feel that inspection of a recognised institution is necessary before it can arrive at the satisfaction as to whether such recognised institution has contravened any of the provisions of the Act or the rules or the regulations or the orders made thereunder or breached the terms of the recognition. In that event, the route of inspection as provided u/s. 13 has to be followed. If the Regional Committee has been authorised by the Council to perform its function of inspection, the Regional Committee may cause the inspection of recognised institution to be made as provided in Section 13 and prescribed in Rule 8 of National Council for Teacher Education Rules, 1997. Where, however, the Regional Committee feels that the inspection of a recognised institution is not necessary for the proposed action u/s. 17, obviously it can proceed in accordance with the law without following the route of inspection as provided u/s. 13. [Para 28]

2. It cannot be accepted that unnecessary delay would occasion if inspection of a recognised institution is carried out in terms of Section 13 and as prescribed by Rule 8. Rather the inspection in that manner would bring objectivity and fairness. The guidelines for expeditious completion of such inspection can always be

framed by the Council. The efficacy of right of appeal u/s. 18 is not at all affected if the inspection of a recognied institution is done in the manner indicated above. [Para 29]

3. Thus the view of the Delhi High Court that the power of inspection by the Regional Committee is inherent in exercise of the power u/s. 17 and it is not imperative on the part of the Council to issue notice u/s. 13 before taking action u/s. 17 is set aside. The view of Madhya Pradesh High Court that before proceeding u/s. 17, the course of inspection provided in Section 13 has to be necessarily followed in all situations is also set aside. [Para 30]

4. Interest of justice shall be sub-served if the Council causes inspection of all the institutions concerned in the present appeals which approached Madhya Pradesh High Court and Delhi High Court - being made as provided in Section 13, within six weeks from the date of the judgment. The Council shall communicate to the concerned institutions the result of such inspection and call upon the institutions to make up the deficiencies, if found during such inspection, as early as may be possible. With regard to the institutions where no deficiencies are found in the course of inspection or the institutions which make up deficiencies brought to their notice as a result of inspection, the Regional Committee shall issue appropriate order withdrawing order of derecognition. In respect of the institutions which do not make up the deficiencies within time granted by the Council, the order of withdrawal of recognition by the Regional Committee shall stand. [Para 32]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3505 of 2012 etc.

From the Judgment & Order dated 20.09.2010 of the High Court of Madhya Pradesh Bench at Gwalior in W.P. No. 4501 of 2010.

WITH

C.A. Nos. 3518, 3519, 3520, 3521, 3522, 3523, 3524, 3525, 3526, 3506, 3507, 3508, 3509, 3510, 3511, 3512, 3513, 3514, 3515, 3516 and 3517 of 2011.

Pallav Shishodia, Sunil Singh Parihar, S.K. Sabharwal, Amitesh Kumar, Ravi Kant, Priti Kumari, Navin Prakash, Vivek Malik, Kamal Mohan Gupta, Sanjay Sharawat, Jasbir Singh Malik, Dr. Kailash Chand, Varun Thakur, V.N. Raghupathy, C.D. Singh, Sanjay Sharawat, Milind Kumar, Sanjay Ghosh, Nitin Bhardwaj, Ajit umar Gupta, Ajai Kumar Bhatia, Jatinder Kumar Bhatia for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Delay condoned in filing special leave petitions.

2. Interlocutory application for permission to delete respondent Nos. 3 and 4 from the array of parties in Special Leave Petition (Civil) No. 12815 of 2011 is allowed at the risk of the petitioner.

3. Leave granted.

4. Of these 22 Appeals, 9 arise from the judgment of the Delhi High Court and 13 from the different judgments of the Madhya Pradesh High Court. 13 Appeals arising from the judgments of the Madhya Pradesh High Court have been preferred by the National Council for Teacher Education (for short, 'NCTE' or 'Council') and the concerned Regional Committee. The 9 Appeals arising from the judgment of the Delhi High Court have been filed by various institutions.

5. In these Appeals, the common question for

consideration is, where an action is contemplated against recognised institution under Section 17(1) of the National Council for Teacher Education Act, 1993, (for short, 'the 1993 Act') by the Regional Committee and inspection of such recognised institution is found necessary, whether such inspection must proceed under Section 13 of the 1993 Act or independent of Section 13, the Regional Committee is empowered to carry out inspection ?

6. The Madhya Pradesh High Court has taken the view that it is imperative on the part of the Council to issue notice under Section 13 of the 1993 Act to the recognised institution and, if on inspection under Section 13, contraventions are found, then a notice needs to be given by the Council to the concerned recognised institution pointing out to it the deficiencies noticed during inspection and, if the institution fails to remove the deficiencies so pointed out, the action under Section 17 may be taken.

7. The Delhi High Court has not accepted the above view of the Madhya Pradesh High Court. In the view of the Delhi High Court, the power of inspection by the Regional Committee is inherent in exercise of the power under Section 17 of the 1993 Act and it is not imperative on the part of the Council to issue notice under Section 13 of the 1993 Act before taking action under Section 17 of the 1993 Act.

8. Mr. Amitesh Kumar, learned counsel for the NCTE, stoutly defended the judgment of the Delhi High Court. He referred to Sections 13, 14, 15 and 17 of the 1993 Act and submitted that the provision of inspection under Section 13 is entirely different and the power of Regional Committee conferred under Section 17 with regard to withdrawal of recognition and the consequences for contravention of the provisions of the 1993 Act, Rules, Regulations, etc. is self-contained and not circumscribed by the provision of inspection by the Council provided in Section 13. He submitted that Regional Committee might not be able to discharge its functions

under Section 17 appropriately if for exercise of such power the provision of Section 13 is read into Section 17.

9. Learned counsel for the NCTE also raised the grievance about the nature of direction given by the Madhya Pradesh High Court in the impugned judgments.

10. On the other hand, learned counsel for the institutions supported the view of the Madhya Pradesh High Court. They submitted that the view of the Delhi High Court was not in conformity with the statutory scheme under the 1993 Act and the rules framed thereunder.

11. The 1993 Act was enacted by the Parliament to provide for the establishment of a National Council for Teacher Education with a view to achieving planned and co-ordinated development for the teacher education system throughout the country, the regulation and proper maintenance of norms and standards in the teacher education system and for matters connected therewith. It came into force with effect from July 1, 1995.

12. Section 2 deals with definitions of the expressions used elsewhere in the 1993 Act. Section 2(c) defines "Council" as under :

"Section 2(c) "Council" means the National Council for Teacher Education established under sub-section (1) of section 3."

Section 2(i) defines "recognised institution" as under :

"Section 2(i) "recognised institution" means an institution recognised by the Council under section 14."

Section 2(j) defines "Regional Committee" as under :

"Section 2(j) "Regional Committee" means a committee established under Section 20."

According to Section 2(k), "Regulations" means regulations made under Section 32.

13. The establishment of the Council is provided in Section 3. According to sub-section (2) thereof, the Council is a body corporate having perpetual succession. Under sub-section (3) of Section 3, with the previous approval of the Central Government, the Council may establish regional offices at other places in India while the head office of the Council is in Delhi.

14. Section 12 sets out the functions of the Council. Section 13, which is relevant for our purposes, reads as follows :-

"13. Inspection.-

(1) For the purposes of ascertaining whether the recognised institutions are functioning in accordance with the provision of this Act, the Council may cause inspection of any such institution, to be made by such persons as it may direct, and in such manner as may be prescribed.

(2) The Council shall communicate to the institution the date on which inspection under sub-section (1) is to be made and the institution shall be entitled to be associated with the inspection in such manner as may be prescribed.

(3) The Council shall communicate to the said institution, its views in regard to the results of any such inspection and may, after ascertaining the opinion of that institution, recommend to that institution the action to be taken as a result of such inspection.

(4) All communications to the institution under this section shall be made to the executive authority thereof, and the executive authority of the institution shall report to the Council the action, if any, which is proposed to be taken for the purposes of implementing any such recommendation as is referred to in sub-section (3).

15. Recognition of teacher education institutions is provided in Chapter IV of the 1993 Act. Sections 14, 15, 17 and 18, which are relevant for the consideration of the present matter, read as follows :

"14. Recognition of institutions offering course or training in teacher education.-(1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations:

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

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

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

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

(b) if it is of the opinion that such institution does

not fulfil the requirements laid down in sub-clause (a), pass an order refusing recognition to such institution for reasons to be recorded in writing:

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

(4) Every order granting or refusing recognition to an institution for a course or training in teacher education under sub-section (3) shall be published in the Official Gazette and communicated in writing for appropriate action to such institution and to the concerned examining body, the local authority or the State Government and the Central Government.

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

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

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

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

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

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

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

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

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

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

(4) Every order granting or refusing permission to a recognised institution for a new course or training in teacher education under sub-section (3), shall be published in the Official Gazette and communicated in writing for appropriate action to such recognised institution and to the concerned examining body, the local authority, the State Government and the Central Government.

17. Contravention of provisions of the Act and consequences thereof.-

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

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

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

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

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

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

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

end of the academic session next following the date of communication of the said order.

(4) If an institution offers any course or training in teacher education after the coming into force of the order withdrawing recognition under sub-section (1), or where an institution offering a course or training in teacher education immediately before the appointed day fails or neglects to obtain recognition or permission under this Act, the qualification in teacher education obtained pursuant to such course or training or after undertaking a course or training in such institution, shall not be treated as a valid qualification for purposes of employment under the Central Government, any State Government or University, or in any school, college or other educational body aided by the Central Government or any State Government.

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

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

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

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

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

Provided that before disallowing an appeal, the

appellant shall be given a reasonable opportunity to represent its case.

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

16. Section 20 deals with Regional Committees. Sub-section (1) thereof provides that the Council shall, by notification in the Official Gazette, establish the following Regional Committees, namely, (i) The Eastern Regional Committee; (ii) the Western Regional Committee; (iii) the Northern Regional Committee, and (iv) the Southern Regional Committee. Its composition, terms of the members, etc. are provided in different sub-sections. Sub-section (6) provides that the Regional Committee shall, in addition to its functions under Sections 14, 15 and 17, perform such other functions, as may be assigned to it by the Council or as may be determined by regulations.

17. The Council has been empowered to terminate the Regional Committee in the circumstances provided in Section 21. Section 27 empowers the Council to delegate its powers and functions, etc., except the power to make regulations under Section 32.

18. Section 31 empowers the Central Government to make rules, while Section 32 empowers the Council to make regulations. In exercise of powers conferred under Section 31, the Central Government has framed the rules titled the National Council for Teacher Education Rules, 1997 (for short, 'the 1997 Rules'). Relevant rule for the purposes of our consideration is Rule 8, which deals with inspection. Rule 8 provides as under :

"8. Inspection :-

(1) The Council may inspect the recognised institutions in the manner specified in sub-rules (2) to (8).

(2) The Council shall approve a panel of names of experts in teacher education or educational administration who may be able to inspect the recognised institutions. The Chairman shall nominate at least two person out of the panel of experts to a inspection team.

(3) The Council shall give a notice of its intention to the institution alongwith a questionnaire in Form - 'IV' seeking information within fifteen days on all relevant matters relating to the institution.

(4) On receipt of the completed questionnaire, the Council shall communicate the names of the members of inspection team and the date of inspection to the institution.

(5) The institution to be inspected shall nominate its one officer or employee, to be associated with the inspection team.

(6) The inspection team shall ascertain as to whether the institution is functioning in accordance with the provisions of the Act and the rules and regulations made thereunder.

(7) The members of the inspection team may, if deem necessary, interact with the faculty members and other employees of the institution.

(8) The inspection team shall submit its report to the Council within a period of fifteen days from the last day of the inspection."

19. From the survey of the above provisions, it would be seen that the Council has been established for ensuring planned and co-ordinated development for the teacher education; for proper maintenance of norms and standards for teacher education and for discharge of diverse functions assigned to it in the 1993 Act. The Regional Committees are empowered to discharge their functions as statutorily provided in Sections 14, 15 and 17 and also such other functions which

may be assigned to them by the Council or which may be provided in the regulations. For grant of recognition to an institution, the Regional Committee, on receipt of the application as prescribed, has to consider diverse aspects, particularly it has to be satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that the applicant-institution fulfils other conditions necessary for proper functioning for a course or training in teacher education. It is only after the Regional Committee issues recognition to an institution and that is notified in the Official Gazette, the Examining Body grants affiliation to such institution.

20. Under Section 15, the Regional Committee is empowered to grant permission for a new course or training to an institution which has already been granted recognition.

21. Section 17 empowers the Regional Committee to take action against recognised institution where it receives a representation from any person or it is suo motu satisfied that a recognised institution has contravened any of the provisions of the 1993 Act or the 1997 Rules, regulations, orders made or issued thereunder, etc. or the recognised institution has contravened the conditions of recognition.

22. Once recognition has been granted by the Regional Committee to an institution, the Council has to ensure that such recognised institution functions in accordance with the 1993 Act. To achieve that objective, the Council has to get inspection of recognised institution done periodically and, if such institution is found wanting in its functioning as required, then recommend to the institution the remedial action to be taken by it as a result of inspection.

23. In view of the above statutory scheme, it is hard to appreciate the litigious approach of the council and the present controversy. If the Council feels that its function of inspection under Section 13 may be performed by the Regional

Committees, it can so provide by invoking Section 20(6) or Section 27, as the case may be.

24. What is clear from the provisions of the 1993 Act is that post recognition, an institution acquires a different position. On recognition by the Regional Committee under Section 14 and on affiliation being granted by the Examining Body, once the recognised institution starts functioning, the interest of teachers, employees and the students intervene. In order to ensure that the recognised institutions function in accordance with the 1993 Act, the 1997 Rules, regulations and the conditions of recognition and, at the same time, functioning of such recognised institutions is not disturbed unnecessarily, the provision for inspection and follow-up action pursuant thereto has been made in Section 13. By Section 13, as a matter of law, it is intended that the Council ascertains whether the recognised institutions are functioning in accordance with the provisions of the 1993 Act or not. For that purpose, it empowers the Council to cause inspection of any such institution to be made by such persons as it may direct, and in such manner as may be prescribed. The Council may authorise the Regional Committee to carry out its function of inspection. But such inspection has to be made as prescribed in Rule 8 to find out whether such recognised institution is or is not functioning in accordance with the provisions of the 1993 Act.

25. In the 1997 Rules framed by the Central Government, Rule 8 deals with inspection and sub-rule (6) provides that the inspection team shall ascertain as to whether the recognised institution is functioning in accordance with the provisions of the 1993 Act and the rules and regulations made thereunder.

26. On inspection being completed as provided in sub-sections (1) and (2) of Section 13 of the 1993 Act read with Rule 8 of the 1997 Rules, the Council is required to communicate to the concerned institution its views with regard to the outcome of the inspection and, if deficiencies are found, to recommend to such institution to make up the deficiencies. The whole idea is that the Council as a parent body keeps an

eye over the recognised institutions that they function in accordance with the 1993 Act and the rules and the regulations and orders made or issued thereunder and, if any recognised institution is found wanting in its functioning, it is given an opportunity to rectify the deficiencies.

27. Derecognition or withdrawal of recognition of a recognised institution is a drastic measure. It results in dislocating the students, teachers and the staff. That is why, the Council has been empowered under Section 13 to have a constant vigil on the functioning of a recognised institution. On recommendation of the Council after inspection, if a recognised institution does not rectify the deficiencies and continues to function in contravention of the provisions of the 1993 Act or the rules or the regulations, the Regional Committee under Section 17 has full power to proceed for withdrawal of recognition in accordance with the procedure prescribed therein.

28. Sections 17 and 13 must be harmoniously construed. In exercise of its powers under Section 17, the Regional Committee may feel that inspection of a recognised institution is necessary before it can arrive at the satisfaction as to whether such recognised institution has contravened any of the provisions of the 1993 Act or the rules or the regulations or the orders made thereunder or breached the terms of the recognition. In that event, the route of inspection as provided under Section 13 has to be followed. If the Regional Committee has been authorised by the Council to perform its function of inspection, the Regional Committee may cause the inspection of recognition institution to be made as provided in Section 13 and prescribed in Rule 8. Where, however, the Regional Committee feels that the inspection of a recognised institution is not necessary for the proposed action under Section 17, obviously it can proceed in accordance with the law without following the route of inspection as provided under Section 13.

29. Mr. Amitesh Kumar, learned counsel for the NCTE,

submitted that for an action under Section 17, inspection of the recognied institutions would be necessary in most of the situations and, if the route of inspection under Section 13 was followed, it would result in delay and might affect right of appeal given to an aggrieved institution under Section 18 against the order of the Regional Committee passed under Section 17. The submission does not appeal us. It is hard to accept that unnecessary delay would occasion if inspection of a recognised institution is carried out in terms of Section 13 and as prescribed by Rule 8. Rather the inspection in that manner would bring objectivity and fairness. The guidelines for expeditious completion of such inspection can always be framed by the Council. The efficacy of right of appeal under Section 18 is not at all affected if the inspection of a recognied institution is done in the manner indicated above.

30. In view of the above, the view of the Delhi High Court does not commend us and we set aside the judgment of the Delhi High Court. The view of the Madhya Pradesh High Court to the extent it runs contrary to what we have noted above does not hold good. In other words, the view of the Madhya Pradesh High Court that before proceeding under Section 17 of the 1993 Act, the course of inspection provided in Section 13 has to be necessarily followed in all situations is set aside. If satisfaction under Section 17 can be arrived at without inspection of a recognition institution, the Regional Committee is not required to follow the route of Section 13. However, where the Regional Committee forms an opinion that for its proper satisfaction as to whether a recognised institution has contravened the provisions of the 1993 Act or the rules or the regulations or the orders made or issued thereunder or the conditions of recognition, an inspection is necessary, then necessarily the inspection and follow-up action under Section 13 has to be followed. We answer the question accordingly.

31. It appears that the concerned institutions are presently not functional because of withdrawal of recognition. Insofar as Appeals arising from the Madhya Pradesh High Court are

concerned, in the Appeals preferred by the NCTE, the Court by an interim order stayed the judgment of the Madhya Pradesh. As regards the Appeals filed by the institutions from the judgment of the Delhi High Court, we find that this Court refused to grant any stay in favour of the institutions. We are informed that with regard to the institutions who have appealed against the Delhi High Court judgment, the Regional Committee had already ordered withdrawal of their recognition, but later on, the order of withdrawal of recognition was put in abeyance until the decision in the Writ Petitions. It would be, thus, seen that on dismissal of the Writ Petitions by the Delhi High Court, the order of withdrawal of recognition of the institutions has come into operation.

32. In what we have discussed above, in our considered view, interest of justice shall be sub-served if the Council causes inspection of all the institutions concerned in these Appeals - which approached Madhya Pradesh High Court and Delhi High Court - being made as provided in Section 13 of the 1993 Act within six weeks from today. The Council shall communicate to the concerned institutions the result of such inspection and call upon the institutions to make up the deficiencies, if found during such inspection, as early as may be possible. With regard to the institutions where no deficiencies are found in the course of inspection or the institutions which make up deficiencies brought to their notice as a result of inspection, the Regional Committee shall issue appropriate order withdrawing order of derecognition. In respect of the institutions which do not make up the deficiencies within time granted by the Council, the order of withdrawal of recognition by the Regional Committee shall stand.

33. Civil Appeals are disposed of as above with no order as to costs.

34. In view of the above, Interlocutory Applications, if any, do not survive and stand disposed of.

K.K.T. Appeals dismissed.

VIJAY SINGH
v .
STATE OF U.P. & ORS.
(Civil Appeal No. 3550 of 2012)

APRIL 13, 2012

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

UTTAR PRADESH POLICE OFFICERS OF THE SUBORDINATE RANKS (PUNISHMENT AND APPEAL) RULES, 1991: Withholding of integrity certificate - Integrity certificate of police inspector withheld on the ground that he did not investigate a criminal case properly - Held: Punishment of withholding the integrity certificate is not provided for under the Rules - Therefore, order by Disciplinary Authority withholding integrity certificate as a punishment for delinquency was without jurisdiction.

ADMINISTRATIVE LAW: Administrative action - Held: The Authority has to act or purport to act in pursuance or execution or intended execution of the Statute or Statutory Rules - Holding departmental proceedings and recording a finding of guilt against any delinquent and imposing the punishment for the same is a quasi-judicial function and not administrative one - Imposing the punishment for a proved delinquency is regulated and controlled by the statutory rules - Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed - The disciplinary authority is bound to give strict adherence to the said rules.

The Poona City Municipal Corporation v. Dattatraya Nagesh Deodhar **AIR 1965 SC 555: 1964 SCR 178;** *The Municipal Corporation, Indore v. Niyamatulla (dead) by his Legal representatives* **AIR 1971 SC 97: 1970 (2) SCR 714;**

J.N. Ganatra v. Morvi Municipality, Morvi **AIR 1996 SC 2520: 1996 (3) Suppl. SCR 742;** *Borosil Glass Works Ltd. Employees Union v. D.D. Bambode & Ors.* **AIR 2001 SC 378: 2000 (5) Suppl. SCR 187;** *Bachhittar Singh v. State of Punjab & Anr.* **AIR 1963 SC 395: 1962 Suppl. SCR 713;** *Union of India v. H.C. Goel* **AIR 1964 SC 364: 1964 SCR 718;** *Mohd. Yunus Khan v. State of U.P. & Ors.* **(2010) 10 SCC 539: 2010 (12) SCR 448;** *Chairman-cum-Managing Director, Coal India Ltd. & Ors. v. Ananta Saha & Ors.* **(2011) 5 SCC 142: 2011 (5) SCR 44 - relied on.**

REVISION: Plea taken by the delinquent employee from the very initial stage that order passed by the Disciplinary Authority withholding the integrity certificate as a punishment for delinquency was without jurisdiction - Appellate authority brushed aside the said plea - Revisional authority rejected the revision as not maintainable - While holding so, it held that withholding of integrity certificate did not come under punishment under the Rules and therefore, revision was being returned without hearing on merit - Held: Since revisional authority was of the view that integrity could not be withheld as punishment, it erred in not rectifying the mistake committed by the disciplinary authority as well as by the appellate authority - This was a total non-application of mind.

SERVICE LAW: Integrity - Held: Integrity means soundness of moral principle or character, fidelity, honesty, free from every bias or corrupting influence or motive and a character of uncorrupted virtue - The charge of negligence, inadvertence or unintentional acts would not culminate into the case of doubtful integrity - Withholding integrity merely does not cause stigma, rather makes the person liable to face very serious consequences.

Pyare Mohan Lal v. State of Jharkhand & Ors. **AIR 2010**

SC 3753: 2010 (11) SCR 216; *M/s. Glaxo Laboratories (I) Ltd. v. Presiding Officer, Labour Court, Meerut & Ors.* **AIR 1984 SC 505: 1984 (1) SCR 230; A.L.** *Kalra v. The Project and Equipment Corporation of India Ltd.* **AIR 1984 SC 1361: 1984 (3) SCR 646 - relied on.**

CRIMINAL JURISPRUDENCE: Rule of law - Held: In a civilized society governed by rule of law, the punishment not prescribed under the statutory rules cannot be imposed - This principle is prescribed in legal maxim nulla poena sine lege which means that a person should not be made to suffer penalty except for a clear breach of existing law.

S. Khushboo v. Kanniammal & Anr. **AIR 2010 SC 3196: 2010 (5) SCR 322 - relied on.**

Case Law Reference:

1964 SCR 178	**relied on**	**Para 10**
1970 (2) SCR 714	**relied on**	**Para 10**
1996 (3) Suppl. SCR 742	**relied on**	**Para 10**
2000 (5) Suppl. SCR 187	**relied on**	**Para 10**
1962 Suppl. SCR 713	**relied on**	**Para 11**
1964 SCR 718	**relied on**	**Para 11**
2010 (12) SCR 448	**relied on**	**Para 11**
2011 (5) SCR 44	**relied on**	**Para 11**
2010 (11) SCR 216	**relied on**	**Para 14**
1984 (1) SCR 230	**relied on**	**Para 15**
1984 (3) SCR 646	**relied on**	**Para 15**
2010 (5) SCR 322	**relied on**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3550 of 2012.

From the Judgment & Order dated 19.07.2011 of the Court of Judicature at Allahabad in CMWP No. 39609 of 2011.

R.K. Gupta, S.K. Gupta, M.K. Singh, Shekhar Kumar for the Appellant.

Arvind Varma, Prateek Dwivedi, Gunnam Venkateswara Rao, Deependra Narain Singh, Aditi Mohan for the Respondents.

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. This appeal has been preferred against the impugned judgment and order dated 19.7.2011 passed by the High Court of Judicature at Allahabad in CMWP No. 39609 of 2011, wherein the case of the appellant against the order of punishment in disciplinary proceedings has been rejected as the revisional authority had held that against the order passed by the disciplinary authority, the revision was not maintainable. The High Court held that on such facts the writ petition was not worth entertaining.

3. The instant case is an eye opener as it reveals as to what extent the superior statutory authorities decide the fate of their subordinates in a casual and cavalier manner without application of mind and then expect them to maintain complete discipline merely being members of the disciplined forces.

The facts necessary to decide this appeal are as under:

A. The appellant when posted as Sub-Inspector of Police at Police Station, Moth, District Jhansi in the year 2010, had arrested Sahab Singh Yadav for offence punishable under

Section 60 of the U.P. Excise Act and after concluding the investigation, filed a chargesheet before the competent court against the said accused.

B. During the pendency of the said case in court, a show cause notice was served upon him by the Senior Superintendent of Police, Jhansi dated 18.6.2010 to show cause as to why his integrity certificate for the year 2010 be not withheld, as a preliminary enquiry had been held wherein it had come on record that the appellant while conducting investigation of the said offence did not record the past criminal history of the accused.

C. The appellant filed reply to the said show cause notice on 4.7.2010 pointing out that the said offence was bailable. The purpose of finding out the past criminal history of an accused is relevant in non-bailable cases as it may be a relevant issue for considering his bail application. More so, withholding the integrity could not be the punishment and as the criminal case was sub judice before the competent court against the said accused on the chargesheet submitted by him, no action could be taken against the appellant unless the court comes to the conclusion that investigation was defective.

D. The disciplinary authority, i.e. Senior Superintendent of Police without disclosing as under what circumstances not recording the past criminal history of the accused involved in the case had prejudiced the cause of the prosecution in a bailable offence and without taking into consideration the reply to the said show cause, found that the charge framed against the appellant stood proved, reply submitted by the appellant was held to be not satisfactory. Therefore, the integrity certificate for the year 2010 was directed to be withheld vide impugned order dated 8.7.2010.

E. Aggrieved, the appellant preferred an appeal before the Deputy Inspector General of Police on 20.8.2010 raising all the issues including that it was not necessary to find out the past

criminal history of the accused in bailable offence and the punishment so imposed was not permissible under the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as "Rules 1991"). The appeal stood rejected by the appellate authority vide order dated 29.10.2010.

F. Being aggrieved, appellant preferred a revision before the Additional Director General of Police which was dismissed vide order dated 29.3.2011 observing that withholding integrity certificate did not fall within the ambit of the Rules 1991. Therefore, the said revision could not be dealt with on merit and thus was not maintainable.

G. Aggrieved, appellant filed a Writ Petition which was dismissed by the High Court by the impugned judgment and order dated 19.7.2011. Hence, this appeal.

4. Shri R.K. Gupta, learned counsel appearing for the appellant has raised all the issues which had been agitated persistently by the appellant in his show cause reply, grounds in appeal and revision and in the writ petition before the High Court and submitted that as the punishment awarded is not provided under the Rules, 1991, the punishment so awarded is without jurisdiction and is liable to be quashed.

5. On the contrary, Shri Arvind Verma, learned counsel appearing for the State of U.P. made an attempt to defend the impugned orders on the ground that the appellant did not conduct the investigation properly and, therefore, the order passed against him was justified and no interference was required.

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

7. The only question involved in this appeal is as to whether the disciplinary authority can impose punishment not

prescribed under statutory rules after holding disciplinary proceedings. The appellant is employed in the U.P. Police and his service so far as disciplinary matters are concerned, is governed by the Rules 1991. Rule 4 thereof provides the major penalties and minor penalties and it reads as under:-

"1. Punishment - (1) The following punishments may, for good and sufficient reasons and as hereinafter provided, be imposed upon a Police Officer, namely -

a. Major Penalties -

i. Dismissal from service.

ii. Removal from service.

iii. Reduction in rank including reduction to a lower-scale or to a lower stage in a time scale.

b. Minor Penalties -

i. Withholding of promotion.

ii. Fine not exceeding one month's pay.

iii. Withholding of increment, including stoppage at an efficiency bar.

iv. Censure.

(2) In addition to the punishments mentioned in sub-rule (1) Head Constables and Constables may also be inflicted with the following punishments -

(i) Confinement to quarters (this term includes confinement to Quarter Guard for a term not exceeding fifteen days extra guard or other duty).

(ii) Punishment Drill not exceeding fifteen days.

(iii) Extra guard duty not exceeding seven days.

(iv) Deprivation of good-conduct pay.

(3) In addition to the punishments mentioned in sub-rules (1) and (2) Constables may also be punished with Fatigue duty, which shall be restricted to the following tasks:

(i) Tent pitching.

(ii) Drain digging.

(iii) Cutting grass, cleaning jungle and picking stones from parade grounds.

(iv) Repairing huts and butts and similar work in the lines.

(v) Cleaning arms.

8. Admittedly, the punishment imposed upon the appellant is not provided for under Rule 4 of Rules 1991. Integrity of a person can be withheld for sufficient reasons at the time of filling up the Annual Confidential Report. However, if the statutory rules so prescribe it can also be withheld as a punishment. The order passed by the Disciplinary Authority withholding the integrity certificate as a punishment for delinquency is without jurisdiction, not being provided under the Rules 1991, since the same could not be termed as punishment under the Rules. The rules do not empower the Disciplinary Authority to impose "any other" major or minor punishment. It is a settled proposition of law that punishment not prescribed under the rules, as a result of disciplinary proceedings cannot be awarded.

9. This Court in *State of U.P. & Ors. v. Madhav Prasad Sharma,* (2011) 2 SCC 212, dealt with the aforesaid Rules 1991 and after quoting Rule 4 thereof held as under:

"16. We are not concerned about other rule. The perusal of major and minor penalties prescribed in the above Rule makes it clear that sanctioning leave without pay *is not one of the punishments prescribed,* though, and under what circumstances leave has been sanctioned without pay is a different aspect with which we are not concerned for the present. However, Rule 4 makes it clear that sanction of leave without pay is not one of the punishments prescribed. *Disciplinary authority is competent to impose appropriate penalty from those provided in Rule 4 of the Rules which deals with the major penalties and minor penalties.* Denial of salary on the ground of "no work no pay" cannot be treated as a penalty in view of statutory provisions contained in Rule 4 defining the penalties in clear terms." (Emphasis added)

10. The Authority has to act or purport to act in pursuance or execution or intended execution of the Statute or Statutory Rules. (See: *The Poona City Municipal Corporation v. Dattatraya Nagesh Deodhar,* AIR 1965 SC 555; *The Municipal Corporation, Indore v. Niyamatulla (dead) by his Legal representatives,* AIR 1971 SC 97; *J.N. Ganatra v. Morvi Municipality, Morvi,* AIR 1996 SC 2520; and *Borosil Glass Works Ltd. Employees Union v. D.D. Bambode & Ors.,* AIR 2001 SC 378).

11. The issue involved herein is required to be examined from another angle also. Holding departmental proceedings and recording a finding of guilt against any delinquent and imposing the punishment for the same is a quasi-judicial function and not administrative one. (Vide: *Bachhittar Singh v. State of Punjab & Anr.,* AIR 1963 SC 395; *Union of India v. H.C. Goel,* AIR 1964 SC 364; *Mohd. Yunus Khan v. State of U.P. & Ors.,* (2010) 10 SCC 539; and *Chairman-cum-Managing Director, Coal India Ltd. & Ors. v. Ananta Saha & Ors.,* (2011) 5 SCC 142).

Imposing the punishment for a proved delinquency is

regulated and controlled by the statutory rules. Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed. The disciplinary authority is bound to give strict adherence to the said rules.

Thus, the order of punishment being outside the purview of the statutory rules is a nullity and cannot be enforced against the appellant.

12. This very ground has been taken by the appellant from the very initial stage. Before the appellate authority such a ground was taken. Unfortunately, the appellate authority brushed aside the said submission observing that the judgments mentioned by him to the effect that integrity could not be withheld as punishment not prescribed under the statutory rules, had no application to the case, and therefore, in that respect no further consideration was necessary. The order of punishment imposed by the disciplinary authority did not require any interference. The revisional authority rejected the revision as not maintainable observing as under:

"Representation is not maintainable. *Withholding of integrity certificate does not come under punishment under 1991 Rules*....Therefore, the revision is returned without hearing on merit on the ground of non maintainability."

(Emphasis added)

13. We fail to understand, if the revisional authority was of the view that integrity could not be withheld as punishment, why the mistake committed by the disciplinary authority as well as by the appellate authority could not be rectified by him. This shows a total non-application of mind. In such a fact-situation, the subordinate officer has to face the adverse consequences without any fault on his part. The grievance raised by the appellant that recording the past criminal history of an accused

is relevant in non-bailable offences only as it may be a relevant factor to be considered at the time of grant of bail, and he did not record the same as it was a bailable offence, has not been considered by any of the authorities at all. Undoubtedly, the statutory authorities are under the legal obligation to decide the appeal and revision dealing with the grounds taken in the appeal/revision etc., otherwise it would be a case of non-application of mind.

14. The present case shows dealing with the most serious issues without any seriousness and sincerity. Integrity means soundness of moral principle or character, fidelity, honesty, free from every biasing or corrupting influence or motive and a character of uncorrupted virtue. It is synonymous with probity, purity, uprightness rectitude, sinlessness and sincerity. The charge of negligence, inadvertence or unintentional acts would not culminate into the case of doubtful integrity.

Withholding integrity merely does not cause stigma, rather makes the person liable to face very serious consequences. (Vide: *Pyare Mohan Lal v. State of Jharkhand & Ors.,* AIR 2010 SC 3753).

15. Unfortunately, a too trivial matter had been dragged unproportionately which has caused so much problems to the appellant. There is nothing on record to show as to whether the alleged delinquency would fall within the ambit of misconduct for which disciplinary proceedings could be initiated. It is settled legal proposition that the vagaries of the employer to say ex post facto that some acts of omission or commission nowhere found to be enumerated in the relevant rules is nonetheless a misconduct (See: *M/s. Glaxo Laboratories (I) Ltd. v. Presiding Officer, Labour Court, Meerut & Ors.,* AIR 1984 SC 505; and *A.L. Kalra v. The Project and Equipment Corporation of India Ltd.,* AIR 1984 SC 1361).

16. Undoubtedly, in a civilized society governed by rule of law, the punishment not prescribed under the statutory rules

cannot be imposed. Principle enshrined in Criminal Jurisprudence to this effect is prescribed in legal maxim nulla poena sine lege which means that a person should not be made to suffer penalty except for a clear breach of existing law. In *S. Khushboo v. Kanniammal & Anr.,* AIR 2010 SC 3196, this Court has held that a person cannot be tried for an alleged offence unless the Legislature has made it punishable by law and it falls within the offence as defined under Sections 40, 41 and 42 of the Indian Penal Code, 1860, Section 2(n) of Code of Criminal Procedure 1973, or Section 3(38) of the General Clauses Act, 1897. The same analogy can be drawn in the instant case though the matter is not criminal in nature.

Thus, in view of the above, the punishment order is not maintainable in the eyes of law.

17. In the result, appeal succeeds and is allowed. The impugned order dated 8.7.2010 withholding integrity certificate for the year 2010 and all subsequent orders in this regard are quashed. Respondents are directed to consider the case of the appellant for all consequential benefits including promotion etc., if any, afresh taking into consideration the service record of the appellant in accordance with law.

D.G. Appeal allowed.

###NEXT FILE
RASHTRIYA ISPAT NIGAM LTD.
v.
M/S. DEWAN CHAND RAM SARAN
(Civil Appeal No. 3905 of 2012)

APRIL 25, 2012

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

Contract – Work contract – Payment of service tax – Liability of – Whether of the availer of service or the service provider – Service availer deducting service tax from the bill of the service provider – Dispute referred to arbitrator – Arbitrator holding that service tax was rightly deducted from the bills of the service provider in terms of the contractual obligation – In arbitration petition Single Judge of High Court holding that availer of service was liable since it was the assessee – Order of Single Judge confirmed by Division Bench of High Court – On appeal, held: Service provider under contractual obligation was liable to pay the service tax – Availer of service became the assessee after amendment by Finance Act 2000 – The liability arose out of the services rendered prior to 2000 amendment when the liability was on the service provider – Even when the service availer becomes liable to pay the service tax after 2000 amendment there is no bar from entering into an agreement and passing on the tax liability on the service provider – Award of the

arbitrator is upheld – Arbitration – Finance Act, 1994 – s. 65 – Finance Act, 2000 – s. 116.

Doctrine/Principle – Doctrine of contra proferentem – Applicability of.

The appellant-manufacturer of steel products, appointed the respondent as the handling contractor for transportation of its materials. The parties entered into a contract on 17.6.1998. Clause 9.3, thereof provided that contractor had to bear all taxes, duties and other liabilities in connection with discharge of his obligations.

By Finance Act, 1997, the service tax was extended to 'handling contractor'. The service tax was brought into force w.e.f. 16.11.1997. Consequent thereto, the appellant deducted service tax on the bills of the respondent for the period 30.11.1997 to 6.8.1999. The respondent refused to accept the deductions and raised a dispute for arbitration.

By Finance Act, 2000, an amendment was brought in whereby 'assessee' would be the person who availed the services and not the service provider.

The arbitrator dismissed the claim petition, holding that though the party who availed the service (appellant herein) was the 'assessee', in view of the agreement in clause 9.3 of the contract, it is contractual obligation of the claimant (respondent herein) to pay the service tax and the same was rightly deducted from the bills of the claimant in terms of the contractual obligation.

Respondent filed arbitration petition. Single Judge of High Court set aside the award holding that availer of service (appellant herein), as 'assessee' was liable to pay the tax. Appeal against the order was dismissed by Division Bench of the High Court. Hence the present

appeal.

Allowing the appeal, the Court

HELD: 1. The respondent as the contractor had to bear the service tax under clause 9.3 as the liability in connection with the discharge of his obligations under the contract. The appellant could not be faulted for deducting the service tax from the bills of the respondent under clause 9.3, and there was no reason for the High Court to interfere in the view taken by the arbitrator which was based, in any case on a possible interpretation of clause 9.3. The Single Judge as well as the Division Bench clearly erred in interfering with the award rendered by the arbitrator. The award made by the arbitrator is upheld. [Paras 30 and 31]

2. If the evolution of the service tax law is seen, initially the liability to pay the service tax was on the service provider, though it is now provided by the amendment of 2000 that the same is on the person who avails of the service. The agreement between the parties was entered into on 7.6.1998. The appellant had deducted 5% service tax on the bills of the respondent for the period 30.11.1997 to 6.8.1999 which in fact it was required to deduct under the service tax law as it then stood. Subsequently, by the amendment of the definition of assessee effected on 12.5.2000 (though retrospectively effective from 16.7.1997) the liability to pay the service tax was shifted to the person who was availing the service as the assessee. [Para 22]

3. Since clause 9.3 of the contract refers to the liabilities of the contractor in connection with discharge of his obligations, one will have to refer to clause 6 of the "Terms and Conditions for Handling of Iron and Steel Materials of RINL, VSP" which was an integral part of the

contract between the petitioner and the respondent, and which was titled "Obligations of the Contractor". The said paragraph 6 deals in great details with the work which was required to be done by the respondent as clearing and forwarding agent. It is therefore absolutely clear that the term "his obligations under this order" in clause 9.3 of the contract denoted the contractor's responsibilities under clause 6 in relation to the work which he was required to carry out as handling contractor. [Para 23]

4. If the clause 9.3 and the contract are read as a whole and various provisions thereof are harmonized, clause 9.3 will have to be held as containing the stipulation of the contractor accepting the liability to pay the service tax, since the liability did arise out of the discharge of his obligations under the contract. It appears that the rationale behind clause 9.3 was that the petitioner as a Public Sector Undertaking should be thereby exposed only to a known and determined liability under the contract, and all other risks regarding taxes arising out of the obligations of the contractor are assumed by the contractor. [Para 25]

5. Service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax. Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too

prior to this amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent. It is conventional and accepted commercial practice to shift such liability to the contractor. [Paras 26 and 28]

Laghu Udyog Bharati vs. Union of India **1999 (6) SCC 418: 1999 (3) SCR 1199;** *Numaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd.* **2007 (8) SCC 466: 2007 (9) SCR 724 – relied on.**

6. Even, assuming that clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator. [Para 29]

SAIL vs. Gupta Brother Steel Tubes Ltd. **2009 (10) SCC 63: 2009 (14) SCR 253;** *Sumitomo Heavy Industries Ltd. vs. ONGC Ltd.* **2010 (11) SCC 296 – relied on.**

7. If clause 9.3 was to be read as meaning that the respondent would be liable only to honour his own tax liabilities, and not the liabilities arising out of the obligations under the contract, there was no need to make such a provision in a bilateral commercial document executed by the parties, since the respondent would be otherwise also liable for the same. A clause in a commercial contract is a bilateral document mutually agreed upon, and hence the principle of *contra proferentem* can have no application. Therefore, clause 9.3 will have to be read as incorporated only with a view to provide for contractor's acceptance of the tax liability arising out of his obligations under the contract. [Para 27]

Bank of India vs. K. Mohan Das **2009 (5) SCC 313: 2009 (5) SCR 118 – distinguished.**

H.P. State Electricity Board vs. R.J. Shah **1999 (4) SCC 214: 1999 (2) SCR 643;** *M/s Sudarsan Trading Co. vs. Govt. of Kerala* **1989 (2) SCC 38: 1989 (1) SCR 665;** *Gujarat Ambuja Cements Ltd. vs. Union of India* **2005 (4) SCC 214: 2000 (2) SCR 594 – referred to.**

Case Law Reference:

1999 (2) SCR 643	**Referred to.**	**Para 16**
1989 (1) SCR 665	**Referred to.**	**Para 17**
2000 (2) SCR 594	**Referred to.**	**Para 18**
1999 (3) SCR 1199	**Relied on.**	**Para 26**
2009 (5) SCR 118	**Distinguished.**	**Para 27**
2007 (9) SCR 724	**Relied on.**	**Para 28**
2009 (14) SCR 253	**Relied on.**	**Para 29**
2010 (11) SCC 296	**Relied on.**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3905 of 2012.

From the Judgment & Order dated 25.02.2008 of the High

Court of Judicature at Bombay in Appeal No. 188 of 2006.

S. Ganesh, Pratap Venugopal, Surekha Raman, Namrata Sood, Gaurav Nair, Varun Singh (for K.J. John & Co.) for the Appellant.

K.K. Rai, S.K. Pandey, Awanish Kumar, Krishnanand Pandeya for the Respondent.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 25.2.2008 rendered by a Division Bench of the Bombay High Court in Appeal No.188/2006 confirming the decision of a single Judge of that court dated 4.7.2005 in Arbitration Petition No.364/2004, whereby the High Court has set aside the award dated 25.5.2004 passed by a sole arbitrator which award had dismissed the Claim Petition of the respondent against the appellant herein.

3. The questions involved in this appeal are two-fold, (i) firstly, whether under the relevant clause 9.3 of the terms and conditions of the contract between the parties, the appellant was right in deducting the service tax from the bills of the respondent and, (ii) secondly, whether the interpretation of this clause and the consequent award rendered by the arbitrator was against the terms of the contract and therefore illegal as held by the High Court, or whether the view taken by the arbitrator was a possible, if not a plausible view.

The contract and the relevant clause:

4. The appellant - a Govt. of India undertaking is engaged in the manufacture of steel products and pig-iron for sale in the domestic and export markets. The respondent is a partnership firm carrying on the business of transportation of goods. In the year 1997, the appellant appointed the respondent as the handling contractor in respect of appellant's iron and steel materials from their stockyard at Kalamboli, Navi Mumbai. A formal contract was entered into between the two of them on 17.6.1998. 'Terms and conditions for handling of iron and steel materials' though recorded in a separate document, formed a part of this contract. Clause 9.0 of these terms and conditions was concerning the payment of bills. Clause 9.3 thereof read as follows:-

> "9.3. The Contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the Tax Authorities for the account of the Contractor and the Company shall provide the Contractor with required Tax Deduction Certificate."

Evolution of service tax:

5. Service Tax was introduced for the first time under Chapter V of the Finance Act, 1994. Section 66 of the Act was the charging section and it provided for the levy of service tax at the rate of five per cent of the value of the taxable services. "Taxable service" was defined in Section 65 to include only three services namely any service provided to an investor by a stockbroker, to a subscriber by the telegraph authority, and to a policy-holder by an insurer carrying on general insurance business. Section 68 required every person providing taxable service to collect the service tax at specified rates. Section 69 of the Finance Act, 1994 provided for registration of the persons responsible for collecting service tax. Sub-sections (2) and (5) indicated that it was the provider of the service who was responsible for collecting the tax and obliged to get registered.

6. By the Finance Act, 1997 the first amendment to Section 65 of the Finance Act, 1994 was made, inter alia, by extending the meaning of "taxable service" from three services

to 18 different services categorised in Section 65(41), sub-clauses (a) to (r). Sub-clause (j) made service to a client by clearing and forwarding agents in relation to clearing and forwarding operations, a taxable service. Similarly, service to a customer of a goods transport operator in relation to carriage of goods by road in a goods carriage was, by sub-clause (m), also included within the umbrella of taxable service. The phrases "clearing and forwarding agent" and "goods transport operator" were defined as follows:

> "65. (10) 'clearing and forwarding agent' means any person who is engaged in providing any service, either directly or indirectly, connected with clearing and forwarding operations in any manner to any other person and includes a consignment agent;
>
> ***
>
> (17) 'goods transport operator' means any commercial concern engaged in the transportation of goods but does not include a courier agency;"

7. The service tax was brought into force on 5.11.1997 vide Notification No.44/77 with effect from 16.11.1997. Consequent thereupon, the appellant deducted 5% tax on the bills of the respondent for the period 30.11.1997 to 6.8.1999. The respondent, however, refused to accept the deductions, and raised a dispute for arbitration under clause 15 of the terms and conditions mentioned above. This dispute was referred for the arbitration of a sole arbitrator, a retired Judge of the Delhi High Court.

8. Rules 2 (xii) and 2 (xvii) of the Service Tax Rules, 1994 as amended in 1997 made the customers or clients of clearing and forwarding agents and of goods transport operators as assesses. These amended rules were challenged and were held ultra vires the Act by this Court in *Laghu Udyog Bharati vs. Union of India* reported in 1999 (6) SCC 418. The Court examined the provisions of the Act and particularly Section 68 and the definition of "person responsible for collecting the service tax" in Section 65(28) and in terms held in paragraph 9 that "the service tax is levied by reason of the services which are offered. The imposition is on the person rendering service."

9. To overcome the law laid down in *Laghu Udyog Bharati* (supra), the Finance Act 2000 brought in an amendment on 12.5.2000 (effective from 16.7.1997) in the manner indicated in Section 116 which reads as follows:

> "116. Amendment of Act 32 of 1994. - During the period commencing on and from the 16th day of July, 1997 and ending with the 16th day of October, 1998, the provisions of Chapter V of the Finance Act, 1994 shall be deemed to have had effect subject to the following modifications, namely-
>
> (a) in Section 65,-
>
> (i) for clause (6), the following clause had been substituted, namely-
>
> '(6) "assessee" means a person liable for collecting the service tax and includes-
>
> (i) his agent; or
>
> (ii) in relation to services provided by a clearing and forwarding agent, every person who engages a clearing and forwarding agent and by whom remuneration or commission (by whatever name called) is paid for such services to the said agent; or
>
> (iii) in relation to services provided by a goods transport operator, every person who pays or is liable to pay the freight either himself or through his agent for the transportation of goods by road in a goods carriage;'

(ii) after clause (18), the following clauses had been substituted, namely-

'(18-A) "goods carriage" has the meaning assigned to it in clause (14) of Section 2 of the Motor Vehicles Act, 1988;

(18-B) "goods transport operator" means any commercial concern engaged in the transportation of goods but does not include a courier agency;';

(iii) in clause (48), after sub-clause (m), the following sub-clause had been inserted, namely-

'(m-a) to a customer, by a goods transport operator in relation to carriage of goods by road in a goods carriage;';

(b) in Section 66, for sub-section (3), the following sub-section had been substituted, namely-

'(3) On and from the 16th day of July, 1997, there shall be levied a tax at the rate of five per cent of the value of taxable services referred to in sub-clauses (g), (h), (i), (j), (k), (l), (m), (m-a), (n) and (o) of clause (48) of Section 65 and collected in such manner as may be prescribed.';

(c) in Section 67, after clause (k), the following clause had been inserted, namely-

'(k-a) in relation to service provided by goods transport operator to a customer, shall be the gross amount charged by such operator for services in relation to carrying goods by road in a goods carriage and includes the freight charges but does not include any insurance charges'."

Proceedings prior to this appeal:

10. The respondent contended before the learned arbitrator that its dominant work was of transporting and forwarding of goods by road, and not of a handling contractor, and that the mere fact that it may be required to handle the goods in a manner and to the extent provided in the contract between the parties, was merely incidental. The learned arbitrator, however, noted that the contract between the parties dated 17.6.1998 referred the respondent as the 'handling contractor', who shall undertake the job of handling iron and steel materials at the yard of the company on the terms and conditions stipulated therein as also in the manner and in all respects as mentioned in the contract. He referred to the notice inviting tender, the declaration of particulars relating to the tender, the schedule of rates, the provision relating to scope of work and the obligations of the contractor detailed in clause 6. In that connection, he referred to the letter dated 27.11.1997 received from the office of Commissioner of Central Excise, Chennai wherein he had also held the work of the handling contractor as that of the clearing and forwarding agent liable to pay service tax. The arbitrator therefore held that the respondent was forwarding and clearing contractor.

11. Thereafter, he dealt with the question of liability to pay the service tax, and by a detailed award dated 25.5.2004 rejected the contentions of the respondent and dismissed the Claim Petition. In the penultimate paragraph, the learned arbitrator held as follows:-

> "Clause 9.3 of the Tender Terms and Conditions of the Contract, to my mind is clear & unambiguous. Thus it is the Respondent who is the assessee. It is also true that liability is of the Respondent to pay the tax. But then, under the contract, under clause 9.3 to be more precise, it was agreed that it would be the claimant who shall bear "all taxes, duties and other liabilities" which accrue or become payable "In connection with the discharge of his obligation." Service tax was one such tax/duty or a liability which was directly connected with "the discharge of his

obligation" as the clearing & forwarding agent. It is this contractual obligation which binds the claimant and though under the law it is the respondent who is the assessee, it can & rightly did deduct the service tax from the bills of the claimant in terms of the said contractual obligation, the validity and legality of which has not been challenged before me."

12. This award led the respondent to file a petition under Section 34 of the Arbitration and Conciliation Act, 1996 being Arbitration Petition No.364/2004 before the High Court of Judicature at Bombay. A Learned Single Judge of the High Court allowed that petition, and set aside the award with costs by judgment and order dated 4.7.2005. The learned Judge while arriving at that conclusion referred to the definition of the term "assessee" and held that insofar as service tax under the Finance Act, 1994 is concerned, the appellant as the assessee was liable to pay the tax. The learned Judge observed as follows:-

"The purpose of clause 9.3 is not to shift the burden of taxes from the assessee who is liable under the law to pay the taxes to a person who is not liable to pay the taxes under the law. In my opinion, the award therefore suffers from total non-application of mind and therefore, it is required to be set aside."

13. The appellant preferred an appeal to a Division Bench of Bombay High Court against the said judgment and order. The appeal was numbered as Appeal No. 188/2006. The Division Bench dismissed the appeal by holding as follows:

"16. ……..As noted, the Respondents are not "Assessee" under the Service Tax Act. The Appellants are, being recipients, resisted and have filed the return. It is, therefore, the appellant's obligation to pay the Service Tax and not that of the Respondents, there is no specific clause that such service tax, liability would be deductible from the amount payable by the Appellants to the Respondent pursuant to the contract in question. The deduction as claimed and as directed by the award in absence of any agreement or clause, therefore, is not correct."

14. Being aggrieved by the said judgment and order, the present appeal has been filed. Mr. S. Ganesh, learned Senior Counsel has appeared for the appellant, and Mr. K.K. Rai, learned Senior Counsel has appeared for the respondent.

Submissions on behalf of the appellant:

15. As stated at the outset, the question involved before the arbitrator and in the offshoots therefrom, is with respect to interpretation of the above referred clause No.9.3. Mr. Ganesh, learned counsel for the appellant submitted that the entire purpose in providing this clause was to provide that the contractor will be responsible for the taxes, duties and the liabilities which would arise in connection with discharge of the obligations of the contractor. The obligations of the contractor were laid down in clause 6.0 of the terms and conditions, referred to above. This clause provides the details of contractor's responsibility for clearance of the consignments of the appellant. The liability to pay the service tax arises out of the service provided by the respondent. There is no dispute that in view of the above referred amendment of 2000, the appellant as the recipient of the service is the assessee under the service tax law. However, there is no prohibition in the law against shifting the burden of the tax liability. In the instant case, the tax liability will depend upon the value of the taxable service provided by the respondent, and therefore clause 9.3 required the respondent to take the burden. Mr. Ganesh cited the example of sales tax which the assessee can shift to the customer. In his submission, the phrase, "liabilities in connection with the discharge of his obligations" under this clause will have to be construed in that context.

16. The learned counsel submitted that interpretation of

clause 9.3 by the arbitrator was the correct one, and in any case, was a possible if not a plausible one. The Courts were, therefore, not expected to interfere therein. He submitted that the dispute in the present case was concerning the interpretation of a term of the contract. It has been laid down by this Court that in such situations, even if one is of the view that the interpretation rendered by the arbitrator is erroneous, one is not expected to interfere therein if two views were possible. Mr. Ganesh referred to the following observations of this Court in *H.P. State Electricity Board vs. R.J. Shah* reported in [1999 (4) SCC 214] at the end of paragraph 27, which are to the following effect:-

> "27. .....The dispute before the arbitrators, therefore, clearly related to the interpretation of the terms of the contract. The said contract was being read by the parties differently. The arbitrators were, therefore, clearly called upon to construe or interpret the terms of the contract. The decision thereon, even if it be erroneous, cannot be said to be without jurisdiction. It cannot be said that the award showed that there was an error of jurisdiction even though there may have been an error in the exercise of jurisdiction by the arbitrators."

17. It was also submitted by the learned counsel that the court is not expected to substitute its evaluation of the conclusion of law or fact arrived at by the arbitrator and referred to the following observation in paragraph 31 in *M/s Sudarsan Trading Co. vs. Govt. of Kerala* reported in [1989 (2) SCC 38].

> ".....in the instant case the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decision, the arbitrator had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties....."

Submissions on behalf of the respondent

18. Learned senior counsel for the respondent Mr. Rai, on the other hand, submitted that the concerned clause cannot be read to imply a right to shift the tax liability. He submitted that the appellant was the assessee for the payment of service tax, and the concerned clause merely laid down that the contractor will have to pay all taxes, duties and other liabilities which he was otherwise required to pay if they arise in connection with discharge of his obligations under the contract. The appellant was entitled to deduct only the income tax and other taxes or duties which it was so required by law to deduct. The disputed deductions would mean that the contractor had taken over the tax liability of the appellant as if the liability was on the contractor. He referred to the judgment of this Court in *Gujarat Ambuja Cements Ltd. vs. Union of India* reported in [2005 (4) SCC 214]. This judgment discusses the evolution of the service tax as to how service tax was introduced by the Finance Act, 1994, how the meaning of taxable service was extended in 1997, and how the definition of assessee subsequently included the person who engages a clearing and forwarding agent, or a goods transport operator.

19. He drew our attention to paragraph 21 of *Gujarat Ambuja Cement Ltd.* (supra) wherein this Court observed as follows:

> "21. As is apparent from Section 116 of the Finance Act, 2000, all the material portions of the two sections which were found to be incompatible with the Service Tax Rules were themselves amended so that now in the body of the Act by virtue of the amendment to the word "assessee" in Section 65(5) and the amendment to Section 66(3), the liability to pay the tax is not on the person providing the taxable service but, as far as the services

provided by clearing and forwarding agents and goods transport operators are concerned, on the person who pays for the services. As far as Section 68(1-A) is concerned by virtue of the proviso added in 2003, the persons availing of the services of goods transport operators or clearing and forwarding agents have explicitly been made liable to pay the service tax."

20. The respondent relied upon the judgment of this Court in *Bank of India vs. K. Mohan Das* reported in [2009 (5) SCC 313] by one of us (Lodha, J.). The issue in that matter was with respect to the interpretation of some of the provisions of the voluntary retirement scheme of 2000 of the appellant bank. In paragraph 32 thereof this Court has observed as follows:-

"….32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulation, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (verba chartarum fortius accipiuntur contra proferentem)."

Based on this paragraph, it was submitted that the arbitrator was bound to follow the principle of contra proferentem in the present case. It was contended that since the propounder of the contract was the petitioner in case of vagueness, the rule of contra proferentem will have to be applied in interpreting the present contract. Therefore, the liability to pay service tax was on the appellant as the assessee, and it could not be contended that under Clause 9.3 that liability was accepted by the respondent. The judgment in *Bank of India* (supra) was also pressed into service to submit that clause 9.3 and the contract must be read as a whole, and an attempt should be made to harmonise the provisions.

21. It was submitted by the respondent that this Hon'ble Court very succinctly summarised the legal principles for setting aside an award in *SAIL vs. Gupta Brother Steel Tubes Ltd.* (by one of us - Lodha J.) reported in [2009 (10) SCC 63] in paragraph 18 wherefrom principles (i) and (iv) would be attracted. As against that, the appellant stressed sub-paras (ii) & (vi) of the same paragraph 18. We may therefore quote the entire paragraph which reads as follows:-

"….18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions o this Court can be summarised thus:

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal."

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party

who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award."

Consideration of the rival submissions:

22. We have noted the submissions of both the learned counsel. If we see the evolution of the service tax law, initially the liability to pay the service tax was on the service provider, though it is now provided by the amendment of 2000 that the same is on the person who avails of the service. It is relevant to note that the agreement between the parties was entered into on 7.6.1998. The appellant had deducted 5% service tax on the bills of the respondent for the period 30.11.1997 to 6.8.1999 which in fact it was required to deduct under the service tax law as it then stood. Subsequently, by the amendment of the definition of assessee effected on 12.5.2000 (though retrospectively effective from 16.7.1997) the liability to pay the service tax was shifted to the person who was availing the service as the assessee. We must note that it is thereafter that the parties have gone for arbitration, and the respondent has relied upon the changed definition of assessee to contend that the tax liability was that of the appellant.

23. We are concerned with the question as to what was the intention of the parties when they entered into the contract on 7.6.1998, and how the particular clause 9.3 is to be read. Since clause 9.3 of the contract refers to the liabilities of the contractor in connection with discharge of his obligations, one will have to refer to clause 6 of the "Terms and Conditions for Handling of Iron and Steel Materials of RINL, VSP" which was an integral part of the contract between the petitioner and the respondent, and which was titled "Obligations of the Contractor". The said paragraph 6 deals in great details with the work which was required to be done by the respondent as clearing and forwarding agent. It is therefore absolutely clear that the term "his obligations under this order" in clause 9.3 of the contract denoted the contractor's responsibilities under clause 6 in relation to the work which he was required to carry out as handling contractor.

24. If we look into this clause 6.0, we find that the obligations of the contractor are defined and spelt out in minute details. Clause 6.0 is split into 33 sub-clauses, and it provides for obligations of the contractor in various situations concerning the clearance of consignments, and the services to be provided by the respondent as the handling contractor wherefrom the tax liability arises. The contractor is made responsible for pilferage, any loss or misplacement of the consignments also. Clause 9.0 which deals with payment of bills, provides in clauses 9.1 and 9.2 that the bills will be prepared on the basis of the actual operations performed and the materials accounted on the basis of weight carried and received. Clause 9.3 has to be seen on this background. The tax liability will depend upon the value of the taxable service provided, which will vary depending upon the volume of the goods handled.

25. It was submitted on behalf of the respondent that clause 9.3 and the contract must be read as a whole and one must harmonise various provisions thereof. However, in fact when that is done as above, clause 9.3 will have to be held as containing the stipulation of the contractor accepting the liability to pay the service tax, since the liability did arise out of the discharge of his obligations under the contract. It appears that the rationale behind clause 9.3 was that the petitioner as a Public Sector Undertaking should be thereby exposed only to a known and determined liability under the contract, and all other risks regarding taxes arising out of the obligations of the contractor are assumed by the contractor.

26. As far as the submission of shifting of tax liability is concerned, as observed in paragraph 9 of *Laghu Udyog Bharati* (Supra), service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax. Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.

27. If this clause was to be read as meaning that the respondent would be liable only to honour his own tax liabilities, and not the liabilities arising out of the obligations under the contract, there was no need to make such a provision in a bilateral commercial document executed by the parties, since the respondent would be otherwise also liable for the same. In *Bank of India* (supra) one party viz. the bank was responsible for the formulation of the Voluntary Retirement Scheme, and the employees had only to decide whether to opt for it or not, and the principle of contra proferentem was applied. Unlike the VRS scheme, in the present case we are concerned with a clause in a commercial contract which is a bilateral document mutually agreed upon, and hence this principle can have no application. Therefore, clause 9.3 will have to be read as incorporated only with a view to provide for contractor's acceptance of the tax liability arising out of his obligations under the contract.

28. It was pointed out on behalf of the appellant that it is conventional and accepted commercial practice to shift such liability to the contractor. A similar clause was considered by this Court in the case of *Numaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd.,* reported in [2007 (8) SCC 466]. In that matter, the question was as to whether the contractor was liable to pay and bear the countervailing duty on the imports though this duty came into force subsequent to the relevant contract. The relevant clause 2(b) read as follows:

> "2(b) All taxes and duties in respect of job mentioned in the aforesaid contracts shall be the entire responsibility of the contractor…"
>
> Reading this clause and the connected documents, this Court held that they leave no manner of doubt that all the taxes and levies shall be borne by the contractor including this countervailing duty.

29. In any case, assuming that clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator. The legal position in this behalf has been summarized in paragaph 18 of the judgment of this court in *SAIL vs. Gupta Brother Steel Tubes Ltd.* (supra) and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. vs. ONGC Ltd.* reported in [2010 (11) SCC 296] to which one of us (Gokhale J.) was a

party. The observations in paragraph 43 thereof are instructive in this behalf. This paragraph 43 reads as follows:

> "43. …….The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn**. The Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

*[2009 (5) SCC 142]

30. In view of what is stated above, the respondent as the contractor had to bear the service tax under clause 9.3 as the liability in connection with the discharge of his obligations under the contract. The appellant could not be faulted for deducting the service tax from the bills of the respondent under clause 9.3, and there was no reason for the High Court to interfere in the view taken by the arbitrator which was based, in any case on a possible interpretation of clause 9.3. The learned single Judge as well as the Division Bench clearly erred in interfering with the award rendered by the arbitrator. Both those judgments will, therefore, have to be set-aside.

31. Accordingly, the appeal is allowed and the impugned judgments of the learned Single Judge as well as of the Division Bench, are hereby set aside. The award made by the arbitrator