COAL MINES P.F. COMMR. THR. BOARD OF TRUSTEE

v.

RAMESH CHANDRA JHA

(Civil Appeal No. 41 of 2012)

JANUARY 4, 2012

[ALTAMAS KABIR, SURINDER SINGH NIJJAR AND J. CHELAMESWAR, JJ.]

Code of Civil Procedure, 1908 – ss. 2(17) and 80 and Order XXVII Rule 5A – Appellant is the Coal Mines Provident Fund Commissioner through the Board of Trustees, constituted u/s.3 of the Coal Mines Provident Fund and Miscellaneous Provisions Act, CMPF Organisation – Respondent, an employee in Coal Mines Provident Fund Organisation [CMPFO], removed from service – He filed suit challenging his removal from service – Preliminary issue framed in the suit as to whether in the absence of notice u/s.80 CPC, the suit was maintainable – Matter brought upto Supreme Court which held that appellant-Coal Mines Provident Fund Commissioner is a "public officer" within meaning of s.2(17) CPC and that notice u/s.80 was required to be given to him before the suit was filed by the Respondent – Respondent withdrew his suit and filed a fresh suit after serving notice upon the appellant u/s.80 CPC – Suit decreed – First Appellate Court held that since the Coal Mines Provident Fund Commissioner was a public officer under the Union of India so as to attract the provisions of Order XXVII Rule 5A and s.79 of CPC, the suit was bad for non-joinder of the Union of India which was a necessary party – Respondent filed Second Appeal which was allowed by the High Court – Held: The judgment of the High Court does not require any interference, particularly when the issue raised has already been decided by Supreme Court, wherein it was categorically held that the Coal Mines Provident Fund Commissioner is a

"public servant" within the meaning of s.2(17) CPC – In view of the aforesaid finding regarding the status of the Coal Mines Provident Fund Commissioner, the First Appellate Court erred in reversing the finding of the Trial Court on this score – It was not open to the First Appellate Court to re-open the question which had been decided by Supreme Court, at least on the same submissions which had been made earlier that though the officer concerned was an employee of the Central Government, he no longer enjoyed the said status when he was discharging the functions of the Chairman of the Board of Trustees of the Coal Mines Provident Fund Scheme – Coal Mines Provident Fund and Miscellaneous Provisions Act – s.3.

The appellant is the Coal Mines Provident Fund Commissioner through the Board of Trustees, constituted under Section 3 of the Coal Mines Provident Fund and Miscellaneous Provisions Act, CMPF Organisation. The Respondent, a Lower Division Clerk in the service of the Coal Mines Provident Fund Organisation [CMPFO], was removed from service.

Challenging his removal from service, the Respondent filed Title Suit No.78 of 1979. A preliminary issue was framed in the suit as to whether in the absence of notice under Section 80 CPC, the suit was maintainable. Aggrieved, Respondent filed Civil Revision in the High Court, which held that since the Appellant was not a "public officer" as defined in CPC, no notice under Section 80 was required to be served upon him before the suit was filed and held the suit to be maintainable. The appellant, thereafter, brought the matter to this Court and in Civil Appeal No.1932 of 1982 this Court reversed the finding of the Appellate Authority upon holding that the appellant-Coal Mines Provident Fund Commissioner is a "public officer" within the meaning of Section 2(17) of

CPC and that notice under Section 80 was required to be given to him before the suit was filed by the Respondent.

Subsequently, Respondent withdrew his Title Suit No.78 of 1979 and filed a fresh suit being Title Suit No.102 of 1990 after serving notice upon the Appellant under Section 80 CPC. The suit was decreed in favour of the Respondent. The appellant preferred Title Appeal. The First Appellate Court held that since the Coal Mines Provident Fund Commissioner was a public officer under the Union of India so as to attract the provisions of Order XXVII Rule 5A and Section 79 of CPC, the suit was bad for non-joinder of the Union of India which was a necessary party. Aggrieved, the Respondent filed Second Appeal which was allowed by the High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD: The judgment and order of the High Court does not require any interference, particularly when the issue raised in this appeal has already been decided by this Court in Civil Appeal No.1932 of 1982, wherein it was categorically held that the Coal Mines Provident Fund Commissioner is a "public servant" within the meaning of Section 2(17) of CPC. The First Suit filed by the Respondent, being Title Suit No.78 of 1979, was withdrawn on the ground that it had been held that a notice under Section 80 of the Code was necessary since the Coal Mines Provident Fund Commissioner was a public servant and, thereafter, a second suit, being Title Suit No.102 of 1990, was filed by the Respondent upon due notice to the Coal Mines Provident Fund Commissioner. In view of the aforesaid finding regarding the status of the Coal Mines Provident Fund Commissioner, the First Appellate Court erred in reversing the finding of the Trial Court on this score. It was not open to the First Appellate Court to re-open the question which

had been decided by this Court, at least on the same submissions which had been made earlier that though the officer concerned was an employee of the Central Government, he no longer enjoyed the said status when he was discharging the functions of the Chairman of the Board of Trustees of the Coal Mines Provident Fund Scheme. [Para 13]

R.P.F. Commissioner v. Shiv Kumar Joshi **AIR 2000 SC 331: 1999 (5) Suppl. SCR 294 and** *Steel Authority of India Ltd. & Ors. v. National Union Waterfront Workers and Ors.* **2001 (7) SCC 1: 2001 (2) Suppl. SCR 343 – cited.**

Case Law Reference:

1999 (5) Suppl. SCR 294	**cited**	**Para 10**
2001 (2) Suppl. SCR 343	**cited**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 41 of 2012.

Sunil Kumar, Mona K. Rajvanshi for the Appellant.

Ramesh Chandra Jha Respondent-In-Person.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The appellant herein is the Coal Mines Provident Fund Commissioner through the Board of Trustees, constituted under Section 3 of the Coal Mines Provident Fund and Miscellaneous Provisions Act, CMPF Organisation, Dhanbad. The Respondent was appointed as a Lower Division Clerk on 16th January, 1967, by the Chief Commissioner in the service of the Coal Mines Provident Fund Organisation, hereinafter referred to as 'CMPFO'. In connection with the forcible occupation of a Type III quarter, a departmental proceeding was commenced against the Respondent and on 16th March, 1979, on being

found guilty of the charge framed against him, the Respondent was removed from service.

3. Challenging his removal from service, the Respondent filed Title Suit No.78 of 1979 in the Court of Munsif at Dhanbad. Simultaneously, the Respondent also filed an appeal before the Appellate Authority under Regulation 37 of the Staff Regulations, which was dismissed on 4th March, 1980.

4. Meanwhile, in the suit, the learned Munsif, Dhanbad (Jharkhand) framed a preliminary issue in Suit No.78 of 1979 as to whether in the absence of notice under Section 80 of the Code of Civil Procedure, the suit was maintainable? Aggrieved by the said order, the Respondent filed Civil Revision No.341 of 1980(R) in the Ranchi Bench of the Patna High Court, which held that since the Appellant was not a "public officer" as defined in the Code of Civil Procedure, no notice under Section 80 was required to be served upon him before the suit was filed. By its order dated 7th September, 1981, the Ranchi Bench of the Patna High Court set aside the findings of the learned Munsif and held the suit to be maintainable. The Appellant, thereafter, brought the matter to this Court and in Civil Appeal No.1932 of 1982 this Court by its judgment dated 31st January, 1990, reversed the finding of the Appellate Authority upon holding that the Coal Mines Provident Fund Commissioner is a "public officer" within the meaning of Section 2(17) of the aforesaid Code. It was, therefore, settled upto this Court that the Appellant herein was a public officer and that notice under Section 80 was required to be given to him before the suit was filed by the Respondent.

5. On account of the above decision of this Court, on 15th February, 2002, the Respondent withdrew his Title Suit No.78 of 1979 and filed a fresh suit being Title Suit No.102 of 1990 after serving notice upon the Appellant under Section 80 CPC. The Appellant contested the suit which was decreed in favour of the Respondent on 15th February, 2002, by the Second Munsif, Dhanbad, declaring the removal of the Respondent from

service to be arbitrary and in violation of the principles of natural justice and the provisions of Article 311 of the Constitution. Holding the same not to be binding on the Respondent/Plaintiff, the Munsif declared that the Respondent would be deemed to be in continuous service in the CMPF Organisation under the Appellant, together with all benefits and privileges.

6. Aggrieved by the order of the learned Munsif decreeing the Respondent's Title Suit No.102 of 1990, the Appellant preferred Title Appeal No.29 of 2002 before the Court of XIIIth Additional District Judge, Dhanbad. In the said Appeal, the Respondent herein raised the question as to whether the suit of the Respondent was bad for non-joinder of the Union of India which was a necessary party in the suit? Accepting the contention of the Appellant, the First Appellate Court held that since the Coal Mines Provident Fund Commissioner was a public officer under the Union of India so as to attract the provisions of Order XXVII Rule 5A and Section 79 of the Code of Civil Procedure, the suit was bad for non-joinder of the Union of India which was a necessary party. The XIIIth Additional District Judge, Dhanbad, accordingly, set aside the order of the learned Munsif, Second Court, Dhanbad, in Title Suit No.102 of 1990 by its judgment and order dated 16th February, 2005.

7. Aggrieved by the order of the First Appellate Authority, the Respondent filed Second Appeal No.134 of 2005 before the Jharkhand High Court at Ranchi. Four years later, on 15th June, 2009, since the Respondent had not delivered vacant possession of the quarters in his possession, the Estate Officer, by his order dated 15th June, 2009, gave the Respondent 15 days' time to vacate the suit premises along with other members of his family. The Respondent, however, did not vacate the quarters as directed, whereupon the Appellant filed I.A. No.1871 of 2009 in the Second Appeal No.134 of 2005 pending before the High Court, for a direction upon the Respondent to vacate the quarters occupied by him. On 24th August, 2009, the Respondent, through his counsel, gave an

undertaking to vacate the quarters by 30th November, 2009. In addition, the Estate Officer passed an order in the execution proceedings on 28th August, 2009, for eviction of the Respondent from the quarters in question. On his failure to honour the undertaking given by him to vacate the suit premises, the High Court took strong exception to the violation of the undertaking given by the Respondent and initiated fresh contempt proceedings against him and ordered the Superintendent of Police, Dhanbad, to get the quarters vacated and to hand over vacant possession of the same to the competent authority of the CMPFO, Dhanbad within 48 hours of the receipt of the order. On 19th February, 2010, the High Court heard the contempt case when it was informed that the Respondent had vacated the quarters and had handed over the keys to the concerned authorities on 17th February, 2010.

8. It is necessary to indicate at this stage that Second Appeal No.134 of 2006, which had been filed by the Respondent, was admitted on the substantial question of law as to whether the Lower Appellate Court had committed a serious error in dismissing the Respondent/Plaintiff's suit on the ground of non-joinder of the Union of India thereby upsetting the judgment and decree of the Trial Court without deciding the question as to whether the Coal Mines Provident Fund Commissioner is a public officer under the Union of India so as to attract the provisions of Order XXVII Rule 5A of the Code of Civil Procedure.

9. Appearing in support of the Appeal, Mr. J.P. Singh, learned Senior Advocate, urged that the High Court had not properly answered the aforesaid question ignoring the fact that earlier this Court had in Civil Appeal No.1932 of 1982 between the same parties, categorically decided that the Coal Mines Provident Fund Commissioner, though functioning as the Chairman of the Board of Trustees constituted under paragraph 3 of the Coal Mines Provident Fund Act, is a public officer and was, therefore, required to be made a party in the proceedings

under Order XXVII Rule 5A of the Code of Civil Procedure, which, *inter alia,* provides as follows :-

> "**Order 27 Rule 5A – To be joined as a party in suit against a public officer. -** Where a suit is instituted against a public officer for damages or other relief in respect of any act alleged to have been done by him in his official capacity, the Government shall be joined as a party to the suit."

Mr. J.P. Singh urged that since this Court had already decided the issue, there was no further need for the High Court to go into the question once again and decide the same in a manner which was contrary to the law declared by this Court. Mr. Singh submitted that this was in blatant violation of the principles of hierarchy of Courts and also the binding nature of the judgments of the Supreme Court in terms of Article 141 of the Constitution of India. Learned counsel submitted that this was a fit case where the order of the High Court was liable to be set aside since the provisions of Order XXVII Rule 5A of the Code of Civil Procedure were squarely attracted to the facts of the case.

10. The Respondent, who appeared in-person, urged that notwithstanding the earlier decision of this Court in which the Coal Mines Provident Fund Commissioner had been held to be a public officer, such a stand was contrary to the other decisions of this Court in (1) *R.P.F. Commissioner Vs. Shiv Kumar Joshi* [AIR 2000 SC 331] and (2) *Steel Authority of India Ltd. & Ors. Vs. National Union Waterfront Workers and Ors.* [2001 (7) SCC 1], wherein it had been held that the Regional Provident Fund Commissioner under the Employees Provident Fund Act and the Employees Provident Fund Scheme, 1952, is not a public officer, though it discharges statutory functions for running the Scheme. It was also observed that the Board of Trustees had not in any way been delegated with the sovereign powers of the State even if it is held that administrative charges were payable by the Central

Government. The Respondent urged that the finding of the lower Appellate Court holding the suit to be bad for non-joinder of the Union of India as a party in the Appeal, was patently erroneous, contrary to law and unsustainable. Consequently, the order of the learned lower Appellate Court was set aside and the judgment and decree of the Trial Court in Title Suit No.102 of 1990 was restored.

11. Challenging the order of the learned Single Judge of the Jharkhand High Court, the Appellant herein filed Second Appeal No.134 of 2005, which was ultimately allowed and the finding of the lower Appellate Court that the suit was bad for non-joinder of the Union of India as a party was held to be erroneous and was liable to be set aside.

12. As indicated hereinbefore, it is the said judgment and order of the High Court of Jharkhand which is the subject matter of the present Civil Appeal.

13. Having considered the submissions made on behalf of the Appellant and the Respondent appearing in-person, we are of the view that the judgment and order of the High Court does not require any interference, particularly when the issue raised in this Appeal has already been decided by this Court in Civil Appeal No.1932 of 1982, wherein it was categorically held that the Coal Mines Provident Fund Commissioner is a "public servant" within the meaning of Section 2(17) of the Code of Civil Procedure. It cannot be forgotten that the First Suit filed by the Respondent, being Title Suit No.78 of 1979, was withdrawn on the ground that it had been held that a notice under Section 80 of the Code was necessary since the Coal Mines Provident Fund Commissioner was a public servant and, thereafter, a second suit, being Title Suit No.102 of 1990, was filed by the Respondent upon due notice to the Coal Mines Provident Fund Commissioner. In view of the aforesaid finding regarding the status of the Coal Mines Provident Fund Commissioner, the First Appellate Court erred in reversing the finding of the Trial Court on this score. It was not open to the

First Appellate Court to re-open the question which had been decided by this Court, at least on the same submissions which had been made earlier that though the officer concerned was an employee of the Central Government, he no longer enjoyed the said status when he was discharging the functions of the Chairman of the Board of Trustees of the Coal Mines Provident Fund Scheme.

14. We, therefore, have no hesitation in holding that in view of the fact that the Coal Mines Provident Fund Commissioner has been held by this Court to be a public officer, it was necessary to join the Union of India as a party in the suit in view of the provisions of Order XXVII Rule 5A of the Code of Civil Procedure. We, accordingly, see no reason to interfere with the judgment and order appealed against and the Appeal filed by the Coal Mines Provident Fund Commissioner is dismissed, though without any order as to costs.

B.B.B. Appeal dismissed.

DENEL (PROPRIETARY LIMITED)
v.
GOVT. OF INDIA, MINISTRY OF DEFENCE
(Arbitation Petition No. 11 of 2011)

JANUARY 09, 2012

[SURINDER SINGH NIJJAR, J.]

Arbitration and Conciliation Act, 1996 – s. 11(4), (5), (6) and (8) – Application u/s. 11(4) and (6) – Government contract – Disputes between parties – Director General, Ordnance Factory (DGOF) appointed Additional General Manager of the Factory as an arbitrator as per the Arbitration clause – Petitioner apprehending bias, issued Notification that mandate of arbitrator was terminated – However, the arbitrator continued with the arbitration proceedings – Thereafter, on an application filed by the petitioner u/s. 14(2), mandate of arbitrator terminated observing that the arbitrator had been biased – Direction for appointment of DGOF as an arbitrator and in the alternative option given to DGOF to appoint Government servant as an arbitrator as per the Arbitration clause – Within 30 days, DGOF not commencing the arbitration proceedings nor did he appoint any Government Servant as arbitrator – Petition u/s. 11(6) seeking appointment of an independent arbitrator by the petitioner – Two weeks later, appointment of 'S' as arbitrator by the respondents(Government) – Maintainability of petition u/s. 11(6) – Held: Is maintainable – Right to appointment of an arbitrator does not automatically get forfeited after expiry of 30 days as prescribed u/s. 11(4) and 11(5) but an appointment has to be made before the petitioner files application u/s. 11 seeking appointment of an arbitrator – On facts, subsequent arbitrator was appointed after filing of the petition u/s. 11(6) – Thus, respondents clearly forfeited their right to make the appointment of an arbitrator and

appointment of 'S' as an arbitrator cannot be sustained – Furthermore, material placed by the petitioner indicate that it would not be unreasonable to entertain the belief that the arbitrator appointed by the respondent would not be independent – Thus, appointment of 'S' cannot pass the test u/s. 11(8) which is ensuring appointment of independent and impartial arbitrator – Sole Arbitrator appointed to adjudicate disputes that have arisen between the parties – Appointment of Arbitrators by the Chief Justice of India Scheme, 1996 – Paragraph 2.

Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Anr. **2000 (8) SCC 151;** *Punj Lloyd Ltd. Vs. Petronet MHB Ltd.* **2006 (2) SCC 638;** *Indian Oil Corporation Limited & Ors. Vs. Raja Transport Private Limited* **(2009) 8 SCC 520: 2009 (13) SCR 510 - relied on.**

Yashwith Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd. & Anr. **2006 (6) SCC 204: 2006 (3) Suppl. SCR 96;** *Bharat Sanchar Nigam Limited & Anr. Vs. Motorola India Private Limited* **2009 (2) SCC 337: 2008 (13) SCR 445;** *Denel (Proprietary) Limited Vs. Bharat Electronics Limited & Anr.* **2010 (6) SCC 394: 2008 (13) SCR 445;** *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited* **2008 (10) SCC 240: 2008 (12) SCR 216;** *Ace Pipeline Contracts (P) Ltd. Vs. Bharat Petroleum Corpn. Ltd.* **2007 (5) SCC 304: 2007 (4) SCR 777 – referred to.**

Case Law Reference:

2000 (8) SCC 151	**Relied on.**	**Para 7**
2006 (2) SCC 638	**Relied on.**	**Para 7**
2006 (3) Suppl. SCR 96	**Referred to.**	**Para 7**
2009 (13) SCR 510	**Relied on.**	**Para 8**
2008 (13) SCR 445	**Referred to.**	**Para 11**

2008 (12) SCR 216 **Referred to. Para 12**

2007 (4) SCR 777 **Referred to. Para 12**

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 11 of 2011.

Under Section 11 (6) of the Arbitration and Conciliation Act-1996.

Shekhar Naphade, Vikas Goel, Abhishek Kumar, Momota Devi Oinam for the Petitioner.

H.P. Raval, ASG, Wasim A. Quadri, Sadhna Sandhu, Harsh N. Parekh, Anirudh Sharma, Palash Kanwar, Anil Katityar for the Respondent.

The order of the Court was delivered

O R D E R

SURINDER SINGH NIJJAR, J. 1. The petitioner has filed the present application under Sections 11(4) and (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') read with paragraph 2 of the appointment of the Arbitrators by the Chief Justice of India Scheme, 1996. It is stated that a contract was entered into between the parties for the supply of Base Bleed Units. Initially the quantity to be supplied was 42,000 units. Later on, the quantity was increased to 52,000 units as per Clause 20 of the agreement. By 5th January, 2005, the petitioner had supplied substantial quantity of the goods. However, some of the goods supplied by the petitioner were rejected by the respondent. The petitioner, thereafter, informed the respondent that two more lots were ready for discharge on 17th March, 2005. However, Union of India never responded to the letter, hence, loss and damage has been caused to the petitioner. In April, 2005, after various discussions, the petitioner came to know that improper fuzes were used by the Union of India which led to the problem that occurred in the lots which were rejected. Thereafter, on 21st April, 2005, Union of India put on hold all contracts. Further, on

14th May, 2008, Union of India sent a notice seeking refund of amount of US $ 23,20,240, failing which legal action was to issue.

2. The disputes having arisen between the parties, efforts were made to resolve the same. The details of the efforts made are narrated in the petition. Since the disputes could not be resolved through mutual discussions, the DGOF appointed one Mr. A.K. Jain, Additional General Manager, Ordnance Factory, Ambajhari, Nagpur as an arbitrator in terms of Clause 19(F) of the contract, which reads as under:-

> "All the disputes and difference arising out of or in any way touching or concerning the agreement (matters for which the decision of a specific authority as specified in the contract shall be final under this agreement, shall not be subject to arbitration) shall be referred to the sole arbitration of the Director General, Ordnance Fys. Govt. of India for the time being or a Government servant appointed by him. The appointee shall not be a Govt. Servant who had dealt with the matters to which this agreement relates and that in the course of his duties as Govt. Servant has had not expressed views on all or any of the matter is in dispute or difference. In case the appointed Govt. Servant in place of the incumbents."

3. The petitioner objected to the appointment of the Arbitrator. The petitioner apprehended that the arbitrator would be favorably inclined towards the employer. Therefore, on 23rd January, 2009, the petitioner issued a notification under Section 14 of the Arbitration Act stating that the mandate of the arbitrator had been terminated. Since inspite of the aforesaid notification, the arbitrator continued with the arbitration proceedings, the petitioner moved the Principal District Court, Chandrapur and filed Civil Misc. Application No. 45 of 2009 under Section 14(2) of the Act. On 21st December, 2010, the Principal District Court, Chandrapur terminated the mandate of the Sole Arbitrator with the observation that the arbitrator has

been biased in favour of respondent No.1. A direction was also issued in the following terms:-

> "Director General, Ordnance Factory, Government of India, is appointed as an Arbitrator or he may appoint Government servant as an Arbitrator , as per Clause 19(F) of February 2004 contract and 19(E) of November 2004 contract, after following due procedure."

4. It is an admitted fact that pursuant to the aforesaid directions, within 30 days, DGOF did not himself commence the arbitration proceedings; nor did he appoint any Government servant as an arbitrator. The petitioner has, therefore, moved the present petition under Section 11(6) of the Act on 2nd of March, 2011 seeking appointment of an independent arbitrator. The petitioner claims that the directions issued by the District Court are without any authority or jurisdiction and as such *void ab initio*. According to the petitioner, the direction of the learned District Judge is based upon an incorrect interpretation of Section 15 of the Act, whereby the learned Judge assumed the authority to appoint an arbitrator, which is beyond her jurisdiction. The Act does not make provision for the appointment of an arbitrator other than in accordance with the arbitration agreement and in the limited circumstances provided for in Section 11. The petitioner also claims that the DGOF would be disqualified to act as an arbitrator as the dispute is against the Government of India and particularly against the Ordnance Factory, Ministry of Defence. If the Director General, Ordnance Factory, Government of India (DGOF) or a Government servant is appointed as an arbitrator, he shall always be bound by the directions/instructions issued by his superior authorities and, therefore, such an arbitrator would not be in a position to independently decide the dispute between the parties. According to the petitioner, such an appointment would be contrary to the provisions of Section 12 of the Act. The petitioner further claims that the DGOF has already through his actions in the dispute between the parties demonstrated his lack of independence and impartiality. The learned District

Judge in her judgment alluded to the fact that the DGOF without receiving any request for referral of the dispute between the petitioner and the respondent colluded with the previous arbitrator to appoint him as an arbitrator without any notice to the petitioner. The petitioner further claims that the DGOF has been directly involved in the dispute as would be evident from the correspondence between the petitioner and the respondent. The petitioner thereafter makes a reference to the letter dated 30th June, 2008 wherein the DGOF took the view that the petitioner is liable to replace the rejected Base Bleed units, as alleged by the respondent, making specific reference to the correspondence in which respondent stated its claim against the petitioner and cancelled the contract with the petitioner. The petitioner further claims that the DGOF has failed to appoint the arbitrator either as directed by the learned District Judge or in accordance with Section 15 of the Act within 30 days of the order dated 21st December, 2010. Therefore, the respondent has forfeited the right to make an appointment from the date of the filing of the petition.

5. The respondent has controverted the plea put forward by the petitioner by way of a detailed counter affidavit. It is claimed by the respondent that the petition under Section 11(6) of the Act is not maintainable, as Mr.Satyanarayana has been appointed as a substitute arbitrator on 16th March, 2011. The petitioner was duly notified about the appointment of the arbitrator in its letter dated 26th March, 2011. The petitioner was requested to forward its claim within 10 days. The petitioner was informed that if such a claim does not reach by 8th April, 2011, the arbitrator will presume that the petitioner did not have any further claim. Upon receipt of that letter, the petitioner objected to the appointment of a new arbitrator by its letter dated 15th April, 2011, as being contrary to clause 19(F). The petitioner has wrongly claimed that since the appointment of the arbitrator was not made prior to the filing of the petition under Section 11(6), the respondent has forfeited the right to make the appointment.

6. I have heard the learned counsel for the parties.

7. On the basis of facts narrated above, Mr. Naphade submits that the petitioner has forfeited its right to appoint the arbitrator. In support of the submission, he relied on the judgments of this Court in the case of *Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Anr.*[1], *Punj Lloyd Ltd. Vs. Petronet MHB Ltd.*[2] and *Yashwith Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd. & Anr.*[3]

8. On the other hand, Mr. Raval, appearing for the Union of India has submitted that the petitioner has failed to make out a case for not appearing before the arbitrator appointed pursuant to the order of the Principal District Court, Chandrapur on 21st December, 2010. He submits that the respondents have willingly accepted the appointment of the earlier arbitrator in accordance with the arbitration clause. Therefore, they can have no justification to challenge the appointment of the present arbitrator, who has only been appointed as the mandate of the earlier arbitrator had been terminated by the orders of the Court. The petitioner was duly informed about the appointment of the arbitrator on 16th March, 2011. The arbitrator had intimated both the parties about the appointment and had requested them to submit their respective claims within a period of 10 days. It was only at that stage that the petitioner wrote a letter dated 15th April, 2011 stating that the appointment of the arbitrator was in violation of arbitration clause. Mr. Raval further submitted that in the present circumstances, the matter is squarely covered against the petitioner by the judgment in the case of *Indian Oil Corporation Limited & Ors. Vs. Raja Transport Private Limited*[4]. On the basis of the aforesaid judgment, the learned counsel submitted that the present petition under Section 11(6) is misconceived,

1. 2000 (8) SCC 151.
2. 2006 (2) SCC 638.
3. 2006 (6) SCC 204.
4. (2009) 8 SCC 520.

as the Sole Arbitrator has been appointed in terms of the agreed procedure contained in Clause 19 (F) and (E).

9. I have considered the submissions made by the learned counsel. In my opinion, Mr. Naphade is correct in his submission that the matter is squarely covered by the judgment in *Datar Switchgears Ltd.* (supra), wherein this Court has observed as follows:-

> "**19.** So far as cases falling under Section 11(6) are concerned — such as the one before us — no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, *so far as Section 11(6) is concerned*, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited."

The aforesaid ratio has been reiterated in *Punj Lloyd Ltd.* (supra).

10. In the facts and circumstances of this case, it would

not be possible to accept the submission of Mr. Raval that the present petition filed by the petitioner under Section 11(6) of the Act is not maintainable. On the admitted facts, it is evident that the mandate of the earlier arbitrator Mr. Arun Kumar Jain was terminated by the orders passed by the Principal District Court, Chandrapur in Civil Misc. Application No. 45 of 2009 by order dated 21st December, 2010. A perusal of the aforesaid order would show that the petitioner had challenged the validity of Clause 19(F). The aforesaid submission was rejected by the Court with the observation that the same cannot be the subject matter which could be resolved in a petition under Section 14(2) of the Act. The petitioner was given an opportunity to challenge the clauses in an appropriate forum. The District Judge, however, accepted the submission of the petitioner that there are justifiable reasons to indicate that the arbitrator has not acted fairly. Hence the mandate of Mr. A.K. Jain as the Sole Arbitrator was terminated. In accordance with Section 15(2) of the Act, DGOF was appointed as an arbitrator. He was also given an option to appoint Government servant as an arbitrator as per the arbitration clause. It is a matter of record that DGOF did not act himself as an arbitrator, pursuant to the aforesaid order of the Principal District Judge, Chandrapur dated 21st December, 2010. Mr. Satyanarayana, the subsequent arbitrator, had not been appointed till 16th March, 2011. The present petition was moved on 2nd March, 2011. Therefore, the respondents had clearly forfeited their right to make the appointment of an arbitrator. Consequently, the appointment of Mr. Satyanarayana, as an arbitrator, by letter dated 16th March, 2011 cannot be sustained.

11. Mr. Naphade then submits that in the peculiar facts and circumstances of this case, the respondent cannot now be permitted to insist that the Court should appoint an arbitrator only in terms of the agreed procedure. In support of this submission, he emphasised that DGOF can not act as an arbitrator as the same will be against the principles of natural justice, as no one can be a judge in his own cause. He further

submitted that even if any government employee is appointed as an arbitrator, he will not be in a position to act against the Union of India as he will be obliged to follow the instructions of the superiors. He placed reliance on *Bharat Sanchar Nigam Limited & Anr. Vs. Motorola India Private Limited*[5]. It is not possible to accept the submissions of Mr. Naphade. This Court in the case of *Indian Oil Corporation Limited* (supra) has considered such a submission and observed that :-

> "Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties. If a party, with open eyes and full knowledge and comprehension of the relevant provision enters into a contract with a Government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of the disputes by arbitration, but not by the named arbitrator who is an employee of the other party.
>
> It is now well settled by a series of decisions that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work of the contract) will be the arbitrator, are neither void nor unenforceable. All the decisions proceed on the basis that when senior officers of Government/statutory corporations/public sector undertakings are appointed as arbitrators, they will function independently and impartially, even though they are employees of such institutions/organizations."

In my opinion, the aforesaid observations are a complete answer to the submission made by Mr. Naphade.

12. Learned senior counsel then submitted that even if the arbitration clause is held to be valid, Mr. Satyanarayana still can

5. 2009 (2) SCC 337.

not be permitted to continue with arbitration as the petitioner has a strong apprehension that he is biased in favour of the respondents. In support of the submission, the learned senior counsel has relied on the various notices issued by the arbitrator which were invariably received after the expiry of the time fixed by the arbitrator. In support of his submission, he relied on a judgment of this Court in the case of *Denel (Proprietary) Limited Vs. Bharat Electronics Limited & Anr.*[6].

13. Replying to the apprehension of bias pleaded by Mr. Naphade, it is submitted by Mr. Raval that non-receipt of the letters in time can not possibly give rise to an apprehension that Mr. Satyanarayana is in any manner biased against the petitioner. He submits that the reliance of the petitioner on the judgment in *Denel (Proprietary) Limited* (supra) is also misconceived as the aforesaid judgment was confined to the facts of that particular matter. He, therefore, submits that the Court ought to follow the agreed procedure and not to interfere with the appointment of Mr. Satyanarayana as the arbitrator. In the alternative, he submits that even if the appointment of Mr. Satyanarayana is held to be invalid, the matter has to be left to the DGOF to either act as an arbitrator himself or to appoint an officer appointed by him.

14. It is true that in normal circumstances while exercising jurisdiction under Section 11(6), the Court would adhere to the terms of the agreement as closely as possible. But if the circumstances warrant, the Chief Justice or the nominee of the Chief Justice is not debarred from appointing an independent arbitrator other then the named arbitrator.

15. A Three Judge Bench of this Court in the case of *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited*[7], considered the scope and ambit of Section 11(6) of the Act, as divergent

6. 2010 (6) SCC 394.

7. 2008 (10) SCC 240.

views were taken in two decisions of this Court in *Ace Pipeline Contracts (P) Ltd. Vs. Bharat Petroleum Corpn. Ltd.*[8] and *Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd. (supra).* Upon consideration of the relevant provisions it was inter-alia observed as follows:-

> "A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations."

16. Keeping in view the observations made above, I have examined the facts pleaded in this case. I am of the opinion that in the peculiar facts and circumstances of this case, it would be necessary and advisable to appoint an independent arbitrator. In this case, the contract is with Ministry of Defence. The arbitrator Mr. Satyanarayana has been nominated by DGOF, who is bound to accept the directions issued by the Union of India. Mr. Satyanarayana is an employee within the same organization. The attitude of the respondents towards the proceeding is not indicative of an impartial approach. In fact, the mandate of the earlier arbitrator was terminated on the material produced before the Court, which indicated that the arbitrator was biased in favour of the Union of India. In the present case also, Mr. Naphade has made a reference to various notices issued by the arbitrator, none of which were received by the petitioner within time. Therefore, the petitioner was effectively denied the opportunity to present his case before

8. 2007 (5) SCC 304.

the Sole Arbitrator. Therefore, the apprehensions of the petitioner can not be said to be without any basis.

17. It must also be remembered that even while exercising the jurisdiction under Section 11(6), the Court is required to have due regard to the provisions contained in Section 11(8) of the Act. The aforesaid section provides that apart from ensuring that the arbitrator possesses the necessary qualifications required of the arbitrator by the agreement of the parties, the Court shall have due regard to other considerations as are likely to ensure the appointment of an independent and impartial arbitrator. Keeping in view the aforesaid provision, this Court in the case of *Indian Oil Corporation Limited* (supra), whilst emphasizing that normally the Court shall make the appointment in terms of the agreed procedure has observed that the Chief Justice or his designate may deviate from the same after recording reasons for the same. In paragraph 45 of the aforesaid judgment, it is observed as follows:-

> "**45.** If the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. *But as clarified by Northern Railway Admn.10, where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act.* In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be

> the exception to the rule, to be resorted for valid reasons."
>
> (emphasis supplied)

18. The material placed before the Court by the petitioner would indicate that it would not be unreasonable to entertain the belief that the arbitrator appointed by the respondent would not be independent. That being so, the appointment of Mr. Satyanarayana can not pass the test under Section 11(8) of the Act.

19. Similarly, applying the test laid down in *Indian Oil Corporation Ltd.* (supra), this Court in the case of *Denel (Proprietary) Limited* (supra) also observed that the Managing Director, Bharat Electronics Limited, which is a Government company is bound by the directions/instructions issued by his superior authority. The Court also observed that according to the pleaded case of the respondents, though it was liable to pay the amount due under the purchase order, it was not in a position to supply the dues only because of the direction issued by the Ministry of Defence, Government of India. Therefore, the Court concluded that the Managing Director may not be in a position to independently decide the dispute between the parties. Consequently, the Court proceeded to appoint an independent arbitrator.

20. In my opinion, the circumstances in the present case are similar and a similar course needs to be adopted. In view of the above, the petition is allowed.

21. In exercise of my powers under Section 11(4) and (6) of the Arbitration and Conciliation Act, 1996 read with Paragraph 2 of the Appointment of Arbitrator by the Chief Justice of India Scheme, 1996, I hereby appoint Hon.Mr.Justice Ashok C. Agarwal, Retd. Chief Justice of the Madras High Court, R/o No. 20, Usha Kiran, 2nd Pasta Lane, Colaba, Mumbai-400 005, as the Sole Arbitrator, to adjudicate the disputes that have arisen between the parties, on such terms

and conditions as the learned Sole Arbitrator deems fit and proper. Undoubtedly, the learned Sole Arbitrator shall decide all the disputes arising between the parties without being influenced by any prima facie opinion expressed in this order, with regard to the respective claims of the parties.

22. The registry is directed to communicate this order to the Sole Arbitrator forthwith to enable him to enter upon the reference and decide the matter as expeditiously as possible.

N.J. Arbitration Petition allowed.

V.K. NASWA

v.

HOME SECRETARY, U.O.I. AND ORS.

(WRIT PETITION (CIVIL) NO. 533 OF 2011)

JANUARY 09, 2012

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Constitution of India, 1950 – Article 32 – Writ petition against respondents alleging that they insulted the National Flag and violated the norms of waiving of National Flag, as provided in the Flag Code 2002 – Petitioner seeking relief that a sum of Rupees Ten Crores be recovered from one respondent for misusing National Flag for gaining undue mileage benefiting his commercial ends as well as the political gain drive during agitations and other respondents be directed to pay Rupees Ten Crores to Prime Minister's Relief Fund for using/misusing National Flag for gaining undue mileage during agitations – Also sought issuance of direction to the Central Government through Ministry of Law & Justice to revise the Flag Code of India 2002 and amend the same incorporating the amendment suggested by the petitioner himself – Held: National Flag is both a benediction and a beckoning – In case a person shows any kind of disrespect to the National Flag or does not observe the terms contained in the Code, legal action may be taken against him under the relevant statutory provisions – However, these are factual issues whether on a particular event a particular person showed any kind of disrespect to the National Flag – For that purpose, the petitioner has already filed criminal complaints before the police authorities – Thus, he cannot pursue the remedy simultaneously by filing the writ petition – More so, such a factual controversy cannot be examined in a petition under Article 32 – Neither the Court can legislate, nor it has any competence to issue directions to the legislature to enact

the law in a particular manner – The court has very limited role and in exercise of that it is not open to judicial legislation – Thus, no interference is called for – Flag Code of India 2002.

Union of India v. Naveen Jindal & Anr. **AIR 2004 SC 1559;** *Mullikarjuna Rao & Ors. etc. etc. v. State of Andhra Pradesh & Ors. etc. etc.,* **AIR 1990 SC 1251;** *V.K. Sood v. Secretary, Civil Aviation & Ors.,* **AIR 1993 SC 2285;** *M/s. Narinder Chand Hem Raj & Ors. v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh & Ors.* **AIR 1971 SC 2399;** *State of Himachal Pradesh v. A Parent of a Student of Medical College, Shimla & Ors.* **AIR 1985 SC 910;** *Asif Hameed & Ors. v. State of Jammu & Kashmir & Ors.* **AIR 1989 SC 1899;** *Union of India & Anr. v. Deoki Nandan Aggarwal* **AIR 1992 SC 96;** *Ajaib Singh v. Sirhind Co-operative Marketing-cum-Processing Service Society Ltd. & Anr*. **AIR 1999 SC 1351;** *Union of India v. Association for Democratic Reforms & Anr.* **AIR 2002 SC 2112;** *District Mining Officer & Ors. v. Tata Iron & Steel Co. & Anr.* **(2001) 7 SCC 358;** *Supreme Court Employees' Welfare Association v. Union of India & Anr.* **(1989) 4 SCC 187;** *State of Jammu & Kashmir v. A.R. Zakki & Ors.* **AIR 1992 SC 1546;** *Union of India v. Prakash P. Hinduja & Anr.,* **AIR 2003 SC 2612;** *University of Kerala v. Council, Principals', Colleges, Kerala & Ors.* **AIR 2010 SC 2532;** *State of U.P. & Ors. v. Jeet S. Bisht & Anr.* **(2007) 6 SCC 586;** *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Workers & Ors.* **(2011) 8 SCC 568;** *Vishaka & Ors. v. State of Rajasthan & Ors.* **AIR 1997 SC 3011;** *Common Cause (A Regd. Society) v. Union of India & Ors.* **AIR 2008 SC 2116;** *Destruction of Public and Private Properties v. State of A.P. & Ors.,* **AIR 2009 SC 2266 – relied on.**

Case Law Reference:

2004 (1) SCR 1038	**Relied on.**	**Para 3**
1990 (2) SCR 418	**Relied on.**	**Para 6**

1993 (3) SCR 772	**Relied on.**	**Para 6**
1972 SCR 940	**Relied on.**	**Para 7**
1985 (3) SCR 676	**Relied on.**	**Para 8**
1989 (3) SCR 19	**Relied on.**	**Para 9**
AIR 1992 SC 96	**Relied on.**	**Para 10**
1999 (2) SCR 505	**Relied on.**	**Para 11**
2002 (3) SCR 696	**Relied on.**	**Para 12**
2001 (1) Suppl. SCR 147	**Relied on.**	**Para 13**
1989 (3) SCR 488	**Relied on.**	**Para 14**
1991 (3) Suppl. SCR 216	**Relied on.**	**Para 14**
2003 (1) Suppl. SCR 307	**Relied on.**	**Para 15**
2009 (15) SCR 800	**Relied on.**	**Para 16**
2007 (7) SCR 705	**Relied on.**	**Para 17**
(2011) 8 SCC 568	**Relied on.**	**Para 18**
1997 (3) Suppl. SCR 404	**Relied on.**	**Para 18**
2008 (6) SCR 262	**Relied on.**	**Para 18**
2009 (6) SCR 439	**Relied on.**	**Para 18**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 533 of 2011.

V.K. Naswa Petition-In-Person.

The Order of the Court was delivered

O R D E R

1. This writ petition has been filed making grievance that the respondents, namely, Yog Guru Baba Ramdev; Shri Anna

Hazare, Mrs. Kiran Bedi and others have, on several occasions insulted the National Flag and violated the norms of waiving of National Flag, as provided in the Flag Code 2002. Thus, the petitioner has sought relief that a sum of Rs.10,00,000,00/- (Rupees Ten crores) be recovered from Baba Ramdev for misusing National Flag for gaining undue mileage benefiting his commercial ends (yoga business) as well as the political gain drive during agitations; Shri Anna Hazare and others be directed to pay a sum of Rs.1,00,000,00/- (Rupees Ten crores) to the Prime Minister's Relief Fund for using/misusing National Flag for gaining the political mileage during agitations, and further to issue direction to the Central Government through Ministry of Law & Justice to revise the Flag Code of India 2002 and amend the same incorporating the amendment suggested by the petitioner himself.

2. The petitioner appears in person and on being asked by the court it has been pointed out by him that against the above referred respondents he has filed the criminal complaints before the police authorities and he has been pursuing the said remedy simultaneously.

3. The issue involved in the case has been dealt with by this Court elaborately in *Union of India v. Naveen Jindal & Anr.,* AIR 2004 SC 1559, interpreting the clauses contained in the Flag Code 2002 and explained as under what circumstances and in what manner the National Flag can be hoisted by the individuals. The Flag Code is divided into 3 parts. Part II provides for the mode and manner of hoisting/ displaying/use of National Flag by Members of Public, Private Organisations, Educational Institutions etc. From reading of clause 2.1 of Section 1 appear in Part II of the Flag Code, it is evident that there is no restriction on the display of National Flag by members of general public, private organizations and educational institutions etc. except to the extent provided in the Emblems and Names (Prevention of Improper Use) Act, 1950 and Prevention of Insults to National Honour Act, 1971 and any

other law enacted on the subject. This Court has further held that Flag Code is not the law within the meaning of Article 13(3)(a) of the Constitution of India. However, right to fly National Flag is a fundamental right. Further the Flag Code provides guidelines to be observed for preservation of dignity and respect to the National Flag.

4. In view of the above, the National Flag is both a benediction and a beckoning. Thus, in case a person shows any kind of disrespect to the National Flag or does not observe the terms contained in the Code, legal action may be taken against him under the relevant statutory provisions. However, these are the questions of facts as to whether on a particular event a particular person has shown any kind of disrespect to the National Flag. For that purpose, the petitioner has already filed complaint before the authorities concerned. Thus, he cannot pursue the remedy simultaneously by filing the writ petition and on that count the petition is liable to be dismissed. More so, such a factual controversy cannot be examined in a petition under Article 32 of the Constitution of India.

5. The petitioner-in-person has emphasised that he has approached this Court to issue directions to the Central Government through Ministry of Law & Justice to amend the law in this regard and in the alternative, this court itself may issue appropriate directions in this regard.

It is a settled legal proposition that the court can neither legislate nor issue a direction to the Legislature to enact in a particular manner.

6.In *Mullikarjuna Rao & Ors. etc. etc. v. State of Andhra Pradesh & Ors. etc. etc.,* AIR 1990 SC 1251; and *V.K. Sood v. Secretary, Civil Aviation & Ors.,* AIR 1993 SC 2285, this Court has held that Writ Court, in exercise of its power under Article 226, has no power even indirectly require the Executive to exercise its law-making power. The Court observed that it is neither legal nor proper for the High Court to issue direction

or advisory sermons to the Executive in respect of the sphere which is exclusively within the domain of the Executive under the Constitution. The power under Article 309 of the Constitution to frame rules is the legislative power. This power under the Constitution has to be exercised by the President or the Governor of a State, as the case may be. The Courts cannot usurp the functions assigned to the Executive under the Constitution and cannot even indirectly require the Executive to exercise its law-making power in any manner. The Courts cannot assume to itself a supervisory role over the rule-making power of the Executive under Article 309 of the Constitution.

7. While deciding the said case, the Court placed reliance on a large number of judgments, particularly *M/s. Narinder Chand Hem Raj & Ors. v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh & Ors.,* AIR 1971 SC 2399, where it has been held that legislative power can be exercised only by the legislature or its delegate and none else.

8. In *State of Himachal Pradesh v. A Parent of a Student of Medical College, Shimla & Ors.,* AIR 1985 SC 910, this Court deprecated the practice adopted by the Courts to issue directions to the legislature to enact a legislation to meet a particular situation observing :

> "...The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging, for Otherwise it is difficult to see why, after the clear and categorical statement by the chief Secretary on behalf of the State Government that the Government will introduce legislation if found necessary and so advised, the Division Bench should have proceeded to again give the same direction. Thus the Division Bench was clearly not entitled to do. It is entirely a matter for the executive branch of the Government to decided whether or not to introduce any particular legislation."

9. In *Asif Hameed & Ors. v. State of Jammu & Kashmir & Ors.,* AIR 1989 SC 1899, this Court while dealing with a case like this at hand observed:

> *"While doing so, the Court must remain within its self-imposed limits. The Court sits in judgment on the action of a co-ordinate branch of the Government. While exercising power of judicial review of administrative action, the Court is not an Appellate Authority. The Constitution does not permit the Court to direct or advise the Executive in matter of policy or to sermonize qua any matter which under the Constitution lies within the sphere of Legislature or Executive."*
>
> (Emphasis added)

10. In *Union of India & Anr. v. Deoki Nandan Aggarwal,* AIR 1992 SC 96, this Court similarly observed :

> *"It is not the duty of the Court either to enlarge the scope of the legislation.....The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Court."*

11. Similarly in *Ajaib Singh v. Sirhind Co-operative Marketing-cum-Processing Service Society Ltd. & Anr.,* AIR 1999 SC 1351, this Court held that Court cannot fix a period of limitation, if not fixed by the legislature, as "the Courts can admittedly interpret the law and do not make laws." The Court cannot interpret the statutory provision in such a manner "which would amount to legislation intentionally left over by the legislature".

12. A similar view has been reiterated by this Court in *Union of India v. Association for Democratic Reforms & Anr.,* AIR 2002 SC 2112, observing that the Court cannot issue direction to the legislature for amending the Act or Rules. It is for the Parliament to amend the Act or Rules.

13. In *District Mining Officer & Ors. v. Tata Iron & Steel Co. & Anr.,* (2001) 7 SCC 358, this Court held that function of the Court is only to expound the law and not to legislate.

14. Similarly, in *Supreme Court Employees' Welfare Association v. Union of India & Anr.,* (1989) 4 SCC 187, this Court held that Court cannot direct the legislature to enact a particular law for the reason that under the constitutional scheme the Parliament exercises sovereign power to enact law and no outside power or authority can issue a particular piece of legislation.

(See also: *State of Jammu & Kashmir v. A.R. Zakki & Ors.,* AIR 1992 SC 1546).

15. In *Union of India v. Prakash P. Hinduja & Anr.,* AIR 2003 SC 2612, this Court held that if the Court issues a direction which amounts to legislation and is not complied with by the State, it cannot be held that the State has committed the Contempt of Court for the reason that the order passed by the Court was without jurisdiction and it has no competence to issue a direction amounting to legislation.

16. The issue involved herein was considered by this Court in *University of Kerala v. Council, Principals', Colleges, Kerala & Ors.,* AIR 2010 SC 2532. The Court elaborately explained the scope of separation of powers of different organs of the State under our Constitution; the validity of judicial legislation and if it is at all permissible, its limits; and the validity of judicial activism and the need for judicial restraint, etc. The Court observed:

> "At the outset, we would say that it is not possible for this Court to give any direction for amending the Act or the statutory rules. It is for the Parliament to amend the Act and the Rules."

17. In *State of U.P. & Ors. v. Jeet S. Bisht & Anr.,* (2007) 6 SCC 586, this Court held that issuing any such direction may

amount to amendment of law which falls exclusively within the domain of the executive/legislature and the Court cannot amend the law.

18. In *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Workers & Ors.,* (2011) 8 SCC 568, this Court while dealing with the issue made the observation that in exceptional circumstances where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its Constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field.

(See also: *Vishaka & Ors. v. State of Rajasthan & Ors.* AIR 1997 SC 3011; *Common Cause (A Regd. Society) v. Union of India & Ors.,* AIR 2008 SC 2116; and *Destruction of Public and Private Properties v. State of A.P. & Ors.,* AIR 2009 SC 2266)

19. Thus, it is crystal clear that the Court has a very limited role and in exercise of that, it is not open to have judicial legislation. Neither the Court can legislate, nor it has any competence to issue directions to the legislature to enact the law in a particular manner.

20. In view of the above, the petition lacks merit. Facts of the case do not warrant any interference by this Court. In such a fact-situation, no relief can be granted to the petitioner. The writ petition is, accordingly, dismissed.

N.J. Writ Petition dismissed.

MOHAN SONI
v.
RAM AVTAR TOMAR AND ORS.
(CIVIL APPEAL NO.237 OF 2012)

JANUARY 10, 2012

[AFTAB ALAM AND R.M. LODHA, JJ.]

Motor Vehicles Act, 1988 – s.166 – Compensation claim – On basis of physical disability suffered in an accident and loss of earning capacity as a result thereof – Appellant, a cart puller, suffered physical disability in an accident – One of his legs was amputated – Compensation awarded by Tribunal – On appeal, compensation amount enhanced by High Court – Whether the amount of compensation awarded was justified – Held: On facts, both the Tribunal and the High Court were in error in pegging down the disability of appellant to 50% with reference to Schedule 1 of the Workmen's Compensation Act, 1923 – In the context of loss of future earning, any physical disability resulting from an accident has to be judged with reference to the nature of work being performed by the person suffering the disability – At the time of the accident, the age of appellant was 55 years – At that age it would be impossible for him to find any job – The party advocating for a lower amount of compensation must plead and show that the victim enjoyed some legal protection (as in the case of persons covered by The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995) or in case of the vast multitude who earn their livelihood in the unorganized sector by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving a certain income – Loss of earning capacity of the appellant may be as high as 100% but in no case it would be less than 90% – Compensation for loss of appellant's future earnings computed on that basis.

The appellant used to earn his livelihood as a cart puller. While carrying some goods on a four-wheel cart, he was hit by a tanker. In the accident, the left leg of the appellant was crushed. He was admitted to a hospital where he had to undergo two surgeries and in the end his left leg was amputated below the knee. He filed application before the Motor Accident Claims Tribunal, claiming compensation for the injuries suffered by him under section 166 of the Motor Vehicles Act, 1988. Though the disabled-person identity card given to the appellant showed his disability as 60%, the Tribunal, with reference to Schedule 1 of the Workmen's Compensation Act, 1923, held that the appellant's disability could not be reckoned above 50%. Having held that that the appellant's age at the time of the accident was 55 years, the Tribunal applied the multiplier of 11 and on the basis of the findings that the appellant's monthly income was Rs.2,400/- and the extent of his disability was 50%, fixed the amount of Rs.1,58,400/- as compensation for loss of future earnings. In addition to this, the Tribunal gave to the appellant Rs.30,000/- for mental and physical agony due to permanent disability and a further sum of Rs.15,000/- for medical expenses and special diet. Accordingly, the Tribunal, by its award held the appellant entitled to receive a total sum of Rs.2,03,400/- as compensation along with interest at the rate of 9% per annum from the date of filing of the claim petition till the date of payment. Against the award of the Tribunal, the appellant preferred an appeal before the High Court. The High Court raised the amount of the monthly income of the appellant from Rs.2,400/- to Rs.3,000/- and, thereby, arrived at a sum of Rs.1,98,000/- as compensation for the loss of future earnings. The total compensation amount was, thus, raised from Rs.2,03,400/- to Rs.2,58,000/- .

In the instant appeal, the appellant made grievance

that the amount of compensation awarded to him by the Tribunal and the High Court was low.

Allowing the appeal to an extent, the Court

HELD:1.1. Both the Tribunal and the High Court were in error in pegging down the disability of the appellant to 50% with reference to Schedule 1 of the Workmen's Compensation Act, 1923. In the context of loss of future earning, any physical disability resulting from an accident has to be judged with reference to the nature of work being performed by the person suffering the disability. This is the basic premise and once that is grasped, it clearly follows that the same injury or loss may affect two different persons in different ways. The loss of one of the legs either to the marginal farmer or the cycle-rickshaw-puller would be the end of the road insofar as their earning capacity is concerned. But in case of a person engaged in some kind of desk work in an office, the loss of a leg may not have the same effect. The loss of a leg (or for that matter the loss of any limb) to anyone is bound to have very traumatic effects on one's personal, family or social life but the loss of one of the legs to a person working in the office would not interfere with his work/earning capacity in the same degree as in the case of a marginal farmer or a cycle-rickshaw-puller. [Para 7]

1.2. It is extremely difficult to uphold the decision of the High Court and the Tribunal based on the finding that the loss of the appellant's earning capacity as a result of the amputation of his left leg was only 50%. The appellant used to earn his livelihood as a cart puller. The Tribunal has found that at the time of the accident his age was 55 years. At that age it would be impossible for the appellant to find any job. From the trend of cross-examination it appears that an attempt was made to suggest that notwithstanding the loss of one leg the appellant could

still do some work sitting down such as selling vegetables. It is all very well to theoretically talk about a cart puller changing his work and becoming a vegetable vendor. But the computation of compensation payable to a victim of motor accident who suffered some serious permanent disability resulting from the loss of a limb etc. should not take into account such indeterminate factors. Any scaling down of the compensation should require something more tangible than a hypothetical conjecture that notwithstanding the disability, the victim could make up for the loss of income by changing his vocation or by adopting another means of livelihood. The party advocating for a lower amount of compensation for that reason must plead and show before the Tribunal that the victim enjoyed some legal protection (as in the case of persons covered by The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995) or in case of the vast multitude who earn their livelihood in the unorganized sector by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving a certain income. The loss of earning capacity of the appellant may be as high as 100% but in no case it would be less than 90%. It is accordingly held that the compensation for the loss of appellant's future earnings must be computed on that basis. On calculation on that basis, the amount of compensation would come to Rs.3,56,400/- and after addition of a sum of Rs.30,000/- and Rs.15,000/- the total amount would be Rs.4,01,400/-. The additional compensation amount would carry interest at the rate of 9% per annum from the date of filing of the claim petition till the date of payment. [Para 10]

K. Janardhan v. United India Insurance Company Limited and another **(2008) 8 SCC 518: 2008 (8) SCR 157;** *Pratap Narain Singh Deo v. Srinivas Sabata* **(1976) 1 SCC**

289: 1976 (2) SCR 872; *Raj Kumar v. Ajay Kumar and another* **(2011) 1 SCC 343: 2010 (13) SCR 179 – relied on.**

Case Law Reference:

2008 (8) SCR 157	**relied on**	**Para 8**
1976 (2) SCR 872	**relied on**	**Para 8**
2010 (13) SCR 179	**relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 237 of 2012.

From the Judgment & Order dated 01.04.2009 of the High Court of Judicature at Jabalpur, Madhya Pradesh Bench at Gwalior in Misc. Appeal No. 844 of 2004.

Anish Kumar Gupta, R.D. Gupta for the Appellant.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. The appellant, victim of a motor vehicle accident has come to this Court making grievance about the low amount of compensation awarded to him by the Tribunal and the High Court.

3. The appellant used to earn his livelihood as a cart puller. On December 17, 2003, at about 3.00 P.M. he was carrying some goods on a four-wheel cart when he was hit by a tanker which was being driven in a rash and negligent manner. In the accident, the left leg of the appellant was crushed. The X-Ray report showed multiple fractures in the left leg. He was admitted to a hospital where he had to undergo two surgeries between December 17, 2003 and January 3, 2004 and in the end his left leg was amputated below the knee. He filed an application (Claim Case No.16/2004) before the Second Additional Motor Accident Claims Tribunal, Gwalior, (M.P.), claiming

compensation for the injuries suffered by him under section 166 of the Motor Vehicles Act, 1988. It was stated by him before the Tribunal that at the time of accident his age was 50 years and his monthly income, as a cart puller, was Rs.3,300/-. As a result of the amputation of his leg, he was no longer in a position to walk without support and he was, therefore, rendered incapable of doing any work and to earn his livelihood.

4. The Tribunal found and held that the accident took place as a result of the negligent and rash driving by the tanker driver. It further held that at the time of the accident the age of the appellant was 55 years and his monthly income was Rs.2,400/- and not Rs.3,300/- as claimed by him. Coming to the extent of disability, the Tribunal referred to the disabled-person identity card given to the appellant (Exhibit P.27) in which his disability was shown as 60%. The Tribunal also observed that when the claimant appeared in court, it was evident that his left leg was amputated below the knee. Though the appellant's disabled-person card showed his disability as 60%, the Tribunal, with reference to Schedule 1 of the Workmen's Compensation Act, 1923, held that the appellant's disability could not be reckoned above 50%.

5. Having held that that the appellant's age at the time of the accident was 55 years, the Tribunal applied the multiplier of 11 and on the basis of the findings that the appellant's monthly income was Rs.2,400/- and the extent of his disability was 50%, fixed the amount of Rs.1,58,400/- as compensation for loss of future earnings. In addition to this, the Tribunal gave to the appellant Rs.30,000/- for mental and physical agony due to permanent disability and a further sum of Rs.15,000/- for medical expenses and special diet. Accordingly, the Tribunal, by its award dated July 31, 2004 held the appellant entitled to receive a total sum of Rs.2,03,400/- as compensation along with interest at the rate of 9% per annum from the date of filing of the claim petition on January 9, 2004 till the date of payment.

6. Against the award of the Tribunal, the appellant

preferred an appeal (Miscellaneous Appeal No.844 of 2004) before the Madhya Pradesh High Court, Gwalior Bench. In the High Court, the case was referred to Lok Adalat where the Insurance Company agreed for enhancement of the amount of compensation by Rs.50,000/-. It, however, appears that the matter could not be settled in the Lok Adalat and the appeal came to be finally heard and disposed of by the High Court on merits. The High Court by its judgment and order dated April 1, 2009 simply raised the amount of the monthly income of the appellant from Rs.2,400/- to Rs.3,000/- and, thereby, arrived at a sum of Rs.1,98,000/- as compensation for the loss of future earnings. The total compensation amount was, thus, raised from Rs.2,03,400/- to Rs.2,58,000/- (practically what was offered by the Insurance Company before the Lok Adalat on which no settlement was arrived at between the parties!)

7. On hearing counsel for the parties and on going through the materials on record, we are of the view that both the Tribunal and the High Court were in error in pegging down the disability of the appellant to 50% with reference to Schedule 1 of the Workmen's Compensation Act, 1923. In the context of loss of future earning, any physical disability resulting from an accident has to be judged with reference to the nature of work being performed by the person suffering the disability. This is the basic premise and once that is grasped, it clearly follows that the same injury or loss may affect two different persons in different ways. Take the case of a marginal farmer who does his cultivation work himself and ploughs his land with his own two hands; or the puller of a cycle-rickshaw, one of the main means of transport in hundreds of small towns all over the country. The loss of one of the legs either to the marginal farmer or the cycle-rickshaw-puller would be the end of the road insofar as their earning capacity is concerned. But in case of a person engaged in some kind of desk work in an office, the loss of a leg may not have the same effect. The loss of a leg (or for that matter the loss of any limb) to anyone is bound to have very traumatic effects on one's personal, family or social life but the

loss of one of the legs to a person working in the office would not interfere with his work/earning capacity in the same degree as in the case of a marginal farmer or a cycle-rickshaw-puller.

8. The question of loss of earning capacity resulting from amputation of one the legs in the case of a tanker driver was considered by this Court in *K. Janardhan v. United India Insurance Company Limited and another,* (2008) 8 SCC 518. In that case, a tanker driver suffered serious injuries in a motor accident and as a result, his right leg was amputated upto the knee joint. He made a claim under the Workmen's Compensation Act, 1923. The Commissioner for Workmen's Compensation held that disability suffered by him as a result of the loss of the leg was 100% and awarded compensation to him on that basis. In appeal, the High Court, like in the present case, referred to the Schedule to the Workmen's Compensation Act, 1923 and held that the loss of a leg on amputation amounted to reduction in the earning capacity by 60% and, accordingly, reduced the compensation awarded to the tanker driver. This Court set aside the High Court judgment and held that the tanker driver had suffered 100% disability and incapacity in earning his keep as a tanker driver as his right leg was amputated from the knee and, accordingly, restored the order passed by the Commissioner of Workmen's Compensation. In *K. Janardhan* this Court also referred to and relied upon an earlier decision of the Court in *Pratap Narain Singh Deo v. Srinivas Sabata* (1976) 1 SCC 289, in which a carpenter who suffered an amputation of his left arm from the elbow was held to have suffered complete loss of his earning capacity.

9. In a more recent decision in *Raj Kumar v. Ajay Kumar and another,* (2011) 1 SCC 343, this Court considered in great detail the correlation between the physical disability suffered in an accident and the loss of earning capacity resulting from it. In paragraphs 10, 11 and 13 of the judgment in *Raj Kumar*, this Court made the following observations:

"10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. *The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability.* Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. *In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.*

11. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation. (See for example, the decisions of this Court in *Arvind Kumar Mishra v. New India Assurance*

Co. Ltd. (2010) 10 SCC 254 and *Yadava Kumar v. National Insurance Co. Ltd.* (2010) 10 SCC 341).

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood."

10. In light of the aforesaid decisions, we find it extremely difficult to uphold the decision of the High Court and the Tribunal based on the finding that the loss of the appellant's earning capacity as a result of the amputation of his left leg was only 50%. It is noted above that the appellant used to earn his livelihood as a cart puller. The Tribunal has found that at the time of the accident his age was 55 years. At that age it would be impossible for the appellant to find any job. From the trend of cross-examination it appears that an attempt was made to suggest that notwithstanding the loss of one leg the appellant could still do some work sitting down such as selling vegetables. It is all very well to theoretically talk about a cart puller changing his work and becoming a vegetable vendor. But the computation of compensation payable to a victim of motor accident who suffered some serious permanent disability

resulting from the loss of a limb etc. should not take into account such indeterminate factors. Any scaling down of the compensation should require something more tangible than a hypothetical conjecture that notwithstanding the disability, the victim could make up for the loss of income by changing his vocation or by adopting another means of livelihood. The party advocating for a lower amount of compensation for that reason must plead and show before the Tribunal that the victim enjoyed some legal protection (as in the case of persons covered by The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995) or in case of the vast multitude who earn their livelihood in the unorganized sector by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving a certain income. The loss of earning capacity of the appellant, according to us, may be as high as 100% but in no case it would be less than 90%. We, accordingly, find and hold that the compensation for the loss of appellant's future earnings must be computed on that basis. On calculation on that basis, the amount of compensation would come to Rs.3,56,400/- and after addition of a sum of Rs.30,000/- and Rs.15,000/- the total amount would be Rs.4,01,400/-. The additional compensation amount would carry interest at the rate of 9% per annum from the date of filing of the claim petition till the date of payment. The additional amount of compensation along with interest should be paid to the appellant without delay and not later than three months from today.

11. In the result, the appeal is allowed to the extent indicated above.

B.B.B. Appeal allowed to an axtent.

COLLECTOR, DISTT. GWALIOR AND ANOTHER
v.
CINE EXHIBITORS P. LTD. AND ANOTHER
(Civil Appeal Nos.281-282 of 2012)

JANUARY 11, 2012

[DALVEER BHANDARI AND DIPAK MISRA, JJ.]

Town Planning – Nazul land – Leased by Gwalior Development Authority (GDA) in public auction – Subsequent termination of the lease by lessor-GDA and lessee-first respondent asked to hand over possession of the land – Writ petition by first respondent dismissed by Single Judge of High Court –Division Bench of High Court, however, held that cancellation of the lease was unsustainable – Plea raised by State that there was no transfer of the land by the State in favour of GDA, hence, the grant of lease by GDA in favour of first respondent was ab initio void and, therefore, there was no right in favour of the respondent to retain possession rejected by Division Bench on ground that since the GDA had granted lease in auction conducted with the knowledge of the State, the State was estopped from raising the plea that the land had not been transferred to the GDA – Held: Nazul land, unless notified, does not automatically get vested in any authority or trust – Unless affirmative steps are taken by the State Government by issuing a notification changing the character of the land and transferring it in favour of any authority, corporation or municipality, it maintains its own character, i.e., nazul land – In the case at hand, nothing on record that the nazul land in question had ever been notified for transfer in favour of the GDA – GDA never became the owner of the land or had the authority to deal with the land and, therefore, it could not have put the land to auction for any purpose whatsoever – First respondent cannot assert any right or advance any claim to remain in possession and run the

cinema hall thereon and that too after cancellation of the licence for running the cinema hall, solely on the basis of a lease granted by its lessor-GDA, a statutory authority, which had no right on the land as the ownership still remained with the State Government – GDA could not have granted the lease of the property belonging to the State Government as it was Nazul land meant for the Public Works Department – The State Government and its functionaries are at liberty to proceed against the first respondent for its eviction – First respondent may take recourse to arbitration against the GDA for any other relief as entitled in law – M.P. Town Improvement Trust Act, 1960 – Chapters IV and V – Madhya Pradesh Nagar Tatha Gramin Adhiniyam, 1973 – ss. 38 and 87.

Doctrines – Doctrine of Promissory Estoppel – Inapplicability of – Held: The doctrine/principle cannot be soundly embedded or treated to be sacrosanct when a public authority carries out a representation or a promise which is prohibited by law or is devoid of the authority of law – Administrative Law.

Doctrines – Doctrine of public policy – Invocation of – Grant of lease by Gwalior Development Authority (GDA) in respect of property belonging to the State Government – Challenge to – Held: The doctrine of public policy becomes enforceable when an action affects or offends public interest or where injury to the public at large is manifest – On facts, the collective interest in the property could not have been jeopardised by usurpation of power/authority by GDA – Such assumption of power by the GDA made the whole action sans substratum and thereby a nullity.

The Gwalior Development Authority (GDA) had granted lease of land in public auction. The land in question was recorded as nazul land meant for the Public Works Department. The lease was granted to first respondent-company for the purpose of construction of a cinema hall. After execution of the lease deed, the first

respondent-company constructed a cinema hall and commenced business. However, as certain disputes arose between the Directors of the company, it was eventually resolved by it that the licence for running the cinema should be surrendered and pursuant thereto, the Collector cancelled the licence for running the cinema hall. After closure of the cinema hall, the lessor-GDA terminated the lease and directed the first respondent-lessee to hand over possession of the land in question.

The writ petition filed by the first respondent-lessee was dismissed by a Single Judge of the High Court on the ground that as there was cancellation of the licence of the cinema hall, the order of termination of the lease was valid and the first respondent would have an opportunity of hearing before steps are taken for its dispossession. Dissatisfied with the order, the first respondent preferred writ appeal before the Division Bench. The Division Bench held that since no notice of termination of lease was given despite the same being imperative and also since there was no commission of breach of the express conditions of the lease deed, the cancellation of the lease was totally unsustainable. With regard to taking over possession, the Division Bench opined that the authority cannot assume the jurisdiction of taking possession without taking recourse to law. The plea raised by the State that there was no transfer of the land by the State in favour of the GDA, hence, the grant of lease by the GDA in favour of the first respondent-company was *ab initio void* and, therefore, there was no right in favour of the said respondent to retain the possession, was rejcted by the Division Bench on the ground that since the GDA had granted lease in auction that was conducted with the knowledge of the State, it was estopped from raising the plea that the land had not been transferred to the GDA.

The question which arose for consideration in the instant appeal was whether the Division Bench was justified in holding that when the GDA had granted the lease of the land in auction within the knowledge of the State, the State was estopped from raising any such ground that the land had not been transferred to the GDA.

Allowing the appeals, the Court

HELD: 1. It is settled in law that the doctrine of promissory estoppel is founded on the principles of equity and to avoid injustice. However, the said principle cannot be soundly embedded or treated to be sacrosanct when a public authority carries out a representation or a promise which is prohibited by law or is devoid of the authority of law. [Para 10]

Union of India and others vs. Godfrey Philips India Ltd. **AIR 1986 SC 806: 1985 (3) Suppl. SCR 123;** *Dr. Ashok Kumar Maheshwari vs. State of U.P. and another* **AIR 1998 SC 966: 1998 (1) SCR 147;** *Rishabh Kumar vs. State of U.P.* **AIR 1987 SC1576: 1987 Suppl. SCC 306;** *M/s. Sharma Transport vs. Government of A.P. and others* **AIR 2002 SC 322: 2001 (5) Suppl. SCR 390;** *S. Sethuraman v. R. Venkataraman and others* **AIR 2007 SC 2499;** *Rajendra Agricultural University vs. Ashok Kumar Prasad and others* **(2010) 1 SCC 730: 2009 (15) SCR 1168 – relied on.**

2.1. In the case at hand, admittedly, the land in question is nazul land meant for the Public Works Department. In regard to the submission made by respondent no.1 that the land had vested with the Town Improvement Trust, Gwalior constituted under the M.P. Town Improvement Trust Act, 1960 and the said vesting continued under the Madhya Pradesh Nagar Tatha Gramin Adhiniyam, 1973, on a closer scrutiny of the schematic conception of the 1960 Act, especially the provisions contained in Chapter 5 of the 1960 Act dealing

with the acquisition of land belonging to private persons, it is demonstrable that the various provisions deal with the acquisition and improvement of the area under the planned schemes. It is seemly to note that the type of improvement schemes being delineated under Section 31 of the 1960 Act are fundamentally general improvement schemes, re-building scheme, re-housing schemes, a street scheme, deferred street scheme, development scheme, housing accommodation scheme, town expansion scheme, drainage or drainage including sewage disposal scheme; and playground, stadium and recreation ground scheme. The aforesaid has nothing to do with the land belonging to the State Government. Any land coming under the scheme or covered under it has to be governed by the procedure and guidelines for improvement. It is a different concept altogether. [Paras 12, 15]

2.2. The lands belonging to the State Government are dealt with in the Revenue Book Circular and nazul lands are specifically adverted to in Part IV of the said Circular. It deals with management and disposal of nazul lands within the limits of Municipal Corporation, municipal towns and notified areas. The Revenue Book Circular also stipulates that the classification of land is done at the time of settlement. The Collector of the district has been bestowed with the power to make alterations in the settlement classifications on the ground that they have been incorrectly made or that the purpose for which the land was used had changed in the settlement. In such type of cases, 'Abadi' lands are recorded as nazul lands and, accordingly, the vacant spaces are administered as nazul lands. The aforesaid schematic concept read with the language employed in the 1960 Act and the 1973 Act would clearly reveal that nazul land, unless notified, does not automatically get vested in any authority or trust. The State Government, from time to time, has been issuing

notifications to the effect of vesting or transferring of nazul land to be part of improvement trust and giving advance possession to the Town Improvement Trust. That apart, the State Government has issued notifications framing guidelines for distribution of the Nazul plots. [Paras 18, 19]

2.3. Unless affirmative steps are taken by the State Government by issuing a notification changing the character of the land and transferring it in favour of any authority, corporation or municipality, it maintains its own character, i.e., nazul land. In the case at hand, the land is recorded as nazul land for the Public Works Department. Nothing has been brought on record that it had ever been notified for transfer in favour of the GDA. Thus analysed, the GDA never became the owner of the land or had the authority to deal with the land and, therefore, it could not have put the land to auction for any purpose whatsoever. Ergo, the first respondent cannot assert any right or advance any claim to remain in possession and run the cinema hall and that too after cancellation of the licence, solely on the basis of a lease granted by its lessor, a statutory authority, who had no right on the land for the simon pure reason that the ownership still remained with the State Government. When no right lies with the GDA in respect of the land in view of the conditions precedent as stipulated in the Revenue Book Circular not having been satisfied and the nature of the land has remained in a sustained state, no legal sanctity can be attached to the lease executed by it in favour of the Ist respondent. The grant is fundamentally ultra vires and hence, the respondent-company has to meet its Waterloo. [Para 21]

Akhil Bhartiya Upbhokta Congress vs. State of Madhya Pradesh and Ors **AIR 2011 SC 1834 – relied on.**

3. Quite apart from the above, it is condign to note that in a case of the present nature, the common law doctrine of public policy can be invoked. The said doctrine becomes enforceable when an action affects or offends public interest or where injury to the public at large is manifest. As is perceptible, the GDA could not have granted the lease of the property belonging to the State Government as it was Nazul land meant for the Public Works Department. The collective interest in the property could not have been jeopardised by usurpation of power/authority by the GDA. Such assumption of power by the GDA makes the whole action sans substratum and thereby a nullity. Needless to say, any grant has to have legal sanctity and legitimacy. [Para 22]

4. The State Government and its functionaries are at liberty to proceed against the first respondent for its eviction. It is open to the first respondent to take recourse to the arbitration clause against the GDA for any other relief as advised in law. [Para 23]

Case Law Reference:

1985 (3) Suppl. SCR 123	**relied on**	**Para 10**
1998 (1) SCR 147	**relied on**	**Para 11**
1987 Suppl. SCC 306	**relied on**	**Para 11**
2001 (5) Suppl. SCR 390	**relied on**	**Para 11**
AIR 2007 SC 2499	**relied on**	**Para 11**
2009 (15) SCR 1168	**relied on**	**Para 11**
AIR 2011 SC 1834	**relied on**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 281-282 of 2012.

From the Judgment & Order dated 28.03.2008 in Writ

Appeal No. 234 of 2007 and order dated 22.09.2010 of the High Court of Madhya Pradesh, Bench at Gwalior in Review Petition No. 83 of 2010.

B.S. Banthia, Vikas Upadhyay for the Appellants.

Dhruv Mehta, Divyakant Lahoti, Sameer Abhyankar, R.K. Agarwal, Veena Minocha, Arvind Minocha, Randhir Singh, Niraj Sharma, Neeraj Srivastav for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Special leave granted in both the petitions.

2. In these two appeals, the defensibility and legal pregnability of the judgment and order dated 28th March, 2010 passed by the Division Bench of High Court of Judicature of Madhya Pradesh, Jabalpur, Bench at Gwalior in Writ Appeal No. 234 of 2007 and the order dated 22nd September, 2010 in R.P. No. 83 of 2010 whereby the Division Bench has dislodged the order passed by the learned Single Judge in Writ Petition No. 1718 of 2002 wherein the writ court had declined to interfere with the order dated 9.8.2002 passed by the Chief Executive Officer, Gwalior Development Authority (for short " the GDA"), who, by the said order, had terminated the lease of the first respondent herein and directed it to surrender the possession of the property within seven days, failing which appropriate action to be taken against it in accordance with law, is called in question.

3. The succinct expose' of facts are that the GDA issued an advertisement for allotment of plot No. 1 admeasuring 40160 sq. feet situated in the locality known as Mayur Market for the purpose of construction of a cinema house and, in the public auction, the respondent-company, the first respondent herein, became the highest bidder and accordingly, a lease agreement was executed on 27.5.1978 between the GDA and the respondent company. The said lease agreement was for a

period of thirty years with the stipulation of a right of renewal subject to certain conditions. It was asserted in the writ petition that after execution of the lease deed, the respondent company constructed a cinema hall and commenced the business. As certain disputes arose between the directors of the company, it was eventually resolved that the licence for running the cinema should be surrendered and in consonance with the resolution, a letter was issued to the Collector concerned, who cancelled the licence for running the cinema hall. After closure of the cinema hall, the GDA, by communication dated 2.8.2002, terminated the lease and directed for handing over possession of the land in question.

4. It was contended before the learned Single Judge that the notice for cancellation of lease was not served on it and the allegations that there had been violation of the terms and conditions of the agreement were absolutely unsustainable and, therefore, the eventual act of termination was sensitively susceptible. It was also urged that as permission was granted for raising permanent construction, the lease had the character of a permanent lease and could not have been terminated by the GDA. The GDA combated the aforesaid stand put forth by the respondent-company and countered the same by contending, inter alia, that there had been violation of the terms and conditions of the agreement; that the stance of putting the lease on the pedestal of a permanent lease was sans substance; that the plea that the notice for cancellation of lease was not served was contrary to the documents brought on record; that reminders were served on the respondent-company; that the lease was granted for a specific purpose and when the said purpose had totally melted into extinction, it was within the legal province of the GDA to cancel the lease and take appropriate steps for eviction.

5. The learned Single Judge took note of the proponements canvassed by the learned counsel for the parties and posed the question whether the GDA had the right to terminate the lease of the petitioner and, thereafter, scanning

the terms and conditions of the lease deed, expressed the view that as there has been cancellation of the licence of the cinema hall, the order of termination of the lease was valid and the petitioner would have an opportunity of hearing before steps are taken for its dispossession. Being of this view, he dismissed the writ petition. Be it noted, a contention was raised before the learned Single Judge that the land in question is owned by the State but the same was granted on lease by the GDA, which is absolutely impermissible, however, the learned Single Judge did not think it appropriate to dwell upon the same on the foundation that the said question will be decided when the State Government takes any action against the petitioner by the respondent GDA.

6. Being dissatisfied with the aforesaid order, the first respondent preferred a writ appeal and the Division Bench in the intra-court appeal expressed the opinion that no notice of termination of lease was given despite the same being imperative and secondly, there was no commission of breach of the express conditions of the lease deed and hence, the cancellation was totally unsustainable. With regard to taking over possession, the Division Bench opined that the authority cannot assume the jurisdiction of taking possession without taking recourse to law. It is apt to note that on behalf of the State, a stand was vigorously canvassed that when there has been no transfer of the land by the State in favour of the GDA, the grant of lease by the GDA in favour of the first respondent-company is *ab initio void* and, therefore, no right flows in favour of the said respondent to retain the possession. The learned Judges repelled the said stand on the base that when the GDA had granted lease in the auction that was conducted with the knowledge of the State, it is estopped from raising the plea that the land had not been transferred to the GDA. Expressing this view, the appeal was dismissed in the ultimate eventuality.

7. Mr. B.S. Banthia, learned counsel appearing for the appellants, questioning the sustainability of the impugned orders, has raised the following contentions: -

(a) When an issue was raised before the High Court that the State had not transferred the land in favour of the GDA and, therefore, the GDA had no authority to deal with the land in any manner whatsoever, the said facet should have been dealt with in proper perspective and not brushed aside on the ground of estoppel.

(b) The concept of promissory estoppel does not have any play when no competent authority of the Government had transferred the land in favour of the GDA as per the requisite procedure and as a sequitur, any step taken by the GDA even in the presence of an officer will not debar the State to raise the plea as regards its right, title and interest within the period of limitation.

(c) The grant of lease being *per se* wholly vulnerable, the basic infrastructure collapses and once the infrastructure is foundered, the super structure is bound to be razed to the ground. To put it differently, when the GDA had no right to lease the land in question, the respondent-company cannot claim a better right as a lessee than that of a lessor.

(d) It has become a common phenomenon to grab public property by adopting maladroit methodology and, therefore, the Division Bench should not have scuttled the right of the State and its authorities on the ground of estoppel which, in fact, does not arise remotely.

(e) The GDA has unequivocally admitted before this Court that the land in question was not transferred in its favour. The action taken by the State Government should be given the stamp of approval.

8. Mr. Dhruv Mehta, learned senior counsel appearing for

the respondent No. 1, countering the aforesaid submissions, submitted that the approach of the High Court in the writ appeal cannot be found fault with inasmuch as the scope of the writ petition out of which the writ appeal emerged was limited, i.e., whether the lease could be cancelled by the GDA. It is canvassed by him that there may be a cavil between the GDA and the State Government but by any stretch of imagination, the same cannot create any kind of concavity or dent in the right of the first respondent to enjoy the benefit of the lease. It is his further submission that when the State Government has become totally oblivious of its right, if any, it cannot rise like a phoenix and put forth its claim to the property. It is highlighted by him that under the M.P. Town Improvement Trust Act, 1960 (for short "the 1960 Act"), and Madhya Pradesh Nagar Tatha Gramin Adhiniyam, 1973 (for brevity "the 1973 Act") the schemes having come into existence, the property had vested in the GDA and, therefore, the State Government has no right to interfere and in that backdrop, the finding recorded in the intra-court appeal that there has been lack of notice prior to the cancellation of the lease and further no violation of any of the postulates of the lease agreement cannot be flawed.

9. Mr. Neeraj Sharma, learned counsel appearing for the 2nd respondent, the GDA, contended that the land was recorded as 'Nazul' meant for the Public Works Department and was never transferred to the GDA and in that background, the question of estoppel or acquiescence by the State Government does not arise. In fact, submits the learned counsel, by a total mistaken impression, the land was put to auction and the lease deed was executed in favour of the first respondent. Additionally, it is propounded by him that if any dispute has arisen, there is an arbitration clause which would enable the respondent- company to agitate its grievances barring eviction especially when the grant of lease is a void one.

10. The seminal issue that emanates for consideration is whether the Division Bench is justified in stating in a sweeping

manner that when the GDA had granted the lease of the land in auction within the knowledge of the State, the State is estopped from raising any such ground that the land had not been transferred to the GDA after lapse of thirty years. It is not disputed before us that the first respondent had not perfected its right, title and interest by way of adverse possession as it could not have been. Evidently, the High Court has proceeded on the basis of the doctrine of promissory estoppel. It is settled in law that the said doctrine is founded on the principles of equity and to avoid injustice. The said principle cannot be soundly embedded or treated to be sacrosanct when a public authority carries out a representation or a promise which is prohibited by law or is devoid of the authority of law. In *Union of India and others vs. Godfrey Philips India Ltd.,*[1] a three Judge Bench of this Court has crystallised the principle thus:-

> "....that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make"

11. In *Dr. Ashok Kumar Maheshwari vs. State of U.P. and another*[2], a two-Judge Bench of this Court, after referring to the decision in *Rishabh Kumar vs. State of U.P.*[3], proceeded to state as follows: -

> "21. This principle was reiterated in *Union of India v. R.C. D'Souza* AIR 1987 SC 1172 : (1987) 2 SCC 211, where a retired army officer was recruited as Assistant

1. AIR 1986 SC 806.
2. AIR 1998 SC 966.
3. AIR 1987 SC 1576.

Commandant on temporary basis and was called upon to exercise his option for regularisation contrary to the statutory rules. It was held that it would not amount to estoppel against the Department.

22. Whether a Promissory Estoppel, which is based on a 'promise' contrary to law can be invoked has already been considered by this Court in *Kasinka Trading v. Union of India,* (1995) 1 SCC 274 : (1995 AIR SCW 680) as also in *Shabi Construction Co. Ltd. v. City & Industrial Development Corporation* (1995) 4 SCC 301 wherein it is laid down that the Rules of "Promissory Estoppel" cannot be invoked for the enforcement of a 'promise' or a 'declaration' which is contrary to law or outside the authority or power of the Government or the person making that promise."

In this context, we may profitably refer to the decision of this Court in *M/s. Sharma Transport vs. Government of A.P. and others*[4] , wherein a three-Judge Bench opined that it is equally settled law that promissory estoppel cannot be used compelling the Government or a public authority to carry out a representation or promise which is prohibited by law or which is devoid of the authority or power of the officer of the Government or the public authority to make. In this regard, we may also usefully refer to the observations made in *S. Sethuraman vs. R. Venkataraman and others*[5] which is to the effect that if jurisdiction cannot be conferred by consent, it cannot clothe the authority to exercise the same in an illegal manner. Recently, in *Rajendra Agricultural University vs. Ashok Kumar Prasad and others,*[6] it has been laid down that non-compliance with the mandatory statutory requirement will make the act invalid and cannot be regarded as a representation held out by the Government creating any right

4. AIR 2002 SC 322.

5. AIR 2007 SC 2499.

6. (2010) 1 SCC 730

to seek the benefit by inviting the doctrine of promissory estoppel against the government.

12. In the case at hand, admittedly, the land is nazul land meant for the Public Works Department. It had been urged before the High Court that the land in question was not transferred in favour of the GDA. The submission of Mr. Mehta, learned senior counsel for the respondent No. 1, is that the land had vested with the Town Improvement Trust, Gwalior constituted under the 1960 Act and the said vesting continued under the 1973 Act. To appreciate the said submission, we may analyse the scheme of the 1960 Act. The said Act was enacted to consolidate and amend the law relating to the establishment of improvement trust for the purpose of making and executing town improvement scheme in certain towns of Madhya Pradesh. Chapter II of the Act deals with the Constitution of the Trust. Chapter III provides for conduct of business. Chapter IV deals with improvement schemes. Various schemes are being enumerated under various provisions in the said chapter. Section 52 which occurs in Chapter IV provides for issuance of notification of sanction of improvement schemes and order regarding vesting a property in the Trust. The said provision being relevant is reproduced below : -

"52. *Notification of sanction of improvement scheme and order regarding vesting of property in the Trust.* – (1) Whenever the State Government sanctions an improvement scheme, it –

(a) shall announce the fact by notification and except in the case of a deferred street scheme, development scheme, or town expansion scheme, the Trust shall forthwith proceed to execute the same; and

(b) may order that any street, square, park, open space or other land, or any other part thereof,

which is the property of the Government and managed by the Central Government or the State Government shall, subject to such condition as it may impose, vest in the Trust for the purpose of the scheme.

(2) The publication of a notification under sub-section (1) in respect of any scheme shall be conclusive evidence that the scheme has been duly framed and sanctioned."

On scanning of the aforesaid provision, it is luminous that sub-Section (2) of Section 52 postulates that publication of a notification under sub-section (1) in respect of any scheme shall be conclusive evidence that the scheme has been duly framed and sanctioned.

13. Chapter V of the Act deals with acquisition and disposal of land. Section 67 empowers the Trust to acquire by purchase, lease or exchange any land within the area comprised in a sanctioned scheme for many persons under an agreement with such person. Section 68 provides for notice of acquisition of land. As the learned senior counsel for the respondent has placed heavy reliance on the said provision, the same is reproduced below :-

"68. *Notice acquisition of land-* (1) If in the opinion of the Trust any land is required for the purposes of any scheme sanctioned by the State Government under Section 51, the Trust shall by a notice published in the Gazette and in such other manner may be prescribed, signify its intention to acquire such land. Such notice shall specify the place where and the hours during with the maps and specifications of the land proposed to be acquired may be inspected.

(2) The owner of the land which has been notified under sub-section (1) or any other person interested therein may object to the acquisition of such land within 80 days after

the publication of the notice in the Gazette.

(3) Every objection under sub-section (2) shall be made to the Trust in writing and the Trust shall give the objector an opportunity of being heard in person or by a duly authorised agent or pleader and shall after hearing all such objections and making such further inquiry, if may, as may be necessary," take such decision as it may deem fit."

On a plain reading of the aforesaid provision, it is clear as noon day that if in the opinion of the Trust any land is required for the purpose of any scheme sanctioned by the State Government under Section 51, the Trust shall by notice published in the Gazette and by any such other manner as may be prescribed, signify its intention to acquire such land. Such notice, as stipulated therein, shall specify the place etc. The rest of the provision is, in a way, procedural in nature. Section 69 makes a provision whereunder the Trust may apply to the State Government for sanction to acquire the land. Section 70 provides for procedure for sanction of acquisition. Section 71 provides for notification of acquisition and vesting of land in the Trust.

14. Mr. Mehta has drawn immense inspiration from Section 71 which is as follows:-

"71. *Notification of acquisition and vesting of land in Trust* – (1) After the acquisition of land is sanctioned by the State Government under Section 70 the Trust may acquire such land by publishing in the Gazette a notice stating that it had decided to acquire the land and has obtained the sanction of the State Government for the acquisition thereof.

(2) When a notice under sub-section (1) is published in the Gazette the land shall, on and from the date of such publication, vest absolutely in the Trust free from all encumbrance.

(3) Where any land is vested in the Trust under sub-section (2), the Trust may by notice in writing , order any person who may be in possession of the land to surrender or deliver possession thereof to the Trust or any person duly authorised by it in this behalf within thirty days of the service of the notice.

(4) If any person refuses or fails to comply with an order made under sub-section (3), the Trust may take possession of the land and may for that purpose cause to be sued such force as may be necessary."

15. On a closer scrutiny of the schematic conception of the Act, especially the provisions contained in Chapter 5 of the 1960 Act dealing with the acquisition of land belonging to private persons, it is demonstrable that the various provisions deal with the acquisition and improvement of the area under the planned schemes. It is seemly to note that the type of improvement schemes being delineated under Section 31 of the 1960 Act are fundamentally general improvement schemes, re-building scheme, re-housing schemes, a street scheme, deferred street scheme, development scheme, housing accommodation scheme, town expansion scheme, drainage or drainage including sewage disposal scheme; and playground, stadium and recreation ground scheme. The aforesaid has nothing to do with the land belonging to the State Government. Any land coming under the scheme or covered under it has to be governed by the procedure and guidelines for improvement. It is a different concept altogether.

16. We will be failing in our duty if we do not refer to certain provisions, namely, Sections 38 and 87 of the 1973 Act as our attention has been drawn by Mr. Mehta, learned counsel for the respondent No. 1. They read as follows:

"38. *Establishment of Town and Country Development Authority.* – (1) The State Government may, by notification, establish a Town and Country Development Authority by

such name and for such area as may be specified in the notification.

(2) The duty of implementing the proposal in the development plan, preparing one or more town development schemes and acquisition and development of land for the purpose of expansion or improvement of the area specified in the notification under sub-section (1) shall, subject to the provision of this Act vest in the Town and Country Development Authority established for the said area.

Provided that the duty imposed on the Town and Country Development Authority shall, till that authority is established for any area under sub-section (1), be performed by the local authority having jurisdiction over such area as if it were a Town and Country Development Authority established under this Act.

(3) On the establishment of the Town and Country Development Authority for the area to which the proviso to sub-section (2) applies, the following consequences shall ensue in relation to that area, namely : -

(i) all assets and liabilities acquired and incurred by the local authority in the discharge of the duty under the proviso to sub-section (2) shall belong to and be demand to be the assets and liabilities of the Town and Country Development Authority established in place of such local authority;

(ii) all records and papers belonging to the local authority referred to in clause (i) shall vest in and be transferred to the Town and Country Development Authority established in its place.

xxx xxx xxx xxx

87. *Repeal, Savings and construction of references.* (1)

As from the date of, -

(a) the coming into force of the provisions ofChapter II the reference to Chief TownPlanner in any enactment for the timebeing in force, shall be construed as areference to the Director;

(b) the Constitution of a planning area, the following consequences shall ensue,namely –

(i) The Madhya Pradesh Town PlanningAct, 1948 (No. 17 of 1948), shall standrepealed in such area;

(ii) any land use map, draft development o r development plan prepared under the said Act, shall be deemed to have beenprepared under this Act and all papersrelating thereto shall stand transferred tothe Director;

(C) the establishment of the Town and Country Development Authority for any area the following consequences shall ensue in relation to that, area, namely –

(i) the Madhya Pradesh Town Improvement Trust Act, 1960 (No. 14 of 1961), shall stand repealed in its application to the said area,

(ii) the Town Improvement Trust functioning within the jurisdiction of the Town and Country Development Authority so established shall stand dissolved and any Town Improvement Scheme prepared under the said Act, shall in so far as it is not inconsistent with the provisions of this Act be deemed to have been prepared under this Act,

(iii) all assets and liabilities of the Town Improvement Trusts shall belong to and be deemed to be the assets and liabilities of the Town and Country Development Authority

established in place of such Town Improvement Trust under Section 38;

iii-a) grants and contributions payable to the Town Improvement Trust shall continue to be payable to the Town and Country Development Authority established in place of such Town Improvement Trust under Section 38;

(iv) all employees belonging to or under the control of the Town Improvement Trust referred to in sub-clause (ii) immediately before the date aforesaid shall be deemed to be the employees of the Town and Country Development Authority established for such area under Section 38;

Provided that the terms and conditions of service of such employees shall be the same until altered by the Town and Country Development Authority with the previous sanction of the State Government :

Provided further that no sanction under the foregoing proviso shall be accorded by the State Government until the person affected thereby is given a reasonable opportunity of being heard;

(v) all records and papers belonging to the Town Improvement Trusts referred to in sub-clause (ii) shall vest in and be transferred to the Town and Country Development Authority established in its place under Section 38.

(2) Notwithstanding the repeal of the Madhya Pradesh Town Improvement Trusts Act, 1960 (No. 14 of 1961) (hereinafterreferred to as the repealed Act), undersub-clause (i) of clause (c) of sub-section (1), -

(a) all cases relating to compensation in respect of acquisition and vesting of land in the Town Improvement Trust under Section 71 of the

repealed Act and pending before the Town Improvement Trust or the Tribunal or the Court of the District Judge or the High Courti m m e d i a t e l y before the date of such repeal shall be dealt with and disposed of by –

(i) the Town and Country Development Authority established in place of such Town Improvement Trust under Section 38;

(ii) the Tribunal to be constituted under Section 73 of the repealed Act after the commencement of the Madhya Pradesh Nagar Tatha Gram Nivesh (Sanshodhan) Adhiniyam, 1979;

(iii) the Court of the District Judge;

(iv) the High Court;

As the case may be, in accordance with the provisions of the repealed Act, as if this Act had not been passed;

(b) the Town and Country Development Authority, the Tribunal, the Court of the District Judge or the High Court, as the case may be, may proceed to deal withand disposed of the same from the stage at which such cases were left over at the t ime of repeal."

17. If we have correctly understood the submission of Mr. Mehta, learned senior counsel, he has placed reliance on the said provisions solely for the purpose that the right created in favour of the GDA remained unaffected and, in fact, was protected under the 1973 Act. There is no cavil over the said proposition of law. But, a pregnant one, the crux of the matter is whether the land that was recorded as Nazul land meant for the Public Works Department got transferred to the GDA so that its right got concretized.

18. It is apt to note that the lands belonging to the State Government are dealt with in the Revenue Book Circular and nazul lands are specifically adverted to in Part IV of the said Circular. It deals with management and disposal of nazul lands within the limits of Municipal Corporation, municipal towns and notified areas. Under the heading 'What is Nazul', it has been stated thus: -

"'*Nazul' and 'Milkiyat Sarkar'* Land which is the property of Government and which –

(a) is not included in a holding in a village;

(b) is not recorded as Banjar, scrub jungle, hills and rocks, rivers, village-forest or Government-forest;

(c) is not recorded as village roads, Gothan, grazing land Abadi and pastures;

(d) is not reserved for any communal purpose for the Nistar of the village; and

(e) is not service land;

falls under two classes viz. "Nazul" and "Milkiyat Sarkar". Nazul includes such Government land as is used either for building purposes or purposes of public convenience such as markets, or recreation grounds or which is likely to be used for such purposes in future.

Government land in the occupation or on the books of a department of the State Government or of the Central Government are not to be excluded from the classification and will be recorded as "Nazul" or "Milkiyat Sarkar", as the case may be. In brief, it may be stated that "Nazul" is that land which has a site value as opposed to an agricultural value."

Clause 12 of Section IV provides how nazul land can be disposed of. It reads as follows: -

"12. Nazul land can be disposed of in the following ways:-

(1) by permanent lease;

(2) by temporary lease;

(3) on no-claim agreement;

(4) on annual licence; and

(5) transfer in favour of a department of the State Government or other State Governments or the Government of India and vesting in favour of a local body."

Clause 13 deals with the manner in which permanent leases are granted and Clause 14 deals with reservation of special plots. For the sake of completeness, both the Clauses are reproduced below: -

"13. **Permanent leases** – (i) Permanent leases are granted either through auction or without auction.

(ii) Permanent lease may be granted without auction in the following cases: -

(1) When the land in question is adjacent to the land of the applicant and will not be of any use to any person other than the applicant.

(2) When it is decided to condone the encroachment of an encroacher and to grant the encroached area to the encroacher on permanent lease.

(3) When the land in question will be used for religious charitable, educational, co-operative, public or social purposes.

(4) Plots given to very poor persons in a locality where only poor persons live.

(5) Any other land for which there are adequate reasons for foregoing auction, e.g., land required by the Madhya Pradesh Electricity Board, State Road Transport Corporation, etc.

14. *Reservation of special plots.* – At regular settlement all Government plots or sites which are likely to be valuable for any special reason, such as their situation near a line of railway or the like, or which in any scheme of development have been set aside as specially valuable or as being required for a public purpose are marked of by the Settlement Officer in consultation with the Collector as reserved and the disposal of all such plots will be subject to the sanction of the State Government upon such special terms as may be decided for each plot.

All land within a radius of 100 yards of a railway station and all land within 40 yards of a railway station boundary should be reserved.

There will necessarily be exceptions such as for instance where there is a lay out already sanctioned by Government the Collector will maintain a list of these plots and with the approval of the State Government will alter it as the changing circumstances of the town may demand."

19. The Revenue Book Circular also stipulates that the classification of land is done at the time of settlement. The Collector of the district has been bestowed with the power to make alterations in the settlement classifications on the ground that they have been incorrectly made or that the purpose for which the land was used had changed in the settlement. In such type of cases, 'Abadi' lands are recorded as nazul lands and, accordingly, the vacant spaces are administered as nazul lands. The aforesaid schematic concept read with the language employed in the 1960 Act and the 1973 Act would clearly reveal that nazul land, unless notified, does not automatically get vested in any authority or trust. The State Government, from time

to time, has been issuing notifications to the effect of vesting or transferring of nazul land to be part of improvement trust and giving advance possession to the Town Improvement Trust. That apart, the State Government has issued notifications framing guidelines for distribution of the Nazul plots.

20. It is not out of place to mention here that this Court in *Akhil Bhartiya Upbhokta Congress vs. State of Madhya Pradesh and Ors.*[7] had not approved the manner in which the State Government had granted the land belonging to the State in favour of the appellant therein. After referring to the Revenue Book Circular, this Court decried the action of the State Authorities in allotment of Nazul land without following the criteria and by treating it as State largesse wherein the public has an interest. After the said decision was rendered on 06.04.2011, the State of Madhya Pradesh, Department of Revenue, has issued Circular No. 6-53/2011-Nazul dated 8.8.2011 describing certain guidelines in the distribution of Nazul land. In the said circular, it has been stated that the said circular shall be treated as a part of Section 1 of the Revenue Book Circular.

21. We have referred to these aspects singularly to highlight that unless affirmative steps are taken by the State Government by issuing a notification changing the character of the land and transferring it in favour of any authority, corporation or municipality, it maintains its own character, i.e., nazul land. In the case at hand, the land is recorded as nazul land for the Public Works Department. Nothing has been brought on record that it had ever been notified for transfer in favour of the GDA. Thus analysed, the GDA never became the owner of the land or had the authority to deal with the land and, therefore, it could not have put the land to auction for any purpose whatsoever. Ergo, the first respondent cannot assert any right or advance any claim to remain in possession and run the cinema hall and that too after cancellation of the licence, solely on the basis of a lease granted by its lessor, a statutory authority, who had no

7. AIR 2011 SC 1834.

right on the land for the simon pure reason that the ownership still remained with the State Government. When no right lies with the GDA in respect of the land in view of the conditions precedent as stipulated in the Revenue Book Circular not having been satisfied and the nature of the land has remained in a sustained state, no legal sanctity can be attached to the lease executed by it in favour of the Ist respondent. The grant is fundamentally ultra vires and hence, the respondent-company has to meet its Waterloo.

22. Quite apart from the above, it is condign to note that in a case of the present nature, the common law doctrine of public policy can be invoked. The said doctrine becomes enforceable when an action affects or offends public interest or where injury to the public at large is manifest. As is perceptible, the GDA could not have granted the lease of the property belonging to the State Government as it was Nazul land meant for the Public Works Department. The collective interest in the property could not have been jeopardised by usurpation of power/authority by the GDA. Such assumption of power by the GDA makes the whole action sans substratum and thereby a nullity. Needless to say, any grant has to have legal sanctity and legitimacy.

23. For the reasons aforementioned, the appeals are allowed and the orders passed in the writ appeal and the application for review, being unsustainable, are set aside. The State Government and its functionaries are at liberty to proceed against the first respondent for its eviction. It is open to the first respondent to take recourse to the arbitration clause against the GDA for any other relief as advised in law. There shall be no order as to costs.

B.B.B. Appeal allowed.

CHANDRAKALA TRIVEDI
v.
STATE OF RAJASTHAN & ORS.
(CIVIL APPEAL NO. 400 OF 2012)

JANUARY 12, 2012

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

Service Law – Appointment – Qualification – Educational qualification – Appointment to the post of Teacher – Provisional selection of appellant cancelled as he had not passed Higher Secondary/Senior Secondary Examination after passing the Secondary Examination – Plea of appellant that at the time when she passed the Secondary Examination, it was permissible for a candidate passing the Secondary Examination to get admission in the higher classes with a preparatory course; and that she had thereafter acquired higher qualifications such as B.Ed. Degree as also a M.A degree and thus, satisfied the criteria of the required qualification for appointment to the post in question – Plea of appellant negated by the High Court, inter alia, on the ground that as the appellant had not passed the Senior Secondary Examination, which is the basic qualification for the post in question, the candidature of appellant cannot be considered – Held: The view taken by the High Court cannot be appreciated – The basic qualification required was Senior Secondary or Intermediate or its equivalent – High Court erroneously did not consider higher qualification as equivalent to the qualification of passing Senior Secondary examination even in respect of a candidate who was provisionally selected – The word 'equivalent' must be given a reasonable meaning – By using the expression, 'equivalent' one means that there are some degrees of flexibility or adjustment which do not lower the stated requirement – There has to be some difference between what is equivalent and what is exact –

Apart from that after a person is provisionally selected, a certain degree of reasonable expectation of the selection being continued also comes into existence – Appellant should be considered reasonably and the provisional appointment which was given to her should not be cancelled.

Words and Phrases – "equivalent" – Meaning of.

The appellant was provisionally selected for appointment to the post of Teacher. After the appellant was provisionally selected, she received a letter from the State Public Service Commission informing her that provisional selection has been cancelled as the appellant did not pass the Higher Secondary/Senior Secondary Examination after passing the Secondary Examination.

The case of the appellant was that at the time when she passed the Secondary Examination, it was permissible for a candidate passing the Secondary Examination to get admission in the higher classes with a preparatory course; that the appellant thereafter completed her graduation, and also obtained B.Ed. Degree as also a M.A degree and in that view of the matter, the appellant satisfies the criteria of the required qualification for appointment to the post in question.

The case of the appellant was, however, dismissed by the High Court, *inter alia*, on the ground that as the appellant had not passed the Senior Secondary Examination, which is the basic qualification for the post in question, the candidature of the appellant cannot be considered.

Disposing the appeal, the Court

HELD:1. The view taken by the High Court cannot be appreciated. From the qualifications mentioned, it is clear that the basic qualification is Senior Secondary or Intermediate or its equivalent. [Para 7]

2. In the impugned judgment, the High Court has given a finding that the higher qualification is not the substitute for the qualification of Senior Secondary or Intermediate. One fails to appreciate the reasoning of the High Court to the extent that it does not consider higher qualification as equivalent to the qualification of passing Senior Secondary examination even in respect of a candidate who was provisionally selected. The word 'equivalent' must be given a reasonable meaning. By using the expression, 'equivalent' one means that there are some degrees of flexibility or adjustment which do not lower the stated requirement. There has to be some difference between what is equivalent and what is exact. Apart from that after a person is provisionally selected, a certain degree of reasonable expectation of the selection being continued also comes into existence. [Para 8]

3. Considering these aspects of the matter, it is clear that the appellant should be considered reasonably and the provisional appointment which was given to her should not be cancelled. It is hoped and expected the respondent Public Service Commission shall make a suitable recommendation in the light of the observation in this judgment and the State, which is also a party, will make an appointment accordingly thereafter. [Paras 9, 10]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 400 of 2012.

From the Judment and Order dated 19.01.2009 of the High Court of Rajasthan at Jodhpur in Special Appeal (Writ) No. 409 of 2008.

Aishwarya Bhati for the Appellant.

Surya Kant, Pranav Vyas, Dushyant Parashar, Neeraj Kumar Sharma, Purnima Jauhani, A.V. Rangam, Buddy A. Rangadhan and Milind Kumar for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. We have heard learned counsel for the parties.

3. This appeal is directed against the impugned judgment and order dated 19.01.2009 passed in Special Appeal No. 409 of 2008 of the High Court of Rajasthan. The controversy arises out of the appellant's appointment to the post of Teacher for primary and upper primary schools.

4. The appellant was provisionally selected for appointment to the post of Teacher. The educational qualification required for appointment to the Level(II) Upper Primary Middle School Section is;

(I) Senior Secondary School Certificate or intermediate or its equivalent; and

(II) Diploma or certificate in elementary teachers training of duration of not less than two years OR Bachelor of Elementary Education (B.E. Ed.) OR Graduate with Bachelor of Education(B.Ed) or its equivalent"

5. After the appellant was provisionally selected, she received a letter dated 26.09.2007 from the Rajasthan Public Service Commission informing her that provisional selection has been cancelled as the appellant did not pass the Higher Secondary/Senior Secondary Examination after passing the Secondary Examination.

6. The case of the appellant is that at the time when she passed the Secondary Examination, it was permissible for a candidate passing the Secondary Examination to get admission in the higher classes with a preparatory course. The appellant thereafter completed her graduation from the Indira

Gandhi Open University. Then the appellant got her B.Ed. Degree on a regular basis from Maharishi Dayanand Saraswati University, Ajmer, Rajasthan. The appellant then also got her M.A degree from the same University. In that view of the matter, learned counsel for the appellant submits, that the appellant satisfies the criteria of the required qualification for appointment to the post in question. The case of the appellant has, however, been dismissed both by the Single Judge and also by the Division Bench of the High Court, inter alia, on the ground that as the appellant has not passed the Senior Secondary Examination, which is the basic qualification for the post in question, the candidature of the appellant cannot be considered.

7. We fail to appreciate the aforesaid view taken by the High Court. We find that from the qualifications which have been mentioned, it is made clear that the basic qualification is Senior Secondary or Intermediate or its equivalent. We find that the appellant on the basis of her qualification was provisionally selected after she had submitted her requisite testimonials.

8. In the impugned judgment, the High Court has given a finding that the higher qualification is not the substitute for the qualification of Senior Secondary or Intermediate. In the instant case, we fail to appreciate the reasoning of the High Court to the extent that it does not consider higher qualification as equivalent to the qualification of passing Senior Secondary examination even in respect of a candidate who was provisionally selected. The word 'equivalent' must be given a reasonable meaning. By using the expression, 'equivalent' one means that there are some degrees of flexibility or adjustment which do not lower the stated requirement. There has to be some difference between what is equivalent and what is exact. Apart from that after a person is provisionally selected, a certain degree of reasonable expectation of the selection being continued also comes into existence.

9. Considering these aspects of the matter, we are of the

view that the appellant should be considered reasonably and the provisional appointment which was given to her should not be cancelled. We order accordingly.

10. However, we make it clear that we are passing this order taking in our view the special facts and circumstances of the case. We hope and expect the respondent Rajasthan Public Service Commission shall make a suitable recommendation in the light of the observation in this judgment within four weeks from today and the State, which is also a party, will make an appointment accordingly within four weeks thereafter.

11. The appeal is disposed of. No costs.

B.B.B. Appeal disposed of.

M/S INDIAN OIL CORPORATION LTD.
v.
COMMISSIONER OF CENTRAL EXCISE, VADODARA
(CIVIL APPEAL NOS. 4530-4532 OF 2005)

JANUARY 13, 2012

[A.K. PATNAIK AND ANIL R. DAVE, JJ.]

Central Excise Rules, 1944 – Chapter X, r.192 – Exemption from excise duty – Entitlement to – Reduced Crude Oil (RCO) – Held: Proviso in the exemption notification made it clear that for availing exemption two conditions were to be satisfied: First, that it was proved to the satisfaction of the excise officer that the goods were used for intended use and second, where such use was elsewhere than in the factory of production, the procedure set out in Chapter X of the Rules was followed – Plea of appellant-manufacturer that if the first condition is satisfied, exemption has to be granted, not acceptable – RCO produced by appellant was not to be used in its factory but at the place of generation of electricity by the Ahmedabad Electricity Company Ltd. – Hence, the second condition laid down in the proviso was also to be complied with – Language of Rule 192 of Chapter X of the Rules clearly provided that for availing concession from excise duty on excisable goods used in a specified industrial process, a person must obtain a registration certificate from the Collector and that "the concession shall, unless renewed by the Collector, cease on the expiry of the registration certificate"– Registration certificate of appellant had expired on 31.12.1995, hence, exemption granted under the notification ceased on 31.12.1995 – Fresh registration certificate in favour of the Ahmedabad Electricity Company Ltd. was issued only on 26.06.1996 and such registration was not for any period prior to 26.06.1996 – As procedure laid down in Rule 192 of Chapter X of the Rules was not complied with, the appellant

was not entitled to avail the exemption of excise duty under the exemption notification during the period from 01.01.1996 to 25.06.1996 – Exemption Notification – Notification No. 75/84-CE dated 01.03.1984.

Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 – r. 3 – Exemption from excise duty – Entitlement to – Naptha – Held: The exemption notification made it clear that exemption was to be allowed if it was proved to the Central Excise Officer having jurisdiction that the goods were cleared for the intended use – In addition, there was a further condition in the exemption notification that where the intended use was elsewhere than the factory of production, exemption was to be allowed if the procedure set out in the 2001 Rules was followed – Since in the instant case, the Naphtha produced by the appellant in its factory was to be used for the manufacture of fertilizer elsewhere than in its own factory, i.e. in the factory of Indo Gulf Corporation Limited, exemption could be allowed only if the procedure set out in the 2001 Rules was followed – Rule 3(1) of the 2001 Rules made it amply clear that the manufacturer, who intends to use subject goods for specified use at concessional rate of duty, shall make an application in quadruplicate in the Form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be – No such application was made by Indo Gulf Corporation Limited in the form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise – As the procedure set out in the 2001 Rules was not followed, the appellant was not entitled to exemption on the Naphtha cleared from its factory for supply to Indo Gulf Corporation Limited for manufacture of fertilizer – Exemption Notification – Notification No. 3/2001-CE dated 01.03.2001.

Two different set of appeals under Section 35L (b) of the Central Excise Act, 1944 viz. Civil appeal nos. 4530-

4532 of 2005 and Civil Appeal No.8048 of 2004 came up for consideration before this Court.

Civil appeal nos. 4530-4532 of 2005

The appellant in this matter produces *inter alia* Reduced Crude Oil ("RCO"). By Notification No. 75/84-CE dated 01.03.1984, the Central government in exercise of its powers under Sub-Rule 1 of Rule 8 of the Central Excise Rules, 1944 exempted certain goods from duty of excise subject to the intended use, or the conditions, if any. The proviso in the notification stated two conditions subject to which the exemption was granted and one of the conditions was that where the intended use is elsewhere than in the factory of production, the procedure set out in Chapter X of the Rules is followed. Rule 192 in Chapter X of the Rules provided *inter alia* that where the Central Government has by notification under Rule 8 sanctioned the remission of duty on excisable goods other than salt used in a specified industrial process and it is necessary for this purpose to obtain an excise registration certificate, he should submit the requisite application along with the proof of payment of the registration fee and shall then be granted a registration certificate in the proper form. Rule 192 further provided that the concession shall, unless renewed by the Collector, cease on the expiry of the registration certificate. The Ahmedabad Electricity Company Ltd. had obtained a registration certificate in Form CT-2 under Rule 192 of Chapter X of the Rules and on the strength of such registration certificate, purchased RCO from the appellant availing the exemption from excise duty under Notification No. 75/84 dated 01.03.1984. The registration certificate obtained by the Ahmedabad Electricity Company Ltd. expired on 31.12.1995 and a fresh registration was granted in its favour on 26.06.1996. The Assistant Commissioner of Central Excise passed orders

demanding excise duty from the appellant for RCO supplied to the Ahmedabad Electricity Company Ltd. during the period 01.01.1996 to 25.06.1996 on the ground that the said company did not have a registration certificate in Form CT-2 under Rule 192 of Chapter X of the Rules during this period and, therefore, the RCO supplied by the appellant to the Ahmedabad Electricity Company Ltd. during this period was not exempt from excise duty. The appellant paid the excise duty and subsequently applied for refund contending that the registration certificate in Form CT-2 had been obtained by the Ahmedabad Electricity Company Ltd. on 26.06.1996. The refund claims were rejected by the Assistant Commissioner. The Commissioner of Central Excise (Appeals) confirmed the demands of excise duty for the period from 01.01.1996 to 25.06.1996 and the order rejecting the refund claim. The appellant then filed appeals before the Tribunal which dismissed the same holding that as the statutory requirement of conditional exemption notification had not been complied with by the appellant it was not entitled to the exemption benefit.

Civil Appeal No.8048 of 2004:

The appellant herein produces *inter alia* Naphtha. By Notification no. 3/2001-CE dated 01.03.2001 issued under Section 5A of the Central Excise Act, 1944, the Central Government exempted *inter alia* Naphtha cleared for the intended use in the manufacture of fertilizers from excise duty subject to conditions specified in the annexure to the notification. In the annexure to the exemption notification, one of the conditions specified was that where such use is elsewhere than in the factory of production, the exemption shall be allowed if the procedure set out in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 is followed. Rule 3(1) of the

2001 Rules provided that a manufacturer who intends to receive subject goods for specified use at concessional rate of duty, shall make an application in quadruplicate in the Form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be. Indo Gulf Corporation Limited placed an order on 16.07.2001 on the appellant for supply of Naphtha for the purpose of manufacture of fertilizers and furnished a letter to the appellant saying it has made an application to the Commissioner of Excise for authorization for dispatch of one rake of Naphtha. The appellant supplied Naphtha to Indo Gulf Corporation Limited and while clearing the aforesaid Naphtha from its factory did not make any payment of Central Excise duty. The Commissioner of Central Excise made demand of duty on the Naphtha cleared on 16.07.2001 and also imposed a penalty equivalent to the duty amount. On appeal, the Tribunal held that under the exemption notification, the appellant could be exempted from duty on Naphtha supplied to the manufacturer of fertilizer only if the conditions specified in the exemption notification are fulfilled; that one of the conditions specified in the exemption notification was that where the goods were to be used elsewhere than in the factory of production, the exemption would be allowed if the procedure set out in the 2001 Rules was followed and in this case Rule 3(1) of 2001 Rules has not been followed, inasmuch as, the manufacturer, namely, Indo Gulf Corporation Limited had not submitted application in the form at Annexure-1 for obtaining Naphtha without payment of duty and that as the condition of the exemption notification was not complied with, the appellant was not entitled to clear naphtha without payment of excise duty and accordingly sustained the demand of excise duty. The Tribunal further held that penalty was also imposable on the appellant, but in the facts and circumstances of the case reduced the penalty amount.

Dismissing all the appeals, the Court

In re: Civil appeal nos. 4530-4532 of 2005

HELD: 1.1. The proviso in the exemption notification makes it clear that for availing the exemption two conditions must be satisfied: First, that it is proved to the satisfaction of the excise officer that the goods are used for intended use specified in Column (5) of the Table annexed to the exemption notification and second, where such use is elsewhere than in the factory of production, the procedure set out in Chapter X of the Rules is followed. One cannot, therefore, accept the contention of the appellant that if the first condition is satisfied, i.e. it is proved to the satisfaction of the Central Excise officer that the goods are used for the intended use, the exemption has to be granted. Unless the second condition is also satisfied, i.e. the procedure set out in Chapter X of the Rules is followed where the use of the goods is elsewhere than in the factory of production, the exemption cannot be granted under the exemption notification. [Para 7]

1.2. In the facts of the present case, the RCO was not to be used in the factory of the appellant but at the place of generation of electricity by the Ahmedabad Electricity Company Ltd. Hence, the second condition laid down in the proviso was also to be complied with. The language of Rule 192 of Chapter X of the Rules is clear that for availing concession from excise duty on excisable goods used in a specified industrial process, a person must obtain a registration certificate from the Collector and that "the concession shall, unless renewed by the Collector, cease on the expiry of the registration certificate". Admittedly, the registration certificate of the appellant expired on 31.12.1995. Hence, the exemption granted under the notification ceased on 31.12.1995. The fresh registration certificate in favour of the Ahmedabad

Electricity Company Ltd. was issued on 26.06.1996 and it is found on a reading of the copy of the CT-2 certificate annexed as Annexure P5 that the registration certificate was not for any period prior to 26.06.1996. As the procedure laid down in Rule 192 of Chapter X of the Rules has not been complied with, the appellant is not entitled to avail the exemption of excise duty under the exemption notification during the period from 01.01.1996 to 25.06.1996. [Para 8]

M/s Chunni Lal Parshadi Lal v. Commissioner of Sales Tax, U.P., Lucknow **(1986) 2 SCC 501: 1986 (1) SCR 891;** *Commissioner of Customs (Imports), Mumbai* v. *Tullow India Operations Ltd*. **(2005) (189) ELT 401 (SC);** *Commissioner of Central Excise, New Delhi* v. *Harichand Shri Gopal* **2010 (260) ELT 3 (SC);** *Thermax Private Limited v. The Collector of Customs (Bombay), New Customs House* **(1990) 4 SCC 440;** *Collector of Customs, Bombay v. J.K. Synthetics Limited* **(1997) 10 SCC 224;** *Collector of Central Excise, Jaipur v. J.K. Synthetics* **2000 (2000) 10 SCC 393;** *Commissioner of Central Excise, New Delhi v. Hari Chand* **(2011) 1 SCC 236: 2010 (13) SCR 820 – referred to.**

In re: Civil Appeal No.8048 of 2004:

2.1. By the exemption notification the Central Government exempted the excisable goods from duty "subject to the relevant conditions specified in the Annexure" to the exemption notification. It will be clear from Para 3 of the Annexure to the exemption notification that the exemption shall be allowed if it has been proved to the Central Excise Officer having jurisdiction that the goods are cleared for the intended use specified in column 3 of the table. In addition to this condition, there is a further condition in Para 4 of the Annexure to the exemption notification that where the intended use is elsewhere than the factory of production, the exemption shall be allowed if the procedure set out in the 2001 Rules

is followed. The plea of the appellant that as the Naphtha cleared from the factory of the appellant has been used for manufacture of fertilizer, the appellant would be entitled to exemption even if the condition specified in Para 4 of the Annexure to the exemption notification is not followed, is not acceptable. [Para 5]

2.2. The condition specified in Para 4 in the Annexure to the exemption notification states that where the intend use is elsewhere than in the factory of production, the exemption shall be allowed if the procedure set out in the 2001 Rules is followed. In the facts of this case, the Naphtha produced by the appellant in its factory was to be used for the manufacture of fertilizer elsewhere than in its own factory, i.e. in the factory of Indo Gulf Corporation Limited. Hence, the exemption could be allowed only if the procedure set out in the 2001 Rules was followed. [Para 6]

2.3. Rule 3(1) of the 2001 Rules makes it amply clear that the manufacturer, who intends to use subject goods for specified use at concessional rate of duty, shall make an application in quadruplicate in the Form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be. Admittedly, no such application was made by Indo Gulf Corporation Limited in the form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise. As the procedure set out in the 2001 Rules has not been followed, the appellant was not entitled to exemption on the Naphtha cleared from its factory for supply to Indo Gulf Corporation Limited for manufacture of fertilizer. [Para 7]

Case Law Reference:

1986 (1) SCR 891	**referred to**	**Para 4**

(2005) (189) ELT 401 (SC)	**referred to**	**Para 5**
2010 (260) ELT 3 (SC)	**referred to**	**Para 6**
(1990) 4 SCC 440	**referred to**	**Para 6**
(1997) 10 SCC 224	**referred to**	**Para 6**
(2000) 10 SCC 393	**referred to**	**Para 6**
2010 (13) SCR 820	**referred to**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4530-4532 of 2005 etc.

From the Judgment & Order dated 15.03.2005 of Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai in Appeal Nos. E/2329/99, E/2734/2000 and E/835/37.

WITH

C.A. Nos. 8048 of 2004.

Alok Yadav, M.P. Devanath, Krishna Mohan Menon, Rajesh Kumar for the Appellant.

Anup Choudhary, Ashok K. Srivastava, Sunita Rani Singh, B. Krishna Prasad, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

A. K. PATNAIK, J.

CIVIL APPEAL NOs. 4530-4532 OF 2005:

1. These are appeals under Section 35L (b) of the Central Excise Act, 1944 against the order dated 15.03.2005 of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai, (for short "the Tribunal").

2. The facts very briefly are that the appellant produces inter alia Reduced Crude Oil (for short "RCO"). By Notification

No. 75/84-CE dated 01.03.1984, the Central government in exercise of its powers under Sub-Rule 1 of Rule 8 of the Central Excise Rules, 1944 (for short "the Rules") exempted goods described in Column 3 of the table annexed to the notification from so much of the duty of excise as is specified in the notification subject to the intended use, or the conditions, if any, laid down in Column 5 of the table annexed to the notification. One of the goods exempted from excise duty by the notification was RCO, if produced only from indigenous crude oil subject to intended use as fuel for generation of electrical energy by electricity undertakings owned or controlled by the Central Government or any State Government or any State Electricity Board or any local authority or any licensee under Part-II of the Indian Electricity Act, 1910 except those who produce electrical energy not for sale but for their own consumption or for supply to their own undertakings. The proviso in the notification stated two conditions subject to which the exemption was granted and one of the conditions was that where the intended use is elsewhere than in the factory of production, the procedure set out in Chapter X of the Rules is followed. Rule 192 in Chapter X of the Rules provided inter alia that where the Central Government has by notification under Rule 8 sanctioned the remission of duty on excisable goods other than salt used in a specified industrial process and it is necessary for this purpose to obtain an excise registration certificate, he should submit the requisite application along with the proof of payment of the registration fee and shall then be granted a registration certificate in the proper form. Rule 192 further provided that the concession shall, unless renewed by the Collector, cease on the expiry of the registration certificate.

3. The Ahmedabad Electricity Company Ltd. had obtained a registration certificate in Form CT-2 under Rule 192 of Chapter X of the Rules and on the strength of such registration certificate, purchased RCO from the appellant availing the exemption from excise duty under Notification No. 75/84 dated 01.03.1984 (for short 'the exemption notification'). The

registration certificate obtained by the Ahmedabad Electricity Company Ltd. expired on 31.12.1995 and a fresh registration was granted in its favour on 26.06.1996. After issuing two show-cause notices, the Assistant Commissioner of Central Excise passed two orders demanding excise duty of Rs. 32,35,485/- from the appellant for RCO supplied to the Ahmedabad Electricity Company Ltd. during the period 01.01.1996 to 25.06.1996 on the ground that the said company did not have a registration certificate in Form CT-2 under Rule 192 of Chapter X of the Rules during this period and, therefore, the RCO supplied by the appellant to the Ahmedabad Electricity Company Ltd. during this period was not exempt from excise duty. The appellant paid the excise duty and subsequently applied for refund contending that the registration certificate in Form CT-2 had been obtained by the Ahmedabad Electricity Company Ltd. on 26.06.1996. The refund claims were rejected by the Assistant Commissioner. Thereafter, the appellant filed appeals before the Commissioner of Central Excise (Appeals) who confirmed the demands of excise duty for the period from 01.01.1996 to 25.06.1996. The appellant then filed three appeals before the Tribunal against the orders of Commissioner of Central Excise (Appeals) confirming demand and the order rejecting the refund claim. By the impugned order, the Tribunal dismissed the appeals saying that as the statutory requirement of conditional exemption notification had not been complied with by the appellant it was not entitled to the exemption benefit.

4. Mr. Alok Yadav, learned counsel for the appellant, submitted that the Tribunal failed to appreciate that the RCO supplied by the appellant to Ahmedabad Electricity Company Ltd. was in fact used as fuel for generation of electrical energy and therefore the appellant was entitled to the benefit of the exemption of excise duty under the exemption notification. He cited the decision of this Court in M/s Chunni Lal Parshadi Lal v. Commissioner of Sales Tax, U.P., Lucknow [(1986) 2 SCC 501] wherein it was held that a dealer can prove by any way

other than the way contemplated by Rule 12A of the U.P. Sales Tax Rules, 1948 that the goods purchased from him were for resale. According to Mr. Yadav, the registration certificate in Form CT-2 is not the only way to prove that the goods sold by the appellant to the Ahmedabad Electricity Company Ltd. were used as fuel for generation of electricity. He also relied on *Commissioner of Customs (Imports), Mumbai v. Tullow India Operations Ltd.* [(2005) (189) ELT 401 (SC)[wherein this Court held that ONGC being a government company would get the requisite exemption, subject, of course, to its fulfilling the condition of obtaining the essentiality certificate. He argued that the appellant being a government company should not be denied the exemption on a technical ground that there was no registration certificate during the period 01.01.1996 to 25.06.1996.

5. Mr. Anup Chaudhary, learned senior counsel appearing for the respondent, on the other hand, submitted that the exemption notification stipulated in the proviso the conditions under which the exemption from excise duty would be available and if the conditions were not fulfilled, the exemption would not be available to the manufacturer. He submitted that one of the conditions was that where the goods were to be used in a place other than in the factory of production, the procedure set out in Chapter X of the Rules is to be followed. He submitted that the procedure laid down in Rules 192 to 196 BB in Chapter X of the Rules, therefore, have to be followed, and if the procedure is not followed in any case, the exemption cannot be granted under the exemption notification. He submitted that since under Rule 192, the Ahmedabad Electricity Company Ltd. was required to obtain a registration certificate in Form CT-2 and the said company did not obtain a certificate for the period 01.01.1996 to 25.06.1996, RCO supplied by the appellant to the Ahmedabad Electricity Company Ltd. during this period was exigible to excise duty. He cited the judgement of the Constitution Bench of this court in *Commissioner of Central Excise, New Delhi v. Harichand Shri Gopal* [2010 (260) ELT

3 (SC)] in which it has been held that if a party wants remission of duty, he has to follow certain prerequisites, the object of which is to see that the goods are not diverted or utilised for some other purpose under the guise of the exemption notification and, therefore, a plea that the goods were meant for intended use specified in the exemption notification has to be rejected.

6. The question whether it was enough to prove to the satisfaction of the Central Excise Officer that the goods are for the intended use specified in the notification of exemption or whether in addition the procedure laid down in Rule 192 of Chapter X of the Rules was also to be complied with for availing concession under the exemption notification was raised before this Court in *Thermax Private Limited v. The Collector of Customs (Bombay), New Customs House* [1992 (61) ELT 352 (SC)] = [(1990) 4 SCC 440] and a two-Judge Bench of this Court held that the possession of a license or production of a C-2 certificate as provided in Rule 192 of Chapter X of the Rules enables the applicant to secure the necessary concession and that the entitlement to the concession will depend on whether the purchaser is the holder of a L-6 license (or C-2 certificate) or not. These observations made in *Thermax Private Limited v. The Collector of Customs (Bombay), New Customs House* (supra) were held by a two-Judge Bench of this Court in *Collector of Customs, Bombay v. J.K. Synthetics Limited* [1996 (87) ELT 582 (SC)] = [(1997) 10 SCC 224] as not laying down principle and held to be limited to eligibility for concession under Rule 192 of the Rules. In the aforesaid decision in the case of *Collector of Customs, Bombay v. J.K. Synthetic Limited* (supra) this Court took the view that where there was evidence on record that show the intended use of the material, the benefit of exemption could be granted. In a subsequent decision in the case of *Collector of Central Excise, Jaipur v. J.K. Synthetics* [2000 (120) ELT 54 (SC)] = [(2000) 10 SCC 393] a three-Judge Bench of this Court took the view that if there was substantial compliance of the procedure laid down in Chapter X of the Rules, exemption could be granted. In the case of *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal* [2010 (260) ELT 3 (SC)] = [(2011) 1 SCC 236] a Constitution Bench of this Court considered the decisions of this Court in *Thermax Private Limited v. The Collector of Customs (Bombay), New Customs House* (supra) and *Collector of Central Excise, Jaipur v. J.K. Synthetics* (supra) and held that a provision for exemption, concession or exception, as the case may be, has to be construed strictly and if the exemption is available only on complying certain conditions, the conditions have to be complied with. In the aforesaid decision, the Constitution Bench further held that detailed procedures have been laid down in Chapter X of the Rules so as to curb the diversion and utilization of goods which are otherwise excisable and the plea of substantial compliance or intended use therefore has to be rejected.

7. When we strictly construe the exemption notification in this case, we find that the proviso in the exemption notification reads as under:

> Provided that where any such exemption is subject to the intended use, the exemption in such case shall be subject to the following conditions namely:-
>
> (i) That it is proved to the satisfaction of an officer not below the rank of the Assistant Collector of Central Excise that such goods are used for the intended use specified in Column (5) of the said Table: and
>
> (ii) Where such use is elsewhere than in the factory of production, the procedure set out in Chapter X of the Central Excise Rules, 1944, is followed.

Thus, the proviso makes it clear that for availing the exemption two conditions must be satisfied: First, that it is proved to the satisfaction of the excise officer that the goods are used for intended use specified in Column (5) of the Table annexed to

the exemption notification and second, where such use is elsewhere than in the factory of production, the procedure set out in Chapter X of the Rules is followed. We cannot, therefore, accept the contention of the learned counsel of the appellant that if the first condition is satisfied, i.e. it is proved to the satisfaction of the Central Excise officer that the goods are used for the intended use, the exemption has to be granted. In our considered opinion, unless the second condition is also satisfied, i.e. the procedure set out in Chapter X of the Rules is followed where the use of the goods is elsewhere than in the factory of production, the exemption cannot be granted under the exemption notification.

8. In the facts of the present case, the RCO was not to be used in the factory of the appellant but at the place of generation of electricity by the Ahmedabad Electricity Company Ltd. Hence, the second condition laid down in the proviso was also to be complied with. Rule 192 of Chapter X of the Rules is quoted hereinbelow:

"RULE 192. Application for concession.—

Where the Central Government has, by notification under rule 8, or section 5A of the Act, as the case may be, sanctioned the remission of duty on excisable goods other than salt, used in a specified industrial process, any person wishing to obtain remission of duty on such goods, shall make application to the Collector in the proper Form stating the estimated annual quantity of the excisable goods required and the purpose for and the manner in which it is intended to use them and declaring that the goods will be used for such purpose and in such manner. If the Collector is satisfied that the applicant is a person to whom the concession can be granted without danger to the revenue, and if he is satisfied, either by personal inspection or by that of an officer subordinate to him that the premises are suitable and contain a secure store-room suitable for the storage of the goods, and if the applicant

agrees to bear the cost of such establishment as the Collector may consider necessary for supervising operation in his premises for the purposes of this Chapter, the Collector may grant the application, and the applicant shall then enter into a bond in the proper Form with such surety or sufficient security, in such amount and under such conditions as the Collector approves. Where, for this purpose, it is necessary for the applicant to obtain an Excise registration certificate, he shall submit the requisite application along with the proof for payment of registration fee and shall then be granted a registration certificate in the proper Form. The concession shall, unless renewed by the Collector, cease on the expiry of the registration certificate:

Provided that, in the event of death, insolvency or insufficiency of the surety, or where the amount of the bond is inadequate, the Collector may, in his discretion, demand a fresh bond; and may, if the security furnished for a bond is not adequate, demand additional security."

The language of Rule 192 of Chapter X of the Rules is clear that for availing concession from excise duty on excisable goods used in a specified industrial process, a person must obtain a registration certificate from the Collector and that "the concession shall, unless renewed by the Collector, cease on the expiry of the registration certificate". Admittedly, the registration certificate of the appellant expired on 31.12.1995. Hence, the exemption granted under the notification ceased on 31.12.1995. The fresh registration certificate in favour of the Ahmedabad Electricity Company Ltd. was issued on 26.06.1996 and we find on a reading of the copy of the CT-2 certificate annexed as Annexure P5 that the registration certificate was not for any period prior to 26.06.1996. As the procedure laid down in Rule 192 of Chapter X of the Rules has not been complied with, the appellant is not entitled to avail the exemption of excise duty under the exemption notification during the period from 01.01.1996 to 25.06.1996.

9. The appeals are, therefore, dismissed but there shall be no order as to costs.

CIVIL APPEAL NO.8048 OF 2004:

This is an appeal under Section 35L (b) of the Central Excise Act, 1944 against the order dated 02.07.2004 of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, (for short "the Tribunal").

2. The facts very briefly are that the appellant produces inter alia Naphtha. By Notification no. 3/2001-CE dated 01.03.2001 (for short "the exemption notification") issued under Section 5A of the Central Excise Act, 1944 (for short "the Act") the Central Government exempted inter alia Naphtha cleared for the intended use in the manufacture of fertilizers from excise duty subject to relevant conditions specified in the annexure to the notification. In the annexure to the exemption notification, one of the conditions specified was that where such use is elsewhere than in the factory of production, the exemption shall be allowed if the procedure set out in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 (for short "the 2001 Rules") is followed. Rule 3(1) of the 2001 Rules provided that a manufacturer who intends to receive subject goods for specified use at concessional rate of duty, shall make an application in quadruplicate in the Form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be. Indo Gulf Corporation Limited placed an order on 16.07.2001 on the appellant for supply of Naphtha for the purpose of manufacture of fertilizers and furnished a letter to the appellant saying it has made an application to the Commissioner of Excise for authorization for dispatch of one rake of Naphtha. The appellant supplied 2241.908 MT of Naphtha to Indo Gulf Corporation Limited and while clearing the aforesaid Naphtha from its factory did not make any payment of Central Excise duty. The Commissioner of Central Excise issued show cause notice

dated 13.06.2002 to the appellant and after considering the reply of the appellant passed the order dated 30.09.2002 confirming the demand of duty amounting to Rs. 44,71,902/- on the Naphtha cleared on 16.07.2001 and also imposed a penalty equivalent to the duty amount. The appellant filed an appeal against the order of the Commissioner before the Tribunal and the Tribunal held in the impugned order that under the exemption notification, the appellant could be exempted from duty on Naphtha supplied to the manufacturer of fertilizer only if the conditions specified in the exemption notification are fulfilled. The Tribunal further held that one of the conditions specified in the exemption notification was that where the goods were to be used elsewhere than in the factory of production, the exemption would be allowed if the procedure set out in the 2001 Rules was followed and in this case Rule 3(1) of 2001 Rules has not been followed, inasmuch as, the manufacturer, namely, Indo Gulf Corporation Limited had not submitted application in the form at Annexure-1 for obtaining Naphtha without payment of duty and had only cleared the Naphtha without payment of duty on the basis of a letter dated 16.07.2001 wherein it was mentioned that it has submitted its application to the Commissioner for issuance of authorization for dispatching one rake of Naphtha. The Tribunal held that as the condition of the exemption notification has not been complied with, the appellant was not entitled to clear naphtha without payment of excise duty and accordingly sustained the demand of excise duty. The Tribunal also held that as the appellant had cleared Naphtha without payment of duty and without getting the requisite Annexure-1 from its customer, penalty was also imposable on the appellant, but on the facts and circumstances of the case the penalty was excessive. The Tribunal accordingly reduced the penalty to Rs.1,00,000/- only.

3. Mr. Alok Yadav, learned counsel for the appellant, submitted that as the Naphtha supplied to Indo Gulf Corporation Limited was in fact used for manufacture of fertilizer, the appellant was entitled to the benefit of exemption notification.

He further submitted that as the appellant was a government company, he should not be denied the exemption on a technical ground that the application at Annexure-1 was not submitted to the authorities by the manufacturer of fertilizer as provided in Rule 3(1) of the 2001 Rules.

4. Mr. Anup Chaudhary, learned senior counsel appearing for the respondent, on the other hand, submitted that one of the conditions specified in the exemption notification was that where the goods were to be used in the place other than in the factory of production, the procedure set out in the 2001 Rules has to be followed and in this case the procedure set out in Rule 3(1) of the 2001 Rules has not been followed.

5. We have considered the submissions of the learned counsel for the parties and we find that by the exemption notification the Central Government exempted the excisable goods from duty "subject to the relevant conditions specified in the Annexure" to the exemption notification. Paras 3 and 4 in the Annexure to the exemption notification read as follows:

> "3. The exemption shall be allowed if it has been proved to the satisfaction of an officer not below the rank of the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction that such goods are cleared for the intended use specified in column 3 of the table.
>
> 4. Where such use is elsewhere than in the factory of production, the exemption shall be allowed if the procedure set out in the Central Excise (Removal of Goods at Concessional Rate of Duty for manufacture of Excisable Goods) Rules, 2001 is followed."

It will be clear from Para 3 of the Annexure to the exemption notification that the exemption shall be allowed if it has been proved to the Central Excise Officer having jurisdiction that the goods are cleared for the intended use specified in column 3

of the table. In addition to this condition, there is a further condition in Para 4 of the Annexure to the exemption notification that where the intended use is elsewhere than the factory of production, the exemption shall be allowed if the procedure set out in the 2001 Rules is followed. We, therefore, do not accept the submission of Mr. Yadav that as the Naphtha cleared from the factory of the appellant has been used for manufacture of fertilizer, the appellant would be entitled to exemption even if the condition specified in Para 4 of the Annexure to the exemption notification is not followed.

6. The condition specified in Para 4 in the Annexure to the exemption notification states that where the intend use is elsewhere than in the factory of production, the exemption shall be allowed if the procedure set out in the 2001 Rules is followed. In the facts of this case, the Naphtha produced by the appellant in its factory was to be used for the manufacture of fertilizer elsewhere than in its own factory, i.e. in the factory of Indo Gulf Corporation Limited. Hence, the exemption could be allowed only if the procedure set out in the 2001 Rules was followed.

7. Rule 3(1) of the 2001 Rules is extracted hereinbelow:

> **"Rule 3. Application by the manufacturer to obtain the benefit.** – (1) A manufacturer who intends to receive subject goods for specified use at concessional rate of duty, shall make an application in quadruplicate in the Form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be (hereinafter referred to as the said Assistant Commissioner or Deputy Commissioner)."

Rule 3(1) makes it amply clear that the manufacturer, who intends to use subject goods for specified use at concessional rate of duty, shall make an application in quadruplicate in the Form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise, as

the case may be. Admittedly, no such application was made by Indo Gulf Corporation Limited in the form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise. As the procedure set out in the 2001 Rules has not been followed, the appellant was not entitled to exemption on the Naphtha cleared from its factory for supply to Indo Gulf Corporation Limited for manufacture of fertilizer.

8. We, therefore, do not find any merit in the appeal and we accordingly dismiss the same. There shall be no order as to costs.

B.B.B. Appeals dismissed.

MADHU

v.

STATE OF KERALA

(CRIMINAL APPEAL NO.522 OF 2006)

JANUARY 13, 2012

[ASOK KUMAR GANGULY AND JAGDISH SINGH KHEHAR, JJ.]

Penal Code, 1860 – ss. 392 and 302 r/w s.34 – Robbery and murder – Case based on circumstantial evidence – Appellant-accused and a co-accused allegedly robbed a woman of the gold ornaments worn by her and murdered her by forcibly drowning her, when she was sitting on the ghat (place leading into water) steps leading to the paddy field, washing utensils – Conviction of appellant by Courts below on basis of recovery of gold ornaments pursuant to confessional statements made by the appellant and the co-accused before Police; and the factum of the accused having been sighted close to the place of occurrence at or around the time of occurrence – Justification – Held: Not justified – Evidence produced by the prosecution did not, in any way, establish the guilt of the accused – Confessional statements made by appellant and the co-accused were not proved against them, or to their detriment – This by itself removed the most vital link in the chain of events sought to be established by the prosecution against the accused – Evidence produced to establish the presence of the accused near the place of occurrence, at or about the time of the commission of the crime was also irrelevant, because, the accused were in any case neighbours of the deceased – Theft of the golden ornaments worn by the deceased was doubtful – Explanation tendered by the prosecution of the earrings worn by the deceased when her body was recovered, also far from satisfactory – No positive inference from the statement

of the Doctor (who conducted post-mortem), and the surrounding facts that the deceased was first smothered and then drowned as alleged by the prosecution – Also there were serious contradictions in the deposition of the prosecution witnesses – Prosecution was not able to connect the accused with the alleged crime in any manner whatsoever – Appellant liable to be acquitted.

Evidence Act, 1872 – ss. 25, 26 and 27 – Confessional statements before police – Relevance of – Exception postulated under s.27 – Applicability of – Robbery and murder case – Recovery of gold ornaments by police, allegedly on basis of confessional statements made by the accused – Validity – Held: Relevance of confessional statements would depend on discovery of facts based on the information supplied by the accused – If any fresh facts have been discovered on the basis of the confessional statement made by the accused, the same would be relevant – If not, the confessional statement cannot be proved against the accused, to the detriment of the accused – In the instant case, the confessional statements made by the accused cannot be said to have led to the discovery of an unknown fact, because the statements of PW7, PW11, PW13 and PW15 reveal that the factual position in respect of the recovery of the articles from the place from where the same were shown to have been eventually recovered, was known to the public at large well before the confessional statements had been recorded – The said statements were inadmissible inspite of the mandate contained in s.27 of the Evidence Act for the simple reason, that they cannot be stated to have resulted in the discovery of some new fact – In the factual background of the case, the gold ornaments which eventually came to be recovered by the police, allegedly at the instance of accused, may well have been planted by the police.

Criminal Trial – Investigation – Inquest report – Held: Genesis of crime should ordinarily emerge from inquest

report, specially when it is in respect of a patent fact.

Criminal Trial – Circumstantial Evidence – Appreciation of – Held: Only circumstantial evidence of a very high order can satisfy the test of proof in a criminal prosecution – In a case resting on circumstantial evidence, the prosecution must establish a complete unbroken chain of events leading to the determination that the inference being drawn from the evidence is the only inescapable conclusion – In the absence of convincing circumstantial evidence, an accused would be entitled to the benefit of doubt.

Constitution of India, 1950 – Art. 136 – Interference in criminal matters – Scope – Benefit of acquittal to similarly placed non-appealing co-accused – Robbery and murder case – Appellant-accused (A-1) and non-appealing co-accused (A-2) were convicted by Courts below on the same evidence and for the same reasons – A-1 acquitted by Supreme Court in instant appeal – Held: To do complete justice, such relief extended to A-2 – A-2 also directed to be acquitted – Penal Code, 1860 – ss. 392 and 302 r/w s.34.

The accused-appellant(A-1) and co-accused 'Sibi'(A-2) were convicted by the Courts below under Section 302 and 392 r/w Section 34 IPC and sentenced to life imprisonment for having robbed a woman 'P' of the gold ornaments worn by her and for having murdered her by forcibly dragging her into the water and suffocating her thereby causing her death by drowning, when she was sitting on the *ghat* (place leading into water) steps leading to the paddy field, washing utensils. The conviction of the accused was based on circumstantial evidence. Principally, the conviction was ordered on the basis of confessional statements made by the appellant and the co-accused to PW21, Circle Inspector of Police, consequent to which the police recovered gold chain as also six gold bangles. The other material evidence taken into consideration by the courts below, to return the

conviction of the appellant (as also the co-accused) was the factum of their having been sighted close to the place of occurrence at or around the time of occurrence. Appellant challenged his conviction before this Court.

Allowing the appeal, the Court

HELD: 1. Only circumstantial evidence of a very high order can satisfy the test of proof in a criminal prosecution. In a case resting on circumstantial evidence, the prosecution must establish a complete unbroken chain of events leading to the determination that the inference being drawn from the evidence is the only inescapable conclusion. In the absence of convincing circumstantial evidence, an accused would be entitled to the benefit of doubt. [Para 5]

2.1. The most significant issue in the present controversy is the veracity of the confessional statements made by the appellant and the other accused Sibi before PW21, Circle Inspector of Police. It is evident that the aforesaid statements were made by the accused before a police officer while the accused were in custody of the police. Section 25 of the Indian Evidence Act postulates that a confession made by an accused to a police officer cannot be proved against him. Additionally, Section 26 of the Indian Evidence Act stipulates that a confession made by an accused while in police custody cannot be proved against him. It is evident from the factual position, that the statements made by the appellant and Sibi were made to a police officer while the accused were in police custody. It is, therefore, apparent that in terms of the mandate of Sections 25 and 26 of the Indian Evidence Act, the said statements could not be used against the appellant and the other accused Sibi. But then, there is an exception to the rule provided for by Sections 25 and 26 aforesaid, under Section 27 of the Indian Evidence Act. As an exception, Section 27 of the

Indian Evidence Act provides that a confessional statement made to a police officer or while an accused is in police custody, can be proved against him, if the same leads to the discovery of an unknown fact. The rationale of Sections 25 and 26 of the Indian Evidence Act is, that police may procure a confession by coercion or threat. The exception postulated under Section 27 of the Indian Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance under the exception postulated by Section 27 aforesaid, is limited "…as it relates distinctly to the fact thereby discovered….". The rationale behind Section 27 of the Indian Evidence Act is, that the facts in question would have remained unknown but for the disclosure of the same by the accused. Discovery of facts itself, therefore, substantiates the truth of the confessional statement. And since it is truth that a court must endeavour to search, Section 27 aforesaid has been incorporated as an exception to the mandate contained in Sections 25 and 26 of the Indian Evidence Act. [Para 17]

2.2. The relevance of the confessional statements would depend on the discovery of facts based on the information supplied by the accused. If any fresh facts have been discovered on the basis of the confessional statement made by the accused, the same would be relevant. If not, the confessional statement cannot be proved against the accused, to the detriment of the accused. The confessional statements made by the accused (vide Exhibit P-9 and P-10) cannot be said to have led to the discovery of an unknown fact, because the statements of PW7, PW11, PW13 and PW15 reveal that the factual position in respect of the recovery of the articles from the place from where the same were shown to have been eventually recovered, was known to the public at large by noon (and certainly before 2.30 p.m.)

i.e., well before the confessional statements had been recorded. As per the deposition of P.J. Thomas (PW21), Circle Inspector of Police, "… A-2's confession statement was recorded at about 2.45 p.m.…". The public had become aware of the recovery by "noon", whereas, appellant was arrested at 1.00 p.m., and Sibi-accused no.2 was arrested at 1.30 p.m. and their confessional statements were recorded by the police after their arrest. In the background of the aforesaid factual position, it is not possible to conclude that the confessional statements made by appellant vide Exhibit P-10 and Sibi-accused no.2 vide Exhibit P-9, can be stated to have resulted in the discovery of any fresh facts. The factual position that recovery of stolen ornaments would be made by the police was a matter of common knowledge well before the confessional statements were made. The said statements recorded vide Exhibits P-9 and P-10 are inadmissible inspite of the mandate contained in Section 27 of the Indian Evidence Act for the simple reason, that they cannot be stated to have resulted in the discovery of some new fact. In the factual background of the present controversy, the gold ornaments which eventually came to be recovered by the police, allegedly at the instance of accused, may well have been planted by the police. On account of the fact that the confessional statements made by appellant and Sibi-accused no.2, which is the main linking factor in the circumstantial evidence of the prosecution version of the controversy, being inadmissible as the same cannot be proved against them, the prosecution's case stands fully demolished. [Para 18]

3. The second significant conglomerate of evidence to link the accused to the crime in question, is their alleged presence at or around the place of occurrence. This evidence emerges from the statements made by PW6 to PW9. The prosecution, through these witnesses,

have endeavoured to demonstrate the presence of the accused, in the vicinity of the place of occurrence, at around the time of occurrence. The statement of PW6 is wholly insignificant to connect the accused with the crime under reference. PW7 has given his version of having seen the accused close to the place of occurrence. But the statement of PW7 is so unrealistic, that it is worthy of rejection without recording any reasons. It is strange that PW7 reached the embankment by swimming upto it since the last boat had already left. He claims to have kept his clothes afloat and above the water while he was swimming through the water. It is, therefore, that his clothes had remained dry. Even though, in his statement, he asserted that "…I identified him as A-2 in the light of my torch…". He subsequently stated that a person was seen coming, flashing a torchlight towards east, and that, he was identified by PW7 as appellant. As per the said statement, the identification was made on the basis of the torch held in the hands of the appellant. The aforesaid contradiction is hard to digest. How PW7 retained the torch in his hand in a dry condition, while swimming, has not been explained. If he was holding his torch in one hand and clothes in the other, it is difficult to understand how he swam across the water. And if the accused himself was carrying the torch, the light would not fall on his face, and in that situation, the accused could not have been identified, because by then it was past 9 p.m. These and other such like discrepancies, when viewed closely, leave no room to accept the credibility of the statement made by PW7. PW8 was the manager of Toddy Shop No.86 at Kuttanad. As per the statement of PW8 both the accused purchased a bottle of toddy each, and after drinking the toddy, they left the toddy shop. This statement does not establish the presence of accused at or near the place of occurrence. PW9 is the only other witness produced by the prosecution to show the presence of the accused close to the place of

occurrence, at or around the time of occurrence, on 8.5.1998. The statement made by PW9, during the course of his deposition before the Sessions Court, in connection with his having seen the accused near the place of occurrence, had not been disclosed by him even to the police during the course of investigation. In fact during the course of his cross-examination he acknowledged "…I have not told anybody-else about my having met the accused persons there, I am speaking about it for the first time in court…". In fact PW9 was working as a labourer in the house of PW10. PW9 had not even disclosed the aforesaid factual position to his employer PW10, even though he must have known, that PW10 was the elder brother of husband of the deceased 'P'. In this situation it is difficult to consider the statement of PW9 as credible. In view of the aforesaid evaluation of the statements of witnesses examined by the prosecution, to establish the presence of the accused, in close vicinity of the place of occurrence, there remains no proved connection of the accused with the accusations levelled against them. Even otherwise, the presence of the accused close to the residence of 'P' is inconsequential, because according to the statement of PW2 (husband of the deceased 'P') both the accused were known to him as they were his neighbours. Surely, presence close to ones own residence cannot be the basis for drawing an adverse inference. This Court is therefore satisfied, that the statements of PW6 to PW9, do not in any manner, further the case of the prosecution. [Para 19]

4. There are other glaring discrepancies as well. A large number of witnesses, including PW1, PW3, PW4, PW5, PW7, PW10, PW13, PW14, PW15 and PW16, deposed, that they had seen utensils lying on the steps of the ghat. Some of the witnesses had gone further to explain, that some of the utensils were washed whereas

some were still to be washed. These statements were made by the witnesses so as to support the prosecution version mentioned in the charge-sheet, wherein it was projected that 'P' had gone out to the steps of the ghat after taking the supper meal, to wash the dirty utensils. The inquest report (Exhibit P-3), however, does not disclose the presence of any utensils at the ghat. In conjunction with the aforesaid, it is relevant to notice, that during the deposition of PW21, Circle Inspector of Police, who carried out the investigation in the case, he categorically asserted (in response to a pointed question posed to him), that when he reached the ghat there were no utensils. He further stated, that none of the witnesses told him, that there were utensils at the ghat or on the steps leading to the paddy fields. The absence of any evidence supporting the prosecution case depicting the reason for 'P' to go out of her house at late hours in the night, so as to be found alone by the accused, reveals the lack of evidence to project the prosecution version reflected in the charge-sheet. But more than that, is the contradiction in the statements of PW1, PW3, PW4, PW5, PW7, PW10 and PW13 to PW16 on the one hand, and the statement of PW21 coupled with the details mentioned in the inquest report on the other. The genesis of the crime should ordinarily emerge from the inquest report specially when it is in respect of a patent fact. If utensils were actually at the ghat, the mention thereof could not have been left out therefrom. This would be so even if the inquest report had been prepared with half the seriousness required in its preparation. A perusal of the inquest report reveals that the same was painstakingly recorded, and even minute details have been recorded therein. It is difficult to state which of the two sides has deposed correctly and/or which one of them has deposed falsely. All the same, the instant aspect of the deposition creates a serious doubt about the credibility of the evidence on the instant factual aspect, irrespective

of the significance thereof in proving the charges. [Para 20]

5.1. Additionally, the charge-sheet pointedly records that appellant caught hold of the plated hair and neck of 'P', and Sibi-accused no.2 caught hold of her feet, and forcibly dragged her into the water and suffocated her thereby cause her death by drowning. This factual position remained unproved as not a single prosecution witness narrated the said factual position, so as to establish the manner in which 'P' came to be drowned by the two accused. [Para 21]

5.2. PW20 (who had conducted the post-mortem) had expressed in the post mortem certificate dated 9.5.1998, and he had affirmed during the course of his deposition before the Sessions Court, that the death of 'P' had been caused by drowning. The fact that she had been smothered first and thereafter drowned by the appellant and Sibi cannot be stated to have been established by the prosecution. No injury whatsoever was suffered by deceased 'P' either on her neck or on her feet. 'P' was 47 years old at the time of occurrence. She would not have easily allowed two drunkards, who were in a state of intoxication, to carry her away by holding her by her neck and feet as has been alleged in the charge-sheet. 'P' would have been expected to fight for her life, consequent upon an assault on her, at the hands of the appellant and Sibi. Injury nos.1 and 2 referred to by the courts below, so as to infer smothering, is clearly unacceptable in view of the fact that PW20, in his cross-examination, clearly asserted, that injury nos.1 and 2 are possible if a person falls and during the course of that fall the right side of the face comes in contact with a rough hard surface. PW20 also stated during his cross-examination, that all the injuries suffered by 'P' were superficial injuries. In the aforesaid view of the matter, even the medical evidence produced by the prosecution,

does not suitably support the prosecution story, that the deceased 'P' was, first assaulted by the appellant and Sibi, and thereafter, drowned. The deceased is alleged to have been dragged, smothered and forcibly drowned. The instant version of the prosecution story, is wholly unacceptable, keeping in mind the statement of PW20. [Para 22]

6. The motive for the accused in committing the murder of 'P' is stated to be theft of her gold ornaments. Appellant is a labourer, and Sibi-accused no.2 is a toddy trapper. If the motive had been theft, so as to snatch away the jewellery of 'P', it is difficult to understand why the accused only took away the golden chain around the neck of the deceased, and the six bangles on her right arm, and forsake the earrings on the person of the deceased. It is relevant to mention, that the factum of the earrings found on the person of the deceased has been explained in a wishy-washy manner. PW21, Circle Inspector of Police, has specifically deposed on the recovery, retention and return of the earrings to the family of the deceased. The statement of PW21 reveals a sorry state of affairs in handling the investigation of the case in hand. According to the statement of PW21, the earrings were removed from the dead body of 'P', by one of the policemen who was assisting him in the preparation of inquest report on 9.5.1998. There is no documentary record of this. The earrings were then (according to PW21) retained by the writer at the police station. This again, without maintaining any record. On 11.6.1998, the said earrings are stated to have been returned to PW2, husband of deceased 'P'. It was also deposed by PW21, that PW2 had visited the police station to take back the earrings. Accordingly, the earrings were returned to him. Yet again, without maintaining any record. Coupled with the conclusion drawn in respect of the gold chain and the six gold bangles, allegedly recovered at the instance of

appellant and Sibi, this Court is of the view that it may well be, that the ornaments were never taken away from the person of the deceased 'P', because if the motive had been theft of gold ornaments, then all the gold ornaments would have been taken away, most certainly the earrings which were openly and clearly visible. The accused were poor persons, for them the earrings alone would have meant a lot. If nothing else, the earrings would have balanced (to some extent at least) the spoils in the hands of the accused. It may well be, that the aforesaid ornaments came to be planted only with the object of solving the case in hand. This aspect of the matter also creates a serious doubt in the prosecution case. [Para 23]

7. The evidence produced by the prosecution does not, in any way, establish the guilt of the accused. The prosecution had endeavoured to prove the allegations levelled against the accused on the basis of circumstantial evidence. The mainstay of the prosecution evidence is the recovery of the gold ornaments belonging to the deceased 'P' at the instance of the appellant and Sibi. The statements made by the appellant and Sibi (vide Exhibits P-10 and P-9 respectively) cannot be proved against the accused, or to their detriment. This by itself removes the most vital link in the chain of events sought to be established by the prosecution against the accused. Evidence produced to establish the presence of the accused near the place of occurrence, at or about the time of the commission of the crime has also been found to be irrelevant. This because, the accused were in any case neighbours of the deceased 'P'. The theft of the golden ornaments worn by the deceased 'P' was also doubtful. The explanation tendered by the prosecution of the earrings worn by the deceased 'P' when her body was recovered, is also far from satisfactory. From the statement of PW20, and the surrounding facts, it cannot be positively inferred that the deceased 'P' was first

smothered and then drowned as has been alleged by the prosecution. Also there were serious contradictions in the deposition of the prosecution witnesses. The prosecution has failed to establish an unbroken chain of events lending to the determination, that the inference being drawn from the evidence is the only inescapable conclusion. In fact the prosecution has not been able to connect the accused with the alleged crime in any manner whatsoever. The appellant is liable to be acquitted of the charges levelled against him. [Paras 24, 25]

8. The evidence to establish the charges against the co-accused Sibi was on the same lines as that projected against the appellant-accused. Sibi-accused no.2 was accused of the allegations for exactly the same reasons, as weighed with the courts below against the appellant. He was also convicted for the same reasons. If Sibi-accused no.2 had preferred an appeal, the result would have been exactly the same, as it has been in the present appeal, in respect of the appellant. To do complete justice, it would be just and appropriate to extend the same benefit as has been extended to the appellant, also to Sibi-accused no.2. Therefore, for exactly the same reasons as have weighed with this Court in the instant appeal, to determine the acquittal of the appellant, this Court hereby orders the acquittal of Sibi-accused no.2 as well, even though he has not preferred an appeal so as to assail the impugned judgment whereby he stands convicted. [Para 27]

Gurucharan Kumar & Anr. vs. State of Rajasthan **(2003) 2 SCC 698:2003 (1) SCR 60** ***and*** *Pawan Kumar v. State of Haryana* **(2003) 11 SCC 241: 2003 (1) Suppl. SCR 710 – relied on.**

Case Law Reference:

2003 (1) SCR 60	**relied on**	**Para 27**
2003 (1) Suppl. SCR 710	**relied on**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 522 of 2006.

From the Judgment & Order dated 15.07.2003 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 266 of 2001.

Asha Gopalan Nair, for the Appellant.

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

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. The appellant herein, Madhu Kalikutty Panicker (hereinafter referred to as "Madhu") was charged along with Sibi Bhaskaran (hereinafter referred to as "Sibi") for offences punishable under Section 302 and 392 read with Section 34 of the Indian Penal Code, for having robbed Padmini Devi alias Omana of her gold ornaments and thereafter having murdered her on 8.5.1998 at her residence, i.e., Kalathil House situated in Ward No.IV of Veliyanad Village. Both Madhu (accused no.1) and Sibi (accused no.2) were also residing in the neighbourhood of the deceased in the same ward and village.

2. The Sessions Judge, Alappuzha convicted the accused and sentenced them to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.25,000/- under Section 392 of the Indian Penal Code. The accused were sentenced to imprisonment for life under Section 302 of the Indian Penal Code. The Sessions Judge directed that the aforesaid sentences would be suffered successively, i.e., one after the other. In case of default of payment of fine, the accused were to undergo further rigorous imprisonment for a period of three

years. The Sessions Judge also directed that the accused would be entitled to set off equivalent to the period of their detention during the course of trial, under Section 428 of the Criminal Procedure Code.

3. On appeal, the High Court of Kerala maintained the conviction of the two accused. On the question of sentence, the High Court modified the order passed by the Sessions Judge to the extent that the sentences would run concurrently. Subject to the aforesaid modification, even the sentences awarded by the Sessions Court were maintained.

4. The conviction of the accused at the hands of the Sessions Judge as also the High Court was based on circumstantial evidence. Principally, the conviction was ordered as a consequence of recovery of ornaments worn by the deceased, pursuant to the information furnished by the accused. Based on the aforesaid recovery, the High Court, relying on Section 114 of the Indian Evidence Act inferred that the accused had committed the murder of Padmini Devi, and thereupon, robbed her off the ornaments worn by her. The only other material evidence taken into consideration by the courts below, to return the conviction of the appellant herein (as also his co-accused Sibi) was the factum of their having been sighted close to the place of occurrence at or around the time of occurrence.

5. The care and caution with which circumstantial evidence has to be evaluated stands recognized by judicial precedent. Only circumstantial evidence of a very high order can satisfy the test of proof in a criminal prosecution. In a case resting on circumstantial evidence, the prosecution must establish a complete unbroken chain of events leading to the determination that the inference being drawn from the evidence is the only inescapable conclusion. In the absence of convincing circumstantial evidence, an accused would be entitled to the benefit of doubt. During the course of deliberations of the present controversy, we shall endeavour to evaluate the

worthiness of circumstantial evidence produced by the prosecution to prove the guilt of the accused. But more importantly, our endeavour would be to evaluate the admissibility of the statements made by the accused to the police, during the course of their detention by the police, resulting in the discovery of the gold ornaments, belonging to Padmini Devi, after having committed her murder. This piece of evidence has been relied upon to connect the accused with the crime.

6. The prosecution case as is revealed from the charge-sheet, notices that the accused with the deliberate intention of committing the murder of Padmini Devi with the motive of robbing her of the ornaments worn by her, proceeded to Kalathil House where the deceased was residing. Padmini Devi was found alone, sitting on the ghat (place leading into water) steps leading to the paddy field, washing utensils. The ghat was situated at about 3 meters (2 meters and 75 cms.) from the last door step of the kitchen's eastern door of Padmini Devi's house (Kalathil House). It is alleged that Madhu – accused no.1, caught hold of the plated hair and neck of Padmini Devi and Sibi-accused no.2, held her by her feet, and the two together forcibly dragged her into the water. Thereupon, they suffocated her. The act of drowning of Padmini Devi is alleged to have been committed by the accused at a place 29 meters from the south-east of the steps of the ghat. The accused are stated to have dragged Padmini Devi to the spot from where her body was eventually recovered, at a distance of 7 meters north-west of the foundation of the Snake God Shrine, which is to the south of the paddy field in question. Madhu-accused no.1, is alleged to have removed six gold bangles worn by Padmini Devi (on her left arm), whereas, Sibi-accused no.2, is alleged to have removed a gold chain worn by Padmini Devi (around her neck). The accused were thus alleged to have committed the murder of Padmini Devi, and the theft of her ornaments jointly.

7. The son of the deceased Asuthosh PW3 is stated to

have received a phone call from his sister Ambily PW4 at 9.45 p.m. on 8.5.1998. Since Ashutosh's sister Ambily informed him that she would like to speak to her mother Padmini Devi, Ashutosh PW3 who was sleeping at the time when the call was received, got up to call his mother. He found his mother missing. He accordingly, approached his relations and neighbours. A joint search was carried out. The husband of the deceased, i.e., Ayyappa Kurup PW2 who, at that point of time, was attending to his night duty in the Telephone Exchange at Changanacherry was summoned. Ayyappa Kurup PW2 reached Kalathil House at around 11.30 p.m. The body of the deceased was found at about 11.45 p.m., from under the water in the field on the eastern side of Kalathil House. Ayyappa Kurup PW2 asked Purushottama Kurup PW1 to make a complaint to the police. This decision was in fact, that the death of Padmini Devi was shrouded in suspicious circumstances. The aforesaid suspicion emerged on account of absence of her golden necklace (worn by the deceased on her neck), as also, six bangles (worn by the deceased around her left arm) when her body was recovered. Accordingly, Purushothama Kurup PW1 reported the matter to the police, disclosing the aforesaid factual position on the following morning i.e. on 9.5.1998 at 8.30 a.m..

8. On the registration of the FIR, PJ Thomas PW21, Circle Inspector of Police, reached the place of occurrence, and prepared the inquest report (Exhibit P-3). As per the inquest report. the deceased Padmini Devi alias Omana was aged 47 years. She was found by Karthikeyan Nair PW16, a neighbour and a resident of Thundiyil House in Ward No.IV, Veliyanad Village at 11.45 p.m. from the paddy field on the eastern side of his house. As per the inquest report, Padmini Devi was last seen alive at her residence by her son Aushutosh at 9.15 p.m. on 8.5.1998. As per the inquest report, apart from the dress worn by her she was wearing a gold chain around her neck of "thara" fashion weighing about 5-1/2 sovereigns, besides 4-5 golden bangles in her left hand and golden earrings in her ears, when Aushutosh saw her for the last time. The inquest report

further depicts, that blood and water was oozing out from her nostrils on both sides, and her tongue was protruding out by ½ inch, with the mouth slightly open. Water weeds were found sticking to her hair. Ears had earrings of "claver" design. The stomach was found to be slightly bloated. The inquest report records, that at a distance of 2 meter 27 cm. of the first foot-step of the kitchen door, there is a ghat (place leading into water) with three steps. The lower step of the ghat is immersed in water. At a distance of 50 cms., from the lowest foot-step the water is 75 cms. deep. The spot in the field from where the dead body of Padmini Devi was recovered, was 29 meters from the lowest foot-step. The depth of the water at the place from where the dead body was recovered is stated to be 82 cms. deep (32.28 inches, i.e., about 3 feet). The inquest report also noted, that ornaments worn around the neck and in the left arm by Padmini Devi were missing. According to the statement of Aushutosh PW3, his mother must have gone to the ghat, fallen into the water and somehow died. Yet, consequent upon the discovery of the missing golden ornaments, those present at the spot at the time of preparation of the inquest report, expressed doubts about the death of Padmini Devi. Accordingly, even though at Serial no.XI of the inquest report, it stands recorded that Padmini Devi alias Omana had died due to drowning, at Serial no.XVI it was mentioned that since the ornaments worn by her were missing, the persons present had unanimously raised a doubt about the cause of her death.

9. The contents of the First Information Report, as also, the Inquest Report constituted the first factual depiction of an occurrence. These are of utmost importance. The evidence produced by the prosecution during the course of trial, will accordingly have to be evaluated along with the aforesaid reports conjointly to substantiate the credibility of the charges levelled against the accused. During the course of hearing, some salient facts which constituted the foundation for establishing the prosecution version emerged. The first and the foremost in the sequence of events, is the fact that Padmini

Devi is alleged to have gone to the steps of the ghat after having taken supper, for washing utensils. The second important feature of the prosecution story is the absence of a gold necklace from around the neck of Padmini Devi, and six gold bangles worn by her on her left arm. Gold earrings worn by the deceased Padmini Devi were found intact on her ears. The third facet is the factum of the state of body of deceased Padmini Devi. The prosecution version is that Padmini Devi was first smothered and thereafter drowned. Thereby inferring murder, as against death by accidental drowning. The fourth component of the prosecution case was the presence of Madhu-accused no.1 and Sibi-accused no.2 in the vicinity of the place of occurrence at or around the time of occurrence on the fateful day i.e., on 8.5.1998. The final and the clinching basis for establishing the guilt of the accused were the confessional statements made by Madhu-accused no.1, i.e., the appellant herein, on 13.5.1998 (Exhibit P-10) to P.J. Thomas PW21, Circle Inspector of Police that he had wrapped six gold bangles belonging to Padmini Devi, in an old plastic paper, and had hidden them under the earth near the field on the southern side of his house. He offered that if he was taken to his house, he could produce the bangles. Likewise, is the confessional statement of Sibi-accused no.2 (Exhibit P-9) recorded on 13.5.1998 by PJ Thomas PW21, Circle Inspector of Police, that he had wrapped the gold chain of Padmini Devi, in a plastic paper, and had kept the same inside a "chadjan leaf" of a coconut tree, standing on the eastern side of his house. He further stated, that he could show the coconut tree and produce the chain. Consequent upon the aforesaid confessional statements, (Exhibits P-10 and P-9 respectively), the police recovered the gold chain as also the six gold bangles on 13.5.1998 at the instance of the accused. These ornaments came to be identified as the necklace and bangles worn by the deceased Padmini Devi.

10. The evidence produced by the prosecution also falls in different compartments. One set of witnesses were

produced to establish the search conducted for the recovery of the body of the deceased Padmini Devi on 8.5.1998. The same set of witnesses deposed about the presence of utensils on the steps of the ghat. The second set of witnesses was produced by the prosecution to establish the presence of Madhu-accused no.1 and Sibi-accused no.2, near the place of occurrence, at or around the time of occurrence on the fateful day i.e., on 8.5.1998. The third set of witnesses deposed about the recovery of the missing gold ornaments, at the instance of the accused. Besides the aforesaid three sets of witnesses, the prosecution examined Dr.Radhakrishnan, Principal, Medical College, Alappuzha as PW20. Dr.Radhakrishnan had conducted the post mortem examination of the body of the deceased. The only other witness whose statement was recorded was PJ Thomas PW21, the then Circle Inspector of Police, whose statement was recorded to show the course and process of investigation.

11. Since the prosecution endeavoured to establish the crime on the basis of circumstantial evidence, it shall be necessary for us to record a bird's eye view of the statements of witnesses produced by the prosecution.

First and foremost the prosecution produced Purushothama Kurup as PW1. Purushothama Kurup, deposed that he had recorded the First Information Report. He also asserted, that he had called the husband of the deceased Ayyappa Kurup (PW2) on telephone, to inform him that Padmini Devi was missing. Purushothama Kurup PW1 also deposed, that on being informed that Padmini Devi was missing, he had reached the house of the deceased and participated in her search. PW1 in his cross-examination deposed, that he had seen utensils, some of which were washed, and some were unwashed, at the upper step leading to the field, even though it was acknowledged, that he had not made any statement to the aforesaid effect to the police. Purushothama Kurup PW1 in his deposition also narrated the fact, that a gold chain of

"thara" fashion weighing about 5-1/2 sovereigns and six gold bangles were missing when the dead body of Padamini Devi was recovered. In his cross-examination he affirmed that he had made the aforesaid assertion, on the basis of the statement made by the deceased's husband Ayyappa Kurup (PW2), after the dead body of the deceased was recovered.

The statement of the husband of the deceased Ayyappa Kurup (PW2) recorded before the Sessions Court reveals, that both the accused Madhu and Sibi were known to him as they were his neighbours. He affirmed that on 13.5.1998, P.J. Thomas PW21, Circle Inspector of Police, brought the accused to his residence at about 6 p.m. The police party showed him six gold bangles, five of which were hand-cut whereas one was machine made. The police also showed him the recovered gold necklace. Ayyappa Kurup PW2 identified the recovered gold ornaments, as the ones which were worn by the deceased Padmini Devi around her neck and left arm. PW2 did not depose about the gold earrings worn by the deceased Padmini Devi, which were found on her ears at the time of recovery of her dead body. Ayyappa Kurup asserted during the course of his cross examination, that he had seen the utensils at the ghat, and that, the same had been taken and restored to the house, and were available at his residence.

Aushutosh, son of the deceased Padmini Devi was examined as PW3. He asserted, that the accused Madhu and Sibi were known to him. He confirmed that utensils were found lying on the eastern ghat when the search for his mother Padmini Devi was carried out. Like his father, he also identified the recovered ornaments on 13.5.1998, when the police party produced the same along with the accused at their residence.

Ambily, the daughter of the deceased Padmini Devi deposed as PW4. She confirmed having spoken to her brother over the telephone, whereupon, her brother Aushuthosh PW3 who had been sleeping, went out in search of his mother Padmini Devi, and found her missing. PW4 asserted that she

had reached her parents house, after she had received a call informing her that her mother was missing. She also asserted that as usual, her mother had gone to wash utensils at the field. She also deposed that her mother's gold chain and six bangles were missing when her dead body was recovered.

Vijayalakshmi was produced by the prosecution as PW5. Vijayalakshmi deposed that the deceased Padmini Devi, as also, both the accused Madhu and Sibi were known to her, as they were residing in her neighbourhood. Vijayalakshmi had joined the search party when Padmini Devi was found missing. In her statement she deposed that she had gone to the ghat on the fateful day, where she had seen two/three utensils. She asserted that the utensils were lying on the steps of the ghat. She further asserted that some of the utensils were washed while some were still unwashed. She asserted that the deceased was her aunt, and that, the golden necklace and the golden bangles worn by her aunt were missing when her body was recovered. She however acknowledged, that her aunt was still wearing the golden earrings when her body was recovered.

It would be relevant to indicate here, that all the aforesaid witnesses (PW1 to PW5) were primarily associated with the search and recovery of the body of deceased Padmini Devi as also, to support the prosecution version that Padmini Devi had gone out of the house to wash utensils at the ghat, on the fateful day. All these witnesses also deposed about the missing gold ornaments, namely, a gold chain and six gold bangles.

12. The next set of witnesses produced by the prosecution was to establish the presence of accused Madhu and Sibi close to the scene of occurrence at or around the time of occurrence on 8.5.1998, as well as, matters associated therewith.

The first witness produced for the aforesaid purpose was Kamalama PW6. Kamalama in her deposition asserted, that

the accused Madhu and Sibi had come to her residence at about 8.30 p.m. on 8.5.1998 as it was raining heavily at that time. She asserted that she had served two plantains each to the accused. As per the statement of Kamalama PW6, the accused had come to her house to borrow an umbrella. In her statement she also deposed, that both the accused were intoxicated and were smelling of liquor. She stated that the accused left her house when the rain subsided.

Madhu, a labourer appeared as PW7. Relevant part of the statement of Madhu PW7 needs to be extracted herein. The same is therefore reproduced hereunder:

> "I swam from the eastern bank of the boat jetty to its northern bank. It should have been 9.30 p.m. then. I swam by taking out by shirt and keeping it aloft. A person was seen walking from the Western side and turning to the North. I identified him as A-2 in the light of my torch. I asked whether he is Sibi. Saying that he is Sibi, he walked towards South. While I walked away and reached on the West of the shutter of Kuttachi's chira, a person was seen coming flashing torch-light towards East. On reaching near me, I identified him as A-1. I asked him whether he was swimming. A-1 told me that it is so. He also added that he is a little intoxicated and that he swam and got into the Karumuppathu ghat. A-1 was wearing a kyli mundu (dhothi). The dhoti was wet. There was a country-boat in the Karumuppathu ghat. A-1 told me that if I am to proceed to that jetty, I can cross to the other side. Witness identified both the accused persons. A-1 proceeded towards East and I went to my house."

Besides the aforesaid, Madhu PW7 also deposed about the recovery of gold ornaments at the instance of accused Madhu and Sibi. He asserted that a golden necklace was recovered from a palm tree at the instance of Sibi-accused no.2, from the compound of his residence, whereas, six gold bangles were recovered from under the earth at the instance of Madhu-

accused no.1 from the compound of his residence. In his cross examination he asserted that the death of the deceased Padmini Devi was not natural as the gold ornaments worn by her were missing. It was however clarified by him, that the fact that ornaments worn by the deceased Padmini Devi were missing came to his notice on account of an assertion made to the aforesaid effect by Ayyappa Kurup PW2. His statement relating to his having seen the accused close to the place of occurrence on 8.5.1998, emerges from his cross-examination which is being extracted hereunder:

> "When it was found that ornaments were missing, it was suspected that it should have been a case of murder. I realized that the ornaments were missing when PW.2 told about it. I did not tell them that I had seen the accused persons (on 8.5.1998). I was summoned to appear before the Police Station on 12.5.1998 at 8.00 a.m. A constable came to my house on the 11th and asked me to come to the Police Station…. I am speaking about this for the first time in Court. Raju is staying just near my house. I swam ashore. At that time, it should have been 9.30 p.m. which fact I did not tell the Police. I had also not told the Police that I had removed my dress and kept it aloft while swimming.
>
> Q. Are you not speaking about this also for the first time in Court?
>
> A. Yes.
>
> The person whom I saw first, proceeded to the West and then turned to the South. I had not stated during the chief-examination that he turned to the North."

It is also important to extract herein the cross-examination of Madhu PW7 on his incidental presence, which led to his having sighted the accused Madhu and Sibi, close to the place of occurrence:

> "To swam ashore some 4/5 minutes are enough. Until I swam ashore and saw the 2nd accused I did not meet anybody else. I was walking by flashing the torch-light. When I got down after the turning, and flashed the torch, I identified the person. The turning is on the East of the Shutter, which is on the East of Kuttachi Chira, and on the West of the Narayanan Achari. A-2 came from the West and turned to the South. I saw him come 15 feet away. I had seen very clearly. I did not notice the colour of the dress of A-2. He was wearing a kyli mundu (dhothi), is what I remember. I did not care to notice whether his dress was wet. I asked him whether he is Sibi. He was walking.
>
> Q. Did he try to run away?
>
> A. No. He walked speedily.
>
> I had not told the Police that he had walked speedily. I had not told the Police how I was able to identify Sibi. There are inmates in the house of Narayanan Achari. Sibi did not stand there talking to me. After answering me that he is Sibi, he proceeded towards South. Within two/three minutes I saw A-1. I saw A-1, some 20 feet on the West of the shutter. Both had not come there together. One was proceeding from behind and the other was walking in front. I saw A-1 some 30 feet away from the place where I saw A-2. My dress was not wet. I was walking along by wearing dhoti and shirt. A-1 asked me whether I was swimming. I told I was swimming. It seems that the dhoti worn by A-1 was of blue colour. I had not told the Police about the colour of that dhoti."

It would be relevant to mention that Madhu PW7 also deposed the presence of utensils on the steps of the ghat. In his statement he affirmed, that he had seen one utensil on the upper step and one utensil on the lower step of the ghat. In response to cross-examination he stated, that he had not made a statement in connection with the utensils on the ghat, because

he was not questioned in connection therewith by the police. His presence, at the time of recovery of the gold ornaments at the instance of accused Madhu and Sibi, is also relevant. The same is also accordingly being extracted hereunder:

> "I went for work on 13th at 7.30 a.m. In the afternoon, I reached my house at about 2.30 p.m. I had gone back home on coming to learn that the accused will be brought there around 4.00 p.m. I do not remember who told me so. A lot of people had gone to the Jetty. Seeing this, I too proceeded there.
>
> Q. Did the people know that the accused will be brought there and there will be recovery or seizure of ornaments?
>
> A. I do not know about it.
>
> I had not told the Police that as people were seen proceeding to the Jetty, I too proceeded there. I had told the Police that I heard it said by Sibi to the Police that the ornaments are hidden under the cadjan leaf."

Madhu PW7 also deposed that he remained present when the recovery of the gold necklace was made at the behest of Sibi-accused no.2, and also thereafter, when the recovery of six gold bangles were made at the behest of Madhu-accused no.1.

Rajankutty was produced by the prosecution as PW8. He deposed that he was the Manager of the Toddy Shop from where Madhu-accused no.1 and Sibi-accused no.2, had purchased one bottle of toddy each at 8.00 p.m. on the fateful day, i.e., 8.5.1998.

Sasseendran Nair was produced by the prosecution as PW9. He deposed that he had seen the accused close to the place of occurrence on the fateful day. He also deposed that he had left the house of Chandrasekhara Kurup PW10 at 9 p.m. on 8.5.1998, when the electricity was restored after the power cut. He stated that when he reached near the bridge on the western

side of the house of Ayyappa Kurup PW2, he had seen a person ascending the bridge, and then proceeding to the eastern bank. He had also seen another person following him and going towards the east. The first person he had noticed was Sibi-accused no.2, whereas the person who followed Sibi was Madhu-accused no.1. The cross-examination of PW9, in connection with his having sighted the accused is significant, relevant extract thereof is accordingly reproduced hereunder:

> "I first met Sibi. I saw Sibi standing under the bridge. Each of the accused persons were seen crossing the bridge from the Western bank to the Eastern bank. I had told the Police that I saw (these persons) crossing the bridge from Western bank to the Eastern bank.
>
> Q. Why is it not been noted by the Police?
>
> A. May be, the Police had not noted it down.
>
> I have not stated that one person alone was seen getting down to the Eastern bank. I had not stated that then one person crossed over the bridge from Western bank and descended on the Eastern bank. Marked Ext.D-3. They were seen turning towards North.
>
> Q. Did you notice any one standing there?
>
> A. I did not see.
>
> I had told the Police that a person along with another came there and turned to the North. What I had seen was both the accused going together towards the North. I had not noted one person standing there and turning to the North along with another. I had not told the Police what was the dress worn by the accused persons or the colour of their dress. I have not told anybody else about my having met the accused persons there. I am speaking about it for the first time in Court. I had told the Police about this.

Q. I put it to you that you had not noticed the accused persons on that day and that due to influence brought to bear upon by Chandrasekhara Kurup, you are speaking about what you had not Personally seen?

A. I had only spoken the truth."

13. The next set of witnesses deposed mainly on the subject of recovery and identification of the stolen gold ornaments and matters associated therewith.

Chandrasekhara Kurup appeared before the Sessions Court as PW10. The deceased Padmini Devi was described by him as the wife of his younger brother Ayyappa Kurup PW2. Chandrasekhara Kurup PW10 deposed about the presence of utensils lying on the steps of the ghat. He also deposed, that he had not only participated in the search but had also gathered people to find Padmini Devi. He asserted that he was present when the dead body of Padmini Devi was found. He confirmed the presence of earrings on the person of Padmini Devi. He also deposed about the missing gold chain and gold bangles. He asserted that he could identify the gold chain, as also, the gold bangles if they were shown to him. Accordingly, he identified the gold chain and bangles recovered at the instance of the accused, during the course of his deposition.

Neelakantan Nair appeared as PW11. His deposition was primarily in respect of recovery of the gold chain and the golden bangles at the instance of accused Madhu and Sibi. His presence at the time of recovery of ornaments, as deposed during the course of his cross-examination, has an important bearing on the controversy, the same is accordingly being reproduced hereunder:

"On the afternoon of 13th, I learnt that the accused persons have been apprehended. I learnt it from the people in the locality. I learnt that the accused persons, who had murdered the teacher, have been arrested. In the morning

itself, it was heard it said that the accused persons will be brought there for recovering the thondy articles. I had told the Police that on 13.05.1998 after my lunch at noon, when I was resting at my house, on coming to know that the Police are coming with the accused persons, who had murdered Omana Teacher, and that the stolen gold ornaments will be recovered, I came to the side of the Boat Jetty, well before 4.00 p.m. A big crowd had assembled at the boat jetty. It was widely known that the stolen booty of gold ornaments will be recovered. All those assembled there were knowing about this. The Police arrived around 4.15 p.m. along with the accused persons. There were two accused persons. The police took A-2, to A-2 house. I too followed them. By about 4.20 p.m. we reached the residence of A-2…. After leaving the residence of A-2, the police along with A-2 boarded the boat. It should have been 5.00 p.m. at that time. They proceeded from there towards West, to the house of A-1. They reached A-1's house, around 5.15 p.m. They got down in front of the house of A-1 in the boat. I had walked from the house of A-2 to the residence of A-1. Police and A-1 at first reached the house of A-1. I heard the Police asking Madhu about the thondy articles. I have not given a statement to the Police that I had heard about this. Madhu dug up the spot with his own hands and took out the packet."

S. Uthaman appeared as PW12. At the relevant time he was the Village Officer of Veliyanad Village. He had prepared the site plan of the scene of occurrence on the directions of the Circle Inspector of Police, P.J. Thomas PW21. His statement is formal and needs no further elaboration.

Gopinathan was produced by the prosecution as PW13. He was produced to establish the recovery of gold chain at the instance of Sibi-accused no.2. In fact he was asked to climb the coconut tree pointed out by Sibi-accused no.2. He brought down the gold chain. His cross-examination on the instant issue

is relevant to determine the validity of the confessional statements made by accused Madhu and Sibi (vide Exhibits P-10 and P-9 respectively). Relevant portion from the cross-examination of PW13 is being reproduced hereunder:

> "Q. When did you come to know that the accused persons are coming to recover the gold ornaments?
>
> A. I knew it at 4.45 p.m.
>
> On the 13th May, 1998, while I was sitting at my house, I learnt that the police party is coming along with accused persons. I had gone to Kumarangary Boat Jetty, coming to know that the accused persons are arriving. The police arrived there along with accused persons after 4.00 in the afternoon. They had come there after I reached there. A large crowd had gathered at the place. There was information available by noon that the police party is coming with the accused persons. I had not noticed the arrival of the Police with accused persons. I saw A-2 leading with the police party behind him."

Ramesh appeared before the Sessions Court as PW14. He was the goldsmith summoned by the investigating agency to examine the gold ornaments and to indicate the purity thereof as also the weight of the recovered ornaments. His deposition being formal needs no further elaboration.

14. The remaining witnesses from PW15 to PW19 made statements on different aspects of the matters. Some of them were formal witnesses.

Chacko appeared before the Sessions Court as PW15. He was associated with the search of Padmini Devi. He affirmed that on the recovery of the body of Padmini Devi, Ayyappa Kurup PW2 had asserted that the gold chain around her neck, and the gold bangles on her left arm were missing. He also deposed, that he had seen utensils on the eastern ghat at the time of search. For the present controversy his statement in

respect of recovery of gold ornaments for the purposes of determining the admissibility of the confessional statements made by accused Madhu and Sibi is relevant. A relevant extract of his statement is accordingly being reproduced hereunder:

> "The accused were arrested at 2.30 p.m. on the 13th, was what I heard. After reaching the Block Jetty around 4.00 p.m. that day, the accused were taken by the Police to the house of A-2. There was a large crowd to witness this. I too went there. After pointing out the coconut tree standing on the East of A-2's house, A-2 told the C.I. that the gold is deposited on the 3rd step. C.I. asked him to go up and bring the gold. A-2 said that he was unable to do as he was tired and feeling unwell. C.I. then asked those assembled there as to who will go up the tree and bring the gold. Gopinathan brought the ladder which was kept slanting at the house of A-2 and with the help of the ladder, went up and brought down by the Western side of the coconut tree, a green plastic packet and handed it over to C.I. It was seen that he was taking it out from the 3rd step. C.I. took out the gold chain and showed it all. Witness identified M.O. 1 chain. This itself is the Plastic cover. A goldsmith appraised the ornament to see whether it is real gold. He also gave the name of the fashion. He said it is `Kattithara' fashion. A mahazar was prepared. I am a witness to the Mahazar. I have affixed my signature on Ext.P-5."

The statement of Chacko PW15 reiterates the factual position recorded in the statements of other witnesses including Gopnathan PW13 and Ramesh PW14. During the course of their cross-examination they acknowledged that they had been the part of search team. They confirmed that at the ghat he had seen utensils on the steps. They asserted in their cross-examination, that all the people in the locality had assembled in the courtyard of the house of Sibi-accused no.2 before the police arrived, as the police was expected to bring the accused

to effect recovery of the stolen gold ornaments.

Karthikeyan Nair appeared before the Sessions Court as PW16. He was also a member of the search party associated for finding Padmini Devi. He reiterated the position in respect of the presence of the utensils at the bathing ghat. He confirmed that the utensils were still there when the police arrived at the scene.

Sivan was produced by the prosecution as PW17. He and his nephew Saboo were part of search team. In fact they were summoned to search out Padmini Devi from the water in the paddy fields. He deposed, that when they found Padmini Devi from under the water in the paddy fields, she was already dead. He also deposed, that the gold chain and bangles of Padmini Devi were missing. In his statement he asserted that he did not know whether when the body of Padmini Devi was recovered, she had earrings. He also stated, that he had no information about the loss of any earrings. He acknowledged his presence at the time of preparation of the inquest report. He denied having noticed utensils at the ghat. He asserted that the depth of the water at the place from where the body of Padmini Devi was recovered was about 2-1/2 feet. He clarified that the depth of the water was upto his waist.

Baby C. George appeared as PW18. He is a formal witness.

Likewise K.D. Sivamony PW19, Sub Inspector of Police was also a formal witness who deposed in connection with the recording of the First Information Report, and its dispatch to the court of the Sub Divisional Magistrate, as also, the JFMC.

15. Dr. Radhakrishnan was examined as PW20. He conducted the post-mortem examination on the body of Padmini Devi on 9.5.1998 between 4 and 5 p.m. His deposition was in consonance with the injuries depicted by him in the post mortem certificate dated 9.5.1998. He described the following injuries on the body of the deceased:

"INJURIES ANTEMORTEM

1. Contusion with minute superficial laceration on the mucosal part of lower lip corresponding to the right lateral incisor and canine teeth.

2. Linear abraded contusion on the whole of the right ear lobe just in front of the old ear lobule perforation.

3. Linear graze abrasions over an area 7x5 cm on the outer aspect of left leg its upper border being 13 cms below the knee placed obliquely outwards and upwards."

Besides the aforesaid his other findings were recorded as under:

"The soft tissue and cartilages of the neck and the hyoid bone were intact. The trachea and bronchi contained blood stained froth. A few particles of fine sand found sticking on to the inner aspect of trachea. The right and left lung weighed 515 and 485 gms respectively. Both lungs were congested and edematous and crepitus and their cut sections exuded copious blood stained frothy fluid. The valves and chambers of the heart were normal and the coronary arteries were patent. The stomach was full and contained 1.2 litre softened rice and vegetables in a watery fluid medium without any peculiar smell. The uterus measured 7.5x6x2.5 cms in size its os closed and cavity empty. The valva and vagina were intact. All the other internal organs of the abdomen were normal but congested. Sheaths of brain and brain matter were intact. Skeletal system did not show any injury. Blood viscera, vaginal swab were collected and preserved for laboratory examination. Diatom test done with the bone marrow and the sample of water from the alleged site of immersion of the body was negative. Opinion as to cause of death – Postmortem findings are consistent with death from drowning. This is the postmortem certificate issued by me

which bears my signature and seal. Marked Ext.P7. The deceased died within a short time after the last meal. There is no signs of any sexual assault. Finger nails were bluish, shows died due to lack of oxygen in the blood. Injuries 1 & 2 could be due to the application of blunt force at that part of the body. Injury numbers 1 & 2 could be produced due to the attempt of smothering. Cardio-vascular system appeared normal. Keeping a person submerged in water forcibly need not produce any injury. Time required for death may vary. But death can occur within 2 to 3 minutes. There was no smell suggestive of poisoning in the stomach contents."

During the course of his cross-examination he asserted that injury nos.1 and 2 depicted by him in his examination-in-chief, could be due to attempted smothering. Even though he clarified by asserting that injury nos.1 and 2 are possible if a person falls and during the course of that fall the right side of the face comes in contact with a rough hard surface. It was also stated by him during his cross-examination, that all the injuries suffered by the deceased Padmini Devi, were superficial in nature.

16. P.J. Thomas, Circle Inspector of Police, appeared as PW21 was the last witness to be examined by the prosecution. He deposed about the course of investigation carried out by him. His deposition in respect of the arrest of the Madhu-accused no.1 and Sibi-accused no.2, as also, the confessional statements made by them is relevant, and is accordingly being reproduced hereunder:

"On 13.05.1998 at 1.00 p.m. in the afternoon, Madhu (A-1) was arrested near at the Boat Jetty at Valadi. Same day at 1.30 p.m. Sibi (A-2) was arrested from near the Toddy shop at Valady. They were questioned lawfully and their statements were recorded. A-1 and A-2 admitted/ confessed about the commission of crime. When A-2 Sibi was questioned, he said "The (gold) chain I have packed in an old plastic paper and have kept it hidden at the top

of the coconut tree standing on the East of my residential house. If I am taken there, I shall point out the coconut tree where I had deposited the chain as well as the gold chain". Confession statement is marked as Ext.P9. On questioning A-1, he confessed :"Six bangles after having packed them in a plastic paper, I have kept hidden under the soil/ earth on the South of my residential house, adjoining the field. If I am taken there, I shall take them out and deliver it." A-1's confession statement is marked as Ext.P10…. The confession statement from the accused persons was recorded in between 2.00 and 2.30 p.m. The statements were recorded separately. It was A-1's statement that was recorded first. It was recorded then and there. A-2's confession statement was recorded at about 2.45 p.m."

It is significant to notice, that the presence of utensils were not depicted in the inquest report. In consonance with his inquest report, when questioned about the presence of utensils at the place of occurrence, PW21 categorically asserted, that there were no utensils either at the ghat or at the steps to the paddy fields. On the issue of earrings on the person of the body of the deceased at the time of preparation of the inquest report his statement is of some interest, and is accordingly being reproduced hereunder:

"The ear-rings were removed from the ears of the dead body by the Policemen who were assisting me at the inquest. The thondy (material) objects seized in a case would be produced before the Court, the Court will direct those M.Os. to be kept in the Station after entering them in the Sentry Leaf Book; the ear-rings and M.O.3 series have not been entered in the Sentry Book.

Q. When were the ear-rings handed back to the relatives?

A. P.W.2 got back the ear-rings on 11.6.1998. He came to the Station and took them back. Until then these ear-rings were kept by the Writer to whom they were entrusted.

Q. Are there records to show that they were kept in the Station?

A. No records are there."

The prosecution closed its evidence after recording the statement of P.J. Thomas (PW21), Circle Inspector of Police.

17. The most significant issue in the present controversy is the veracity of the confessional statements made by the accused Madhu and Sibi before P.J. Thomas PW21, Circle Inspector of Police on 13.5.1998. It is evident that the aforesaid statements were made by the accused before a police officer while the accused were in custody of the police. Section 25 of the Indian Evidence Act postulates that a confession made by an accused to a police officer cannot be proved against him. Additionally, Section 26 of the Indian Evidence Act stipulates that a confession made by an accused while in police custody cannot be proved against him. It is evident from the factual position narrated hereinabove, that the statements made by the accused Madhu and Sibi were made to a police officer while the accused were in police custody. It is, therefore, apparent that in terms of the mandate of Sections 25 and 26 of the Indian Evidence Act, the said statements could not be used against accused Madhu and Sibi. But then, there is an exception to the rule provided for by Sections 25 and 26 aforesaid, under Section 27 of the Indian Evidence Act. Section 27 of the Indian Evidence Act is being extracted hereunder:

> *"27. How much of information received from accused may be proved* – Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

As an exception, Section 27 of the Indian Evidence Act

provides that a confessional statement made to a police officer or while an accused is in police custody, can be proved against him, if the same leads to the discovery of an unknown fact. The rationale of Sections 25 and 26 of the Indian Evidence Act is, that police may procure a confession by coercion or threat. The exception postulated under Section 27 of the Indian Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance under the exception postulated by Section 27 aforesaid, is limited "…as it relates distinctly to the fact thereby discovered….". The rationale behind Section 27 of the Indian Evidence Act is, that the facts in question would have remained unknown but for the disclosure of the same by the accused. Discovery of facts itself, therefore, substantiates the truth of the confessional statement. And since it is truth that a court must endeavour to search, Section 27 aforesaid has been incorporated as an exception to the mandate contained in Sections 25 and 26 of the Indian Evidence Act.

18. We shall now endeavour to apply the exception postulated in Section 27 of the Indian Evidence Act, to the facts of the present controversy, in order to determine whether or not the confessional statements made by Madhu-accused no.1 vide Exhibit P-10, and Sibi-accused no.2 vide Exhibit P-9, can be proved against them in view of the exception stipulated in Section 27 of the Indian Evidence Act. As already noticed hereinabove, relevance of the confessional statements would depend on the discovery of facts based on the information supplied by the accused. If any fresh facts have been discovered on the basis of the confessional statement made by the accused, the same would be relevant. If not, the confessional statement cannot be proved against the accused, to the detriment of the accused. We have extracted the relevant portion of the statement of P.J. Thomas PW21, Circle Inspector of Police hereinabove. It reveals that Madhu-accused no.1 was arrested on 13.5.1998 at 1 p.m. from near the boat-jetty at Valadi. On the same day, Sibi-accused no.2 was arrested from

near a toddy shop at Valadi at 1.30 p.m. It is thereupon, that the confessional statements of accused Madhu and Sibi came to be recorded. In his cross-examination P.J. Thomas PW21 has acknowledged, that the confessional statements of the accused persons were recorded between 2 and 2.45 p.m. It was sought to be clarified, that the confessional statement of Madhu-accused no.1 was recorded first, and thereafter, the confessional statement of Sibi-accused no.2 came to be recorded. As against aforesaid, we would like to refer to the statements made by Madhu PW7, Neelakantan Nair PW11, Gopinathan PW13 and Chacko PW15. Madhu PW7, during the course of his cross-examination, stated that he had left for his work on 13.5.1998 at 7.30 a.m. He further stated that he returned back from his work and reached his residence at 2.30 p.m. In so far as his return from work is concerned, in his examination-in-chief he stated that he would ordinarily return back from work only around 9 p.m. at night. The reason for his return back early on 13.5.1998 was explained by stating, that he had come to know that the accused would be brought to their residences at around 4 p.m. for the recovery of the stolen gold articles. He also asserted, that just like him, a lot of people had gathered at the jetty to witness the recovery and seizure of the stolen ornaments. The statement of Madhu PW7 clearly establishes that he came to know that the police would effect recovery well before 2.30 p.m. Therefore, as an exception to his coming home from work late in the night, he had reached his residence at 2.30 p.m. Likewise, the statement of Neelakantan Nair PW11 reveals, that in the morning itself, on the date of arrest of the accused i.e., on 13.5.1998 he had heard, that the accused persons would be brought for recovery of the stolen articles. He further stated, that a large crowd had gathered to witness the recovery of the stolen articles, and that, he also witnessed the recovery of stolen articles. He reiterated, that just like him all those who were assembled there were aware that the police would bring the accused there for recovery of the stolen articles. Gopinathan PW13 acknowledged, that there was information available by "noon" that the police party

would come along with the accused to recover the stolen articles. It is, therefore, that he had gone to witness the recovery of the stolen articles. Even Chacko PW15 while deposing before the Sessions Court asserted that a large crowd had gathered to witness the recovery of the stolen articles at the house of the accused. The statements of PW7, PW11, PW13 and PW15, narrated (and relevant portions extracted) hereinabove, clearly lead to the positive conclusion that the fact that the stolen articles would be recovered from the premises of the accused was known before the accused were brought to the recovery site. These witnesses, as also the crowd present, were aware of the said factual position at around "noon" (as per statement of Gopinath PW13) but definitely before 2.30 p.m. (as per the statement of Madhu-PW7). But according to PJ Thomas (PW21), the confessional statements were recorded between 2 and 2.45 p.m. The question to be determined is whether the confessional statements made by the accused (vide Exhibit P-9 and P-10) can be said to have led to the discovery of an unknown fact? The answer to the aforesaid query has to be in the negative, because the statements of PW7, PW11, PW13 and PW15 reveal that the factual position in respect of the recovery of the articles from the place from where the same were shown to have been eventually recovered, was known to the public at large by noon (and certainly before 2.30 p.m.) i.e., well before the confessional statements had been recorded. As per the deposition of P.J. Thomas (PW21), Circle Inspector of Police, "... A-2's confession statement was recorded at about 2.45 p.m....". Interestingly, the public had become aware of the recovery by "noon", whereas, Madhu-accused no.1 was arrested at 1.00 p.m., and Sibi-accused no.2 was arrested at 1.30 p.m. and their confessional statements were recorded by the police after their arrest. In the background of the aforesaid factual position, it is not possible for us to conclude that the confessional statements made by Madhu-accused no.1 vide Exhibit P-10 and Sibi-accused no.2 vide Exhibit P-9, can be stated to have resulted in the discovery of any fresh facts. The factual position that

recovery of stolen ornaments would be made by the police was a matter of common knowledge well before the confessional statements were made. The said statements recorded vide Exhibits P-9 and P-10 are inadmissible inspite of the mandate contained in Section 27 of the Indian Evidence Act for the simple reason, that they cannot be stated to have resulted in the discovery of some new fact. In the factual background of the present controversy, the gold ornaments which eventually came to be recovered by the police, allegedly at the instance of accused, may well have been planted by the police. On account of the fact that the confessional statements made by Madhu-accused no.1 and Sibi-accused no.2, which is the main linking factor in the circumstantial evidence of the prosecution version of the controversy, being inadmissible as the same cannot be proved against them, we are of the view that the prosecution's case stands fully demolished. In view of inadmissibility of evidence which was taken into consideration by the Trial Court, as well as, the High Court to implicate the accused with the commission of the offence alleged against them, shall have to be reconsidered on the basis of the remaining evidence.

19. The second significant conglomerate of evidence to link the accused to the crime in question, is their alleged presence at or around the place of occurrence. This evidence emerges from the statements made by PW6 to PW9. The prosecution, through these witnesses, have endeavoured to demonstrate the presence of the accused, in the vicinity of the place of occurrence, at around the time of occurrence. According to the prosecution the occurrence took place on 8.5.1998 at 9.20 p.m. According to the statement of Kamalama PW6, the accused came to her house and asked for an umbrella as it was raining heavily. She offered two plantains each to both the accused. The accused left her residence when the power was restored at 9 p.m., after the power cut. She further stated that both the accused were smelling of liquor and were under the influence of liquor. According to PW6, after leaving her

house the accused turned left, i.e., towards the house of the deceased Padmini Devi. The statement of Kamalama PW6, to our mind, is wholly insignificant to connect the accused with the crime under reference. Madhu PW7 has given his version of having seen the accused close to the place of occurrence. But the statement of PW7 which has been extracted hereinabove is so unrealistic, that it is worthy of rejection without recording any reasons. It is strange that Madhu PW7 reached the embankment by swimming upto it since the last boat had already left. He calims to have kept his clothes afloat and above the water while he was swimming through the water. It is, therefore, that his clothes had remained dry. Even though, in his statement, he asserted that "…I identified him as A-2 in the light of my torch…". He subsequently stated that a person was seen coming, flashing a torchlight towards east, and that, he was identified by Madhu PW7 as Madhu-accused no.1. As per the said statement, the identification was made on the basis of the torch held in the hands of Madhu-accused no.1. The aforesaid contradiction is hard to digest. How PW7 retained the torch in his hand in a dry condition, while swimming, has not been explained. If he was holding his torch in one hand and clothes in the other, it is difficult to understand how he swam across the water. And if the accused himself was carrying the torch, the light would not fall on his face, and in that situation, the accused could not have been identified, because by then it was past 9 p.m. These and other such like discrepancies, when viewed closely, leave no room with us to accept the credibility of the statement made by Madhu PW7. Rajankutty PW8 was the manager of Toddy Shop No.86 at Kuttanad. As per the statement of PW8 both the accused purchased a bottle of toddy each, and after drinking the toddy, they left the toddy shop. This statement does not establish the presence of accused at or near the place of occurrence. Even so, it establishes the correctness of the statement of Kamalama PW6, to the effect that the accused were smelling of liquor, and were under the influence of liquor. Saseendran Nair PW9 is the only other witness produced by the prosecution to show the

presence of the accused close to the place of occurrence, at or around the time of occurrence, on 8.5.1998. The statement made by Saseendran Nair PW9, during the course of his deposition before the Sessions Court, in connection with his having seen the accused near the place of occurrence, had not been disclosed by him even to the police during the course of investigation. In fact during the course of his cross-examination he acknowledged "…I have not told anybody-else about my having met the accused persons there, I am speaking about it for the first time in court…". In fact PW9 was working as a labourer in the house of Chandrasekhara Kurup PW10. Sassendran Nair PW9 had not even disclosed the aforesaid factual position to his employer Chandrasekhara Kurup PW10, even though he must have known, that Chandrasekahara Kurup was the elder brother of Ayyappa Kurup (husband of the deceased Padmini Devi). In this situation it is difficult to consider the statement of Saseendaran Nair PW9 as credible. In view of the aforesaid evaluation of the statements of witnesses examined by the prosecution, to establish the presence of the accused, in close vicinity of the place of occurrence, there remains no proved connection of the accused with the accusations levelled against them. Even otherwise, in our view the presence of the accused close to the residence of Padmini Devi is inconsequential, because according to the statement of Ayyappa Kurup PW2 (husband of the deceased Padmini Devi) both the accused Madhu and Sibi were known to him as they were his neighbours. Surely, presence close to ones own residence cannot be the basis for drawing an adverse inference. We are therefore satisfied, that the statements of PW6 to PW9, do not in any manner, further the case of the prosecution.

20. There are other glaring discrepancies as well. A large number of witnesses, referred to above, including Purushothama Kurup PW1, Aushutosh PW3, Ambily PW4, Vijayalakshmi PW5, Madhu PW7, Chandrasekhara Kurup PW10, Gopinathan PW13, Ramesh PW14, Chacko PW15

and Karthikeyan Naik PW16, deposed, that they had seen utensils lying on the steps of the ghat. Some of the witnesses had gone further to explain, that some of the utensils were washed whereas some were still to be washed. Obviously, these statements were made by the witnesses so as to support the prosecution version mentioned in the charge-sheet, wherein it was projected that Padmini Devi had gone out to the steps of the ghat after taking the supper meal, to wash the dirty utensils. The inquest report (Exhibit P-3), a translated version whereof was made available for our consideration, does not disclose the presence of any utensils at the ghat. In conjunction with the aforesaid, it is relevant to notice, that during the deposition of P.J. Thomas PW21, Circle Inspector of Police, who carried out the investigation in the case, he categorically asserted (in response to a pointed question posed to him), that when he reached the ghat there were no utensils. He further stated, that none of the witnesses told him, that there were utensils at the ghat or on the steps leading to the paddy fields. The absence of any evidence supporting the prosecution case depicting the reason for Padmini Devi to go out of her house at late hours in the night, so as to be found alone by the accused, reveals the lack of evidence to project the prosecution version reflected in the charge-sheet. But more than that, is the contradiction in the statements of PW1, PW3, PW4, PW5, PW7, PW10 and PW13 to PW16 on the one hand, and the statement of PW21 coupled with the details mentioned in the inquest report on the other. The genesis of the crime should ordinarily emerge from the inquest report specially when it is in respect of a patent fact. If utensils were actually at the ghat, the mention thereof could not have been left out therefrom. This would be so even if the inquest report had been prepared with half the seriousness required in its preparation. A perusal of the inquest report reveals that the same was painstakingly recorded, and even minute details have been recorded therein. It is difficult to state which of the two sides has deposed correctly and/or which one of them has deposed falsely. All the same, the instant aspect of the deposition creates a serious

doubt about the credibility of the evidence on the instant factual aspect, irrespective of the significance thereof in proving the charges.

21. Additionally, the charge-sheet pointedly records that Madhu-accused no.1, caught hold of the plated hair and neck of Padmini Devi, and Sibi-accused no.2 caught hold of her feet, and forcibly dragged her into the water and suffocated her thereby cause her death by drowning. This factual position remained unproved as not a single prosecution witness narrated the said factual position, so as to establish the manner in which Padmini Devi came to be drowned by the accused Madhu and Sibi. This issue has been examined from a different perspective in the next paragraph.

22. It is also essential to properly analyse the statement of Dr.Radhakrishnan PW20. Dr. Radhakrishnan had expressed in the post mortem certificate dated 9.5.1998, and he had affirmed during the course of his deposition before the Sessions Court, that the death of Padmini Devi had been caused by drowning. The fact that she had been smothered first and thereafter drowned by the accused Madhu and Sibi cannot be stated to have been established by the prosecution. No injury whatsoever was suffered by deceased Padmini Devi either on her neck or on her feet. Padmini Devi was 47 years old at the time of occurrence. She would not have easily allowed two drunkards, who were in a state of intoxication, to carry her away by holding her by her neck and feet as has been alleged in the charge-sheet. Padmini Devi would have been expected to fight for her life, consequent upon an assault on her, at the hands of the accused Madhu and Sibi. Injury nos.1 and 2 referred to by the courts below, so as to infer smothering, is clearly unacceptable in view of the fact that Dr. Radhakrishnan PW20, in his cross-examination, clearly asserted, that injury nos.1 and 2 are possible if a person falls and during the course of that fall the right side of the face comes in contact with a rough hard surface. Dr. Radhakrishnan PW20 also stated during his cross-examination, that all the injuries suffered by Padmini Devi were

superficial injuries. In the aforesaid view of the matter, even the medical evidence produced by the prosecution, does not suitably support the prosecution story, that the deceased Padmini Devi was, first assaulted by the accused Madhu and Sibi, and thereafter, drowned. The deceased is alleged to have been dragged, smothered and forcibly drowned. The instant version of the prosecution story, is wholly unacceptable, keeping in mind the statement of Dr.Radhakrishna PW20.

23. The motive for the accused in committing the murder of Padmini Devi is stated to be theft of her gold ornaments. Madhu-accused no.1 is a labourer, and Sibi-accused no.2 is a toddy trapper. If the motive had been theft, so as to snatch away the jewellery of Padmini Devi, it is difficult to understand why the accused only took away the golden chain around the neck of the deceased, and the six bangles on her right arm, and forsake the earrings on the person of the deceased. It is relevant to mention, that the factum of the earrings found on the person of the deceased has been explained in a wishy-washy manner. P.J. Thomas PW21, Circle Inspector of Police, has specifically deposed on the recovery, retention and return of the earrings to the family of the deceased. The statement of PW21 reveals a sorry state of affairs in handling the investigation of the case in hand. According to the statement of PW21, the earrings were removed from the dead body of Padmini Devi, by one of the policemen who was assisting him in the preparation of inquest report on 9.5.1998. There is no documentary record of this. The earrings were then (according to PW21) retained by the writer at the police station. This again, without maintaining any record. On 11.6.1998, the said earrings are stated to have been returned to Ayyappa Kurup PW2, husband of deceased Padmini Devi. It was also deposed by PW21, that Ayyappa Kurup PW2 had visited the police station to take back the earrings. Accordingly, the earrings were returned to him. Yet again, without maintaining any record. Coupled with the conclusion drawn by us in respect of the gold chain and the six gold bangles, allegedly recovered at the

instance of accused Madhu and Sibi, we are of the view that it may well be, that the ornaments were never taken away from the person of the deceased Padmini Devi. This view comes to our mind because if the motive had been theft of gold ornaments, then all the gold ornaments would have been taken away, most certainly the earrings which were openly and clearly visible. The accused were poor persons, for them the earrings alone would have meant a lot. If nothing else, the earrings would have balanced (to some extent at least) the spoils in the hands of the accused. It may well be, that the aforesaid ornaments came to be planted only with the object of solving the case in hand. This aspect of the matter also creates a serious doubt in the prosecution case.

24. For the reasons recorded by us hereinabove, we are of the view, that the evidence produced by the prosecution does not, in any way, establish the guilt of the accused. The prosecution had endeavoured to prove the allegations levelled against the accused on the basis of circumstantial evidence. As noticed above, the mainstay of the prosecution evidence is the recovery of the gold ornaments belonging to the deceased Padmini Devi at the instance of the accused Madhu and Sibi. We have concluded that the statements made by the accused Madhu and Sibi (vide Exhibits P-10 and P-9 respectively) cannot be proved against the accused, or to their detriment. This by itself removes the most vital link in the chain of events sought to be established by the prosecution against the accused. Evidence produced to establish the presence of the accused near the place of occurrence, at or about the time of the commission of the crime has also been found to be irrelevant. This because, the accused were in any case neighbours of the deceased Padmini Devi. We have also found, that the theft of the golden ornaments worn by the deceased Padmini Devi was also doubtful. The explanation tendered by the prosecution of the earrings worn by the deceased Padmini Devi when her body was recovered, is also far from satisfactory. From the statement of Dr.Radhakrishnan PW20, and the

surrounding facts, it cannot be positively inferred that the deceased Padmini Devi was first smothered and then drowned as has been alleged by the prosecution. We have also found serious contradictions in the deposition of the prosecution witnesses. The prosecution has failed to establish an unbroken chain of events lending to the determination, that the inference being drawn from the evidence is the only inescapable conclusion. In fact in our view the prosecution has not been able to connect the accused with the alleged crime in any manner whatsoever.

25. For all the reasons recorded by us hereinabove, the appellant-accused/Madhu, is liable to be acquitted of the charges levelled against him. Ordered accordingly. He be released forthwith, unless he is required to continue in detention in some other case.

26. Resultantly, the instant appeal is allowed and the judgments rendered by the Trial Court, as also, by the High Court convicting the appellant-accused/ Madhu are hereby set aside.

27. During the course of the deliberations recorded by us hereinabove, we have dealt with the evidence projected against appellant-accused/Madhu. From our determination it emerged, that the evidence to establish the charges against his co-accused Sibi was on the same lines. In fact Sibi-accused no.2 was accused of the allegations for exactly the same reasons, as have weighed with the courts below against the appellant-accused Madhu. He was also convicted for the same reasons. We are of the view that if Sibi-accused no.2 had preferred an appeal, the result would have been exactly the same, as it has been in the present appeal, in respect of the appellant-accused/ Madhu. But, is it open for us, to extend the benefit of acquittal, determined by us in case of the accused-appellant/Madhu to Sibi-accused no.2 also? In so far as the instant aspect of the matter is concerned, reference may be made to the judgment rendered by this Court in *Gurucharan Kumar & Anr. vs. State*

of Rajasthan, (2003) 2 SCC 698, wherein this Court had observed as under:

> "32. As noticed earlier the accused Pravin Kumar, husband of the deceased Geetu has not preferred an appeal before this Court, on account of the fact that he has already served out the sentence imposed against him. However, though we cannot obliterate the sufferings of Pravin Kumar, we can certainly obliterate the stigma that attaches to him on account of his conviction for a heinous offence under Section 304B IPC. This Court has laid down a judicious principle that even in a case where one of the accused has not preferred an appeal, or even if his special leave petition is dismissed, in case relief is granted to the remaining accused and the case of the accused who has either not appealed or whose special leave petition has been dismissed, stands on the same footing, he should not be denied the benefit which is extended to the other accused. This has been held in *Harbans Singh vs. State of U.P.* [(1982) 2 SCC 101], *Raja Ram v. State of M.P.* [(1994) 2 SCC 568], *Dandu Lakshmi Reddy v. State of A.P.* [(1999) 7 SCC 69] and Akhil ali Jehangir Ali Sayyed v. State of Maharashtra [(2003) 2 SCC 708]."

Reference may also be made to the decision rendered by this Court in *Pawan Kumar v. State of Haryana,* (2003) 11 SCC 241, wherein this Court has held as under:

> "Apart from the salutary powers exercisable by this Court under Article 142 of the Constitution for doing complete justice to the parties, the powers under Article 136 of the Constitution can be exercised by it in favour of a party even suo motu when the Court is satisfied that compelling grounds for its exercise exist but it should be used very sparingly with caution and circumspection inasmuch as only the rarest of rare cases. One of such grounds may be, as it exists like in the present case, where this Court while considering appeal of one of the accused comes to the conclusion that conviction of appealing as well as non-

> appealing accused both was unwarranted. Upon the aforesaid conclusion arrived at by the Apex Court of the land, further detention of the non-appealing accused, by virtue of the judgment rendered by the High Court upholding his conviction, being without any authority of law, infringes upon the right to personal liberty guaranteed to the citizen as enshrined under Article 21 of the Constitution. In our view, in cases akin to the present one, where there is either a flagrant violation of mandatory provision of any statute or any provision of the Constitution, it is not that this Court has a discretion to exercise its suo motu power but a duty is enjoined upon it to exercise the same by setting right the illegality in the judgment of the High Court as it is well settled that illegality should not be allowed to be perpetuated and failure by this Court to interfere with the same would amount to allowing the illegality to be perpetuated. In view of the foregoing discussion, we are of the opinion that accused Balwinder Singh alias Binder is also entitled to be extended the same benefit which we are granting in favour of the appellant."

In view of the ratio laid down in the two cases referred to above, we are satisfied, that to do complete justice, it would be just and appropriate to extend the same benefit as has been extended to the appellant-accused/Madhu, also to Sibi-accused no.2. Therefore, for exactly the same reasons as have weighed with us in the instant appeal, to determine the acquittal of the appellant-accused/Madhu, we hereby order the acquittal of Sibi-accused no.2 as well, even though he has not preferred an appeal so as to assail the impugned judgment whereby he stands convicted.

28. For the reasons recorded hereinabove, even Sibi-accused no.2 is hereby acquitted. He be released forthwith, unless he is required to continue in detention in some other case.

B.B.B. Appeal allowed.

COMMISSIONER OF CENTRAL EXCISE, BANGALORE-II
v.
M/S. OSNAR CHEMICAL P. LTD.
(CIVIL APPEAL NOS. 4055-4056 OF 2009)

JANUARY 13, 2012

[D.K. JAIN AND ASOK KUMAR GANGULY, JJ.]

Central Excise Act, 1944 – s.2(f) – Addition and mixing of polymers and additives to heated bitumen to get superior quality bitumen viz. Polymer Modified Bitumen (PMB) or Crumbled Rubber Modified Bitumen (CRMB) – If amounts to manufacture of a new marketable commodity and as such exigible to Excise duty – Held: In order to bring a process in relation to any goods within the ambit of s.2(f) of the Act, the same is required to be recognised by the legislature as manufacture in relation to such goods in the Section notes or Chapter notes of the First Schedule to the Tariff Act – Therefore, in order to bring petroleum bitumen, falling under CSH 27132000, within the extended or deemed meaning of the expression 'manufacture', so as to fall under CSH 27150090, the process of its treatment with polymers or additives or with any other compound is required to be recognised by the legislature as manufacture under the Chapter notes or Section notes to Chapter 27 – No such process or processes have been specified in the Section notes or Chapter notes in respect of petroleum bitumen falling under Tariff Item 27132000 or even in respect of bituminous mixtures falling under Tariff Item 27150090 to indicate that the said process amounts to manufacture – Thus, the process of adding polymers and additives to heated bitumen to get a better quality bitumen, viz. PMB or CRMB, cannot be given an extended meaning under the expression manufacture in terms of s.2(f)(ii) of the Act – PMB or CRMB cannot be treated as bituminous mixtures falling under CSH 27150090 and

would classified under CSH 27132000 pertaining to tariff for petroleum bitumen – Central Excise Tariff Act, 1985 – Chapter Sub-heading 27132000 and 27150090.

Excise Laws – Manufacture – Test to determine – Held:"Manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use – Mere improvement in quality does not amount to manufacture – It is only when the change or a series of changes take the commodity to a point where commercially it can no longer be regarded as the original commodity but is instead recognized as a new and distinct article that manufacture can be said to have taken place.

Words and Phrases – Manufacture – Meaning of.

The question which arose for consideration in the present appeals was whether the addition and mixing of polymers and additives to heated bitumen to get superior quality bitumen viz. Polymer Modified Bitumen (PMB) or Crumbled Rubber Modified Bitumen (CRMB) amounts to manufacture of a new marketable commodity and as such exigible to Excise duty under the Central Excise Act, 1944.

Dismissing the appeals, the Court

HELD:1.1. The expression 'manufacture' defined in Section 2(f) of the Central Excise Act, 1944, *inter alia* includes any process which is specified in relation to any goods in the Section or Chapter Notes of First Schedule to the Central Excise Tariff Act, 1985. It is manifest that in order to bring a process in relation to any goods within the ambit of Section 2(f) of the Act, the same is required to be recognised by the legislature as manufacture in relation to such goods in the Section notes or Chapter notes of the First Schedule to the Tariff Act. Therefore, in order to bring petroleum bitumen, falling under CSH

27132000, within the extended or deemed meaning of the expression 'manufacture', so as to fall under CSH 27150090, the process of its treatment with polymers or additives or with any other compound is required to be recognised by the legislature as manufacture under the Chapter notes or Section notes to Chapter 27. [Para 15]

1.2. In the present case, a plain reading of the Schedule to the Act makes it clear that no such process or processes have been specified in the Section notes or Chapter notes in respect of petroleum bitumen falling under Tariff Item 27132000 or even in respect of bituminous mixtures falling under Tariff Item 27150090 to indicate that the said process amounts to manufacture. Thus, it is evident that the said process of adding polymers and additives to the heated bitumen to get a better quality bitumen, *viz.* PMB or CRMB, cannot be given an extended meaning under the expression manufacture in terms of Section 2(f) (ii) of the Act. [Para 18]

1.3. It is trite to state that "manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use. It is well settled that mere improvement in quality does not amount to manufacture. It is only when the change or a series of changes take the commodity to a point where commercially it can no longer be regarded as the original commodity but is instead recognized as a new and distinct article that manufacture can be said to have taken place. [Para 19]

1.4. The process of mixing polymers and additives with bitumen does not amount to manufacture. Both the lower authorities have found as a fact that the said process merely resulted in the improvement of quality of bitumen. Bitumen remained bitumen. There was no change in the characteristics or identity of bitumen and

only its grade or quality was improved. The said process did not result in transformation of bitumen into a new product having a different identity, characteristic and use. The end use also remained the same, namely for mixing of aggregates for constructing the roads. [Para 23]

1.5. PMB or CRMB, therefore, cannot be treated as bituminous mixtures falling under CSH 27150090 and shall continue to be classified under CSH 27132000 pertaining to tariff for petroleum bitumen. [Para 25]

Shyam Oil Cake Ltd. v. Collector of Central Excise, Jaipur **2004 (174) E.L.T. 145 (SC);** *Commissioner of Central Excise, New Delhi-I v. S.R. Tissues Pvt. Ltd.* **2005 (186) E.L.T. 385 (SC);** *M/s. Tungabhadra Industries Ltd. v. The Commercial Tax Officer, Kurnool,* **1961 (2) SCR 14;** *Union of India & Ors. v. Delhi Cloth & General Mills Co. Ltd. & Ors.* **1977 (1) ELT (J199) (SC);** *Deputy Commissioner Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Pio Food Packers* **1980 (6) E.L.T. 343 (SC)** ***and*** *Commissioner of Central Excise & Customs v. Tikatar Industries* **2006 (202) E.L.T. 215 (S.C.) – relied on.**

Medley Pharmaceuticals Limited v. Commissioner of Central Excise & Customs, Daman **2011 (263) E.L.T. 641 (SC);** *Nicholas Piramal India Ltd. v. Commnr. Of Central Excise, Mumbai* **2010 (260) E.L.T. 338 (SC);** *Commissioner of Central Excise, Bangalore v. Ducksole (I) Ltd. & Ors.* **(2005) 10 SCC 462;** *Commissioner of Central Excise, Delhi-III v. Uni Products India Ltd. & Ors.* **(2009) 9 SCC 295: 2009 (14) SCR 199;** *Commissioner of Central Excise, Gujarat v. Pan Pipes Resplendents Limited* **(2006) 1 SCC 777;** *Crane Betel Nut Powder Works v. Commissioner of Customs & Central Excise, Tirupathi & Anr.* **(2007) 4 SCC 155: 2007 (4) SCR 109;** *Commissioner of Central Excise, Chennai-II v. Tarpaulin International* **2010 (256) E.L.T. 481 (SC);** *Commissioner of Central Excise, Mumbai v. Lalji Godhoo & Co.* **2007 (216) E.L.T. 514 (SC);** *Commissioner of Central Excise v. Indian*

Aluminium Co. Ltd. **(2006) 8 SCC 314: 2006 (6) Suppl. SCR 886;** *Hindustan Zinc Ltd. v. Commissioner of Central Excise, Jaipur* **(2005) 2 SCC 662: 2005 (2) SCR 391;** *Metlex (I) (P) Ltd. v. Commissioner of Central Excise, New Delhi* **(2005) 1 SCC 271;** *Hindustan Poles Corpn. v. Commissioner of Central Excise, Calcutta* **(2006) 4 SCC 85: 2006 (3) SCR 461;** *HPL Chemicals Ltd. v. Commissioner of Central Excise, Chandigarh* **(2006) 5 SCC 208: 2006 (1) Suppl. SCR 125;** *Commissioner of Central Excise, Navi Mumbai v. Amar Bitumen & Allied Products Private Limited* **2006 (202) E.L.T. 213 (S.C.);** *Commissioner of Central Excise, Mumbai v. Tikitar Industries,* **2010 (253) ELT 513 (SC);** *Collector of Central Excise, Vadodara v. Tikitar Industries* **2000 (118) E.L.T. 468 (Tri.) – referred to.**

McNicol & Anr. v. Pinch **1906 (2) K.B. 352 – referred to.**

Case Law Reference:

2011 (263) E.L.T. 641 (SC)	**referred to**	**Para 5**
2010 (260) E.L.T. 338 (SC)	**referred to**	**Para 5**
(2005) 10 SCC 462	**referred to**	**Para 6**
(2009) 9 SCC 295	**referred to**	**Para 6**
1961 (2) SCR 14	**relied on**	**Para 7,19**
(2006) 1 SCC 777	**referred to**	**Para 7**
(2007) 4 SCC 155	**referred to**	**Para 7**
1977 (1) ELT (J199) (SC)	**relied on**	**Para 7, 20**
2005 (186) E.L.T. 385 (SC)	**relied on**	**Para 8,10, 17,21**
2004 (174) E.L.T. 145 (SC)	**relied on**	**Para 8,16**
2010 (256) E.L.T. 481 (SC)	**referred to**	**Para 10**

2007 (216) E.L.T. 514 (SC)	**referred to**	**Para 10**
(2006) 8 SCC 314	**referred to**	**Para 10,11**
(2005) 2 SCC 662	**referred to**	**Para 10,11, 16**
(2005) 1 SCC 271	**referred to**	**Para 11**
(2006) 4 SCC 85	**referred to**	**Para 11**
(2006) 5 SCC 208	**referred to**	**Para 11**
2006 (202) E.L.T. 215 (S.C.)	**relied on**	**Para 12, 24**
2006 (202) E.L.T. 213 (S.C.)	**referred to**	**Para 12**
2010 (253) E.L.T. 513 (S.C.)	**referred to**	**Para 12**
1906 (2) K.B. 352	**referred to**	**Para 13**
1980 (6) E.L.T. 343 (SC)	**relied on**	**Para 22**
2000 (118) E.L.T. 468 (Tri.)	**referred to**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4055-4056 of 2009 etc.

From the Judgment & Order dated 25.09.2008 of Customs, Excise, and Service Tax Appellate Tribunal, South Zonal Bench at Bangalore in Appeal Nos. E/522 & 523 of 2007.

WITH

C.A. Nos. 5633 of 2009 & 7142 of 2010.

Mukul Gupta, Arijit Prasad, Shipra Ghose, Anil Katiyar, B. Krishna Prasad for the Appellant.

S.K. Bagaria, Meenakshi Arora, Vaishnavi, V. Lashmi Kumaran, Alo Yadav, M.P. Devanath for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. This batch of appeals by the revenue, under Section 35L(b) of the Central Excise Act, 1944 (for short "the Act") arises out of final orders dated 23rd December, 2008 in Appeal No. E/379/2007; 25th September, 2008 in Appeal Nos. Excise/522 & 523/2007 and 28th October, 2009 in Appeal No. E/225/2009 passed by the Customs, Excise & Service Tax Appellate Tribunal South Zonal Bench, Bangalore (for short "the Tribunal"). By the impugned orders in cross-appeals by the revenue and the assessee, the Tribunal has held that the mechanical mixing of polymer with heated bitumen does not amount to manufacture of a new commercially identifiable product and therefore, is not exigible to Excise duty under the Act.

2. Since these three appeals involve a common question of law, these are being disposed of by this common judgment. However, in order to appreciate the controversy, the facts emerging from C.A. Nos. 4055-4056 of 2009, which was treated as the lead case, are being adverted to.

The respondent in this appeal (for short "the assessee") is engaged in the supply of Polymer Modified Bitumen (for short "PMB"). We may note that in one of the appeals (C.A. No.5633/2009), the assessee additionally supplies Crumbled Rubber Modified Bitumen (for short "CRMB"), stated to be a different kind of modifier. The assessee entered into a contract with one M/s Afcons Infrastructure Ltd. (for short "Afcons") for supply of PMB at their work site at Solur Village, Viswanathpura Post, Bangalore. As per the agreement, the base bitumen and certain additives were to be supplied by Afcons to the assessee directly at the site, where the assessee, in its mobile polymer modification plant, was required to heat the bitumen at a temperature of 160?C with the help of burners. To this hot bitumen, 1% Polymer and 0.2% additives were added under constant agitation, for improving its quality by increasing its softening point and penetration. The process of agitation was to be continued for a period of 12 to 18 hours till the mixture

becomes homogenous and the required properties were met. The said bitumen in its hot agitated condition was mixed with stone aggregates which was then used for road construction. The resultant product was considered to be a superior quality binder with enhanced softening point, penetration, ductility, viscosity and elastic recovery.

3. 'Bitumen' is classifiable under Chapter Sub Heading 271320.00 and 'Polymers' are classifiable under Chapter Sub Heading 390190.00 of the Central Excise Tariff Act, 1985 (hereinafter referred to as "the Tariff Act"). The relevant tariff items read as follows:

"Tariff Item	Description of goods
2713	Petroleum coke, petroleum bitumen and other residues of petroleum oil of oils obtained from bituminous minerals.
271132000	Petroulem bitumen
2715	Bituminous mixtures based on natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tax or on mineral tar pitch (for example, bituminous mastic, cut backs)
27150090	Other
3901	Polymers of ethylene, in primary forms
3901 90	Other"

4. The assessee had been paying Central Excise duty on the PMB processed at their factory in Mumbai but had not paid the same for the conversion done at the work site. Consequently, a show cause notice was issued to them by the Commissioner of Central Excise, Bangalore (hereinafter referred to as "the

Commissioner"), demanding duty in respect of PMB falling under sub-heading 271500.90 of the Tariff Act, for the period from 18th August 2004 to 19th September 2006. The Commissioner adjudicated upon the said show cause notice and vide Order-in-original, dated 23rd April 2007, held that the aforesaid process carried out by the assessee amounted to manufacture of PMB in terms of Section 2(f) of the Act, irrespective of the fact whether such process was carried out on their own account or on job work basis and therefore, was dutiable. He accordingly, confirmed the demand indicated in the show cause notice. Aggrieved thereby, the assessee filed an appeal before the Tribunal. Reversing the decision of the Commissioner, the Tribunal has come to the conclusion that since PMB cannot be bought and sold in the market as it is fit for use only in a molten condition, at a temperature around 160?C and resultantly cannot be stored unless kept in continuous agitated state @ 100?C so as to avoid separation of polymer and bitumen; the process carried out by the assessee does not amount to manufacture. A similar view has been expressed by the Tribunal in other orders which are the subject matter of these appeals by the revenue.

5. Mr. Arijit Prasad, learned counsel appearing for the revenue, vehemently argued that having regard to the nature of the process involved, PMB and CRMB are different from bitumen. According to the learned counsel, ordinary bitumen is heated upto a temperature of 200?C, in the Polymer modification plant; to this heated mixture, polymer is added and samples are taken; if the samples, are found to be satisfactory, additives are added and the PMB is either stored or dispatched. It was submitted that the end products, viz. PMB and CRMB are different from bitumen, inasmuch as polymers and additives are the raw materials consumed in the process of manufacture of the said final products and are therefore,

covered by the definition of the term "manufacture" in Section 2(f) of the Act. To buttress his submission that PMB and CRMB are exigible to Excise duty, both falling under a specific entry, learned counsel referred to the Tariff Act, whereunder, while bitumen is classifiable under Chapter Sub heading 271320.00, and polymer is classifiable under Chapter Sub Heading 390190.00, the finished products, PMB and CRMB are classifiable under Chapter Sub Heading 271500.90. In support of his submission that PMB and CRMB are commercially known in the market for being bought and sold and therefore, satisfy the test of marketability which is one of the essential conditions for the purpose of levy of Excise duty, learned counsel commended us to the decisions of this Court in *Medley Pharmaceuticals Limited Vs. Commissioner of Central Excise & Customs, Daman*[1] and *Nicholas Piramal India Ltd. Vs. Commnr. Of Central Excise, Mumbai*[2]. It was also urged that Circular No. 88/1/87-CX.3, dated 16th June, 1987, issued by the Department of Revenue, Ministry of Finance, clarifying that a slight modification of the grade or quality of bitumen, brought about by the process of air blowing to duty paid bitumen did not amount to manufacture, was wrongly relied upon by the Tribunal as it had subsequently been modified by Circular No. 88/1/88-CX.3, dated 1st July, 1988, wherein the said department had clarified that duty would be chargeable on blown-grade bitumen.

6. *Per contra,* learned counsel appearing on behalf of the assessees, led by Mr. S.K. Bagaria, senior advocate, while supporting the decision of the Tribunal, fervently submitted that based on the documents, evidence and materials on record, the Tribunal has found, as a fact, that the process of mixing an insignificant dose of polymer with duty paid bitumen only enhanced the quality of bitumen and did not amount to manufacture and therefore, in the absence of any plea of perversity, the finding does not warrant any interference by this

1. 2011 (263) E.L.T. 641 (SC)
2. 2010 (260) E.L.T. 338 (SC)

Court. In support of the proposition, learned senior counsel placed reliance on the decisions of this Court in *Commissioner of Central Excise, Bangalore Vs. Ducksole (I) Ltd. & Ors.*[3] and *Commissioner of Central Excise, Delhi-III Vs. Uni Products India Ltd. & Ors.*[4].

7. Learned senior counsel vehemently argued that the mechanical process of adding polymer and additives to heated bitumen to bring into existence the so-called new substance, known as PMB, did not amount to 'manufacture' in terms of Section 2(f) of the Act. It was explained that by the said process, only the grade or quality of bitumen is improved by raising its softening point and penetration, for improving the quality of the road; but even with the improved quality, bitumen remained bitumen with the same end use. It was the say of the learned counsel that a mere improvement in the quality did not amount to manufacture, as 'manufacture' takes place only when there is a transformation of raw materials into a new and different article, having a distinctive name, character and use, which is not the case here as the end use of both the articles remained the same. In support of the proposition, learned senior counsel commended us to a plethora of decisions of this Court, including *M/s. Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*[5], *Commissioner of Central Excise, Gujarat Vs. Pan Pipes Resplendents Limited,*[6] *Crane Betel Nut Powder Works Vs. Commissioner of Customs & Central Excise, Tirupathi & Anr.*[7] and *Union of India & Ors. Vs. Delhi Cloth & General Mills Co. Ltd. & Ors.*[8].

8. It was contended that since the period involved in these appeals is post substitution of clause (f) in Section 2 of the Act

3. (2005) 10 SCC 462.
4. (2009) 9 SCC 295.
5. 1961 (2) SCR 14 : AIR 1961 SC 412.
6. (2006) 1 SCC 777.
7. (2007) 4 SCC 155.
8. 1977 (1) ELT (J199) (SC).

by Act 5 of 1986, which gives an extended meaning to the expression "manufacture" by including in terms of sub-clause (ii) to clause (f), any process "which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture", the said provision would be applicable. However, wherever the legislature intended to give an extended or artificial meaning to the said expression in relation to any goods, it has clearly specified it. According to the learned counsel, since the addition of polymer or additives to the bitumen has not been specified in the Section or Chapter notes of the Tariff Schedule as amounting to manufacture, the amended definition is of no avail to the revenue. In support of the contention, heavy reliance was placed on the decisions of this Court in *Commissioner of Central Excise, New Delhi-I Vs. S.R. Tissues Pvt. Ltd.*[9] and *Shyam Oil Cake Ltd. Vs. Collector of Central Excise, Jaipur*[10].

9. Relying on the two afore-mentioned Circulars, F.No. 88/1/87-CX.3, dated 16th June 1987 and F.No.88/1/88-CX.3, dated 1st July 1988, issued by the Department of Revenue, Ministry of Finance, clarifying that blown grade bitumen produced by oxidation of straight grade bitumen is not liable to duty; learned senior counsel submitted that the present case is on a much better footing than the blown grade bitumen, inasmuch as, unlike oxidation, where chemical change takes place, in the mixing of polymer and bitumen, no chemical change in bitumen takes place, and therefore, PMB cannot be subjected to Excise duty as a new commercial commodity. Additionally, reliance was also placed on Circular No.623/14/2002-CX., dated 25th February, 2002, wherein the Central Board of Excise and Customs has clarified that the process of preparation of Hot Asphalt Mix used in making roads does not amount to manufacture as contemplated under Section 2(f) of the Act.

9. 2005 (186) E.L.T. 385 (SC)
10. 2004 (174) E.L.T. 145 (SC).

10. It was argued that merely because bitumen (the basic material) and PMB (the end material) are specified under two different headings, it cannot be presumed that the process of obtaining PMB automatically constituted manufacture, unless in fact there has been a transformation of bitumen into a new and different product or alternatively, the Section Notes or Chapter Notes created a deeming fiction by providing an artificial or extended meaning to the expression 'manufacture' in respect of the goods in question. In support of the proposition, learned counsel placed reliance on the decisions of this Court in *S.R. Tissues Pvt. Ltd* (supra)**,** *Commissioner of Central Excise, Chennai-II Vs. Tarpaulin International*[11], *Shyam Oil Cake Ltd.* (supra), *Commissioner of Central Excise, Mumbai Vs. Lalji Godhoo & Co.*[12], *Commissioner of Central Excise Vs. Indian Aluminium Co. Ltd.*[13] and *Hindustan Zinc Ltd. Vs. Commissioner of Central Excise, Jaipur*[14], wherein it was held that merely because the raw materials and the finished product fall under two different tariff entries, it cannot be presumed that the process of obtaining the finished product from such raw materials automatically constituted manufacture.

11. Learned counsel also strenuously urged that even if it is assumed that the said process amounted to manufacture, still PMB cannot be subjected to excise as it is not commercially marketable. It was argued that for levy of Excise duty, the twin conditions of 'manufacture' and 'marketability' have to be satisfied cumulatively. In support of the proposition, reliance was placed on the decisions of this Court in *Hindustan Zinc Ltd.* (supra), *Indian Aluminium Co. Ltd.* (supra) and *Lalji Godhoo & Co.* (supra). Learned counsel also contended that the burden to prove that the process in question constitutes manufacture and that the goods so manufactured are

11. 2010 (256) E.L.T. 481 (SC)
12. 2007 (216) E.L.T. 514 (SC)
13. (2006) 8 SCC 314.
14. (2005) 2 SCC 662.

marketable as new goods, known to the market, lies on the revenue and the same has not been discharged in the present case. To support the contention, reliance was placed on *Lalji Godhoo & Co.* (supra), *Metlex (I) (P) Ltd. Vs. Commissioner of Central Excise, New Delhi*[15]*; Hindustan Poles Corpn. Vs. Commissioner of Central Excise, Calcutta*[16] and *HPL Chemicals Ltd. Vs. Commissioner of Central Excise, Chandigarh*[17].

12. Lastly, the learned counsel stressed that in the light of the decisions of this Court in *Commissioner of Central Excise & Customs Vs. Tikatar Industries*[18]*, Commissioner of Central Excise, Navi Mumbai Vs. Amar Bitumen & Allied Products Private Limited*[19] and *Commissioner of Central Excise, Mumbai Vs. Tikitar Industries*[20]*,* the issue raised by the revenue in these appeals is no longer *res-integra,* and therefore, all the appeals deserved to be dismissed.

13. Mr. Laxmi Kumaran, learned counsel appearing for the assessee in Appeal No.7142 of 2010, while adopting the arguments advanced by Mr. Bagaria, emphasised that apart from the fact that in his case the assessee was mixing the additives at the site and not in a factory, the percentage of polymer or additives added to bitumen was inconsequential for determination of the issue at hand, as the predominant test was whether the treated bitumen underwent any change in its characteristics so as to acquire a new commercial identity. In support, learned counsel referred to *McNicol & Anr. Vs. Pinch*[21]*,* wherein Darling J., delivering the concurring majority opinion observed that:

15. (2005) 1 SCC 271.
16. (2006) 4 SCC 85.
17. (2006) 5 SCC 2008.
18. 2006 (202) E.L.T. 215 (S.C.).
19. 2006 (202) E.L.T. 213 (S.C.)
20. 2010 (253) E.L.T. 513 (S.C.).
21. 1906 (2) K.B. 352.

> "You can only make one thing out of another. I think the essence of making or of manufacturing is that what is made shall be different thing from that out of which it is made."

In other words, the counsel submitted that the same test namely, whether the product that emerges is something different from the goods with which it is made, was observed to be the determining factor. If bitumen, after its processing with additives and modifiers, remains bitumen; although it is known as PMB, then no new product emerges. It was asserted that in the present case, the revenue had failed to prove that with the addition of polymer or additives, bitumen had undergone any change in its chemical composition and commercial identity. According to the learned counsel, if the treated bitumen is not kept at a particular temperature, bitumen and polymer get separated and revert to their original state, which shows that no chemical reaction takes place when both the commodities are mixed.

14. Thus, the question which falls for consideration in all these appeals is whether the addition and mixing of polymers and additives to base bitumen results in the manufacture of a new marketable commodity and as such exigible to Excise duty?

15. The expression 'manufacture' defined in Section 2(f) of the Act, *inter alia* includes any process which is specified in relation to any goods in the Section or Chapter Notes of First Schedule to the Tariff Act. It is manifest that in order to bring a process in relation to any goods within the ambit of Section 2(f) of the Act, the same is required to be recognised by the legislature as manufacture in relation to such goods in the Section notes or Chapter notes of the First Schedule to the Tariff Act. Therefore, in order to bring petroleum bitumen, falling under CSH 27132000, within the extended or deemed meaning of the expression 'manufacture', so as to fall under CSH 271500900, the process of its treatment with polymers

or additives or with any other compound is required to be recognised by the legislature as manufacture under the Chapter notes or Section notes to Chapter 27.

16. Dealing with the aspect of extended or artificial meaning of the expression 'manufacture' in Section 2(f) of the Act in *Shyam Oil Cake Ltd.* (supra), this Court had held as under :-

> "16. Thus, the amended definition enlarges the scope of manufacture by roping in processes which may or may not strictly amount to manufacture provided those processes are specified in the Section or Chapter notes of the Tariff Schedule as amounting to manufacture. It is clear that the Legislature realised that it was not possible to put in an exhaustive list of various processes but that some methodology was required for declaring that a particular process amounted to manufacture. The language of the amended Section 2(f) indicates that what is required is not just specification of the goods but a specification of the process and a declaration that the same amounts to manufacture. Of course, the specification must be in relation to any goods.
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> XXX XXX XXX XXX
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> 24. In this case, neither in the Section Note nor in the Chapter Note nor in the Tariff Item do we find any indication that the process indicated is to amount to manufacture. To start with the product was edible vegetable oil. Even after the refining, it remains edible vegetable oil. As actual manufacture has not taken place, the deeming provision cannot, be brought into play in the absence of it being specifically stated that the process amounts to manufacture."

17. Then again, in *S.R. Tissues Pvt. Ltd.* (supra), a question arose whether slitting and cutting of toilet tissue paper

on aluminium foil amounted to manufacture under Section 2(f) of the Act. Answering the question in the negative, this Court had observed thus :-

> "15.....In order to make Section 2(f) applicable, the process of cutting/slitting is required to be recognized by the legislature as a manufacture under the chapter note or the section note to Chapter 48. For example, the cutting and slitting of thermal paper is deemed to be "manufacture" under Note 13 to Chapter 48. Similarly, Note 3 to Chapter 37 refers to cutting and slitting as amounting to manufacture in the case of photographic goods. However, slitting and cutting of toilet tissue paper on aluminium foil has not been treated as a manufacture by the legislature. In the circumstance, Section 2(f) of the Act has no application."

18. In the present case, a plain reading of the Schedule to the Act makes it clear that no such process or processes have been specified in the Section notes or Chapter notes in respect of petroleum bitumen falling under Tariff Item 27132000 or even in respect of bituminous mixtures falling under Tariff Item 27150090 to indicate that the said process amounts to manufacture. Thus, it is evident that the said process of adding polymers and additives to the heated bitumen to get a better quality bitumen, *viz.* PMB or CRMB, cannot be given an extended meaning under the expression manufacture in terms of Section 2(f) (ii) of the Act.

19. We may now examine whether the process in question, otherwise amounts to manufacture under the expansive Section 2(f) of the Act. It is trite to state that "manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use. It is well settled that mere improvement in quality does not amount to manufacture. It is only when the change or a series of changes take the commodity to a point where commercially it can no longer be

regarded as the original commodity but is instead recognized as a new and distinct article that manufacture can be said to have taken place. In this behalf the following observations by the Constitution Bench of this Court in *Tungabhadra Industries* (supra) are quite apposite :

> "In our opinion, the learned Judges of the High Court laid an undue emphasis on the addition by way of the absorption of the hydrogen atoms in the process of hardening and on the consequent inter-molecular changes in the oil. The addition of the hydrogen atoms was effected in order to saturate a portion of the oleic and linoleic constituents of the oil and render the oil more stable *thus improving its quality and utility*. But neither mere absorption of other matter, nor inter-molecular changes necessarily *affect the identity of a substance* as ordinarily understood.....The change here is both additive and inter-molecular, but yet it could hardly be said that rancid groundnut oil is not groundnut oil. It would undoubtedly be very bad groundnut oil but still it would be groundnut oil and if so it does not seem to accord with logic that when the *quality of the oil is improved* in that its resistance to the natural processes of deterioration through oxidation is increased, it should be held not to be oil."
>
> (Emphasis supplied by us)

20. In *Delhi Cloth & General Mills Co. Ltd.* (supra), yet another Constitution Bench, exploring the concept of manufacture echoed the following views :

> "14.....*The word 'manufacture' used as a verb is generally understood to mean as "bringing into existence a new substance" and does not mean merely "to produce some change in a substance"*, however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26, from an American judgment. The passage runs thus:-

"Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

(Emphasis supplied by us)

21. In *S.R. Tissues Pvt. Ltd.* (supra), the issue for consideration was whether the process of unwinding, cutting and slitting to sizes of jumbo rolls into toilet rolls, napkins and facial tissue papers amounted to manufacture. While holding that the said process did not amount to manufacture this Court *inter-alia,* held as under :

"12…..However, the end-use of the tissue paper in the jumbo rolls and the end-use of the toilet rolls, the table napkins and the facial tissues remains the same, namely, for household or sanitary use. *The predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue.* In the present case, the Tribunal was right in holding that the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper, after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues."

(Emphasis supplied by us)

22. In *Deputy Commissioner Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers*[22], a three Judge Bench of this Court, while deciding whether conversion of pineapple fruit into pineapple slices for sale in sealed cans amounted to manufacture, observed as follows:-

22. 1980 (6) E.L.T. 343 (SC).

"4……Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. *Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity*.

(Emphasis supplied by us)"

23. Having considered the matter on the touchstone of the aforesaid legal position, we are of the view that the process of mixing polymers and additives with bitumen does not amount to manufacture. Both the lower authorities have found as a fact that the said process merely resulted in the improvement of quality of bitumen. Bitumen remained bitumen. There was no change in the characteristics or identity of bitumen and only its grade or quality was improved. The said process did not result in transformation of bitumen into a new product having a different identity, characteristic and use. The end use also remained the same, namely for mixing of aggregates for constructing the roads.

24. We also find substance in the contention urged on behalf of the assessee that the answer to the issue at hand stands concluded by the dismissal of the Civil Appeals filed by the revenue against the decision of the Tribunal in the case of

Collector of Central Excise, Vadodara Vs. Tikitar Industries[23]. In that case the dispute was whether the process relating to improvement of the quality of bitumen by raising its softening point and penetration amounted to manufacture of a new and different commodity. The process involved in improving the quality of bitumen was oxidation, which converted straight grade bitumen into air blown bitumen. In revenue's appeal the Tribunal had *inter-alia* held as under :

> "19. The duty paid bitumen received by the Assessee is boiled so that foreign substances like sand and stone settle down; thereafter the air is blown into the material for *improving the quality of the bitumen by raising the softening point and penetration;* this makes the bitumen suitable for intended application. It is seen from the process undertaken by the Assessees that only the quality of the product which has already suffered duty is improved……"
>
> (Emphasis supplied by us)

As aforesaid, revenue's appeal was dismissed by this Court vide order dated 2nd August, 2006 in *Tikatar Industries* (supra).

25. We therefore, hold that PMB or CRMB cannot be treated as bituminous mixtures falling under CSH 27150090 and shall continue to be classified under CSH 27132000 pertaining to tariff for petroleum bitumen.

26. In view of the opinion expressed above, we deem it unnecessary to deal with the other grounds urged on behalf of both the sides.

27. For the foregoing reasons, no ground is made out for our interference with the impugned orders passed by the Tribunal in all the appeals mentioned in paragraph 1 supra. The appeals, being bereft of any merit, are dismissed accordingly, with no order as to costs.

B.B.B. Appeals dismissed.

23. 2000 (118) E.L.T. 468 (Tri).

C. SHAKUNTHALA & ORS.
v.
H.P. UDAYAKUMAR & ANR.
(CRIMINAL APPEAL NO. 158 OF 2012)

JANUARY 16, 2012

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

Contempt of Courts Act, 1971 – Criminal contempt – Pursuant to a contempt petition, Division Bench of the High Court by order dated 9-6-2006 held that there was a prima facie case against the accused-respondents to proceed further and frame charge and try them for criminal contempt for abuse of the process of the law – However, by final impugned judgment dated 18-6-2008, another Co-ordinate Bench of the High Court dismissed the contempt petition and acquitted the respondents – Propriety – Held: The subsequent coordinate Bench without adverting to the relevant materials relied on by the earlier coordinate Bench passed a cryptic order by dismissing the contempt petition – Prima facie conclusion arrived by the earlier Bench in the year 2006, based on the acceptable materials, could not be ignored by the subsequent co-ordinate Bench at the time of the passing the final order as if it was an appellate Court – Order dated 18-6-2008 set aside and matter remitted to High Court for fresh disposal.

Pursuant to a petition by the predecessor-interest of the appellants under Section 11(2) of the Contempt of Courts Act, 1971, the Division Bench of the High Court by order dated 9-6-2006 held that there was a *prima facie* case against the accused-respondents to proceed further and frame charge and try them for criminal contempt for abuse of the process of the law. However, by final impugned judgment dated 18-6-2008, another Co-ordinate Bench of the High Court dismissed the

contempt petition and acquitted the respondents, allegedly without adverting to the plea of the parties and the evidence on record.

Allowing the appeal, the Court

HELD: Keeping in view the stand of complainant, his specific assertion with reference to earlier orders and the defence of the respondents/accused as well as the prima facie conclusion by the Division Bench that the complainant has made out a case against the accused to proceed further and adjourned the matter for two weeks for framing charges, it is not understandable how another coordinate Bench after two years without any discussion and adverting to the relevant materials relied on by earlier coordinate Bench passed a cryptic order by dismissing the contempt petition. When the coordinate Bench on earlier occasion, that is, on 09.06.2006, based on the acceptable materials *prima facie* concluded that charges have to be framed, it was but proper by the present Bench to arrive and take a final decision in the light of the materials formulated by the earlier Bench. It is not that the complainant has made out a case for guilty of contempt of courts but the *prima facie* conclusion arrived by the earlier Bench in the year 2006, based on the acceptable materials, cannot be ignored by another Bench at the time of the passing the final order as if it is an appellate Court. In view of the same, there is no other option except setting aside the impugned order dated 18-6-2008 and remitting the matter to the High Court for passing fresh order. [Para 8].

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 158 of 2012.

From the Judgment & Order dated 18.06.2008 of the High Court of Karnataka at Bangalore in Criminal CCC No. 32 of 2005.

Basava Prabhu, S. Patil, B. Subrahmanya Prasad, Anirudh Sanganeria, V.N. Raghupathy for the Appellants.

Abha Jain for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 18.06.2008 passed by the Division Bench of the High Court of Karnataka at Bangalore in Criminal CCC No. 32 of 2005 whereby the High Court dismissed the petition of the appellants herein.

3. Brief facts:

(a) The appellants herein are the children and legal representatives of late M. Channappa, who was the original complainant/landlord before the High Court. Late M. Channappa was the owner of the property bearing Old Survey No. 39/2A, Yediur Village, Bangalore South Taluk. He let out the eastern half portion of the said property to one Kachu Krishna Achari and western portion to one P.V. Lingaiah on rent. In view of the extension of the City, the property fell into the Bangalore City limits and is presently situated on the K.R. Road and bears No. 2038/A.

(b) Late M. Channappa initiated eviction proceedings against both the said tenants and Kachu Krishna Achari came to be evicted pursuant to the decree granted by the competent court. The order of eviction was challenged by P.V. Lingaiah in HRRP No. 559 of 1996 before the High Court of Karnataka which came to be dismissed on 29.02.2000 granting two years time to vacate the tenanted premises subject to filing an undertaking by him.

(c) Pursuant to the said order, Lingaiah filed an undertaking to vacate the tenanted premises and deliver vacant possession to late M. Channappa. In the meantime, Lingaiah approached this Court by way of a special leave petition which

also came to be dismissed.

(d) Mr. Lingaiah failed to adhere to the undertaking given by him to vacate the premises within two years, instead in collusion with his son L. Suresh and H.P. Udayakumar, respondent No.1 herein, he created a sale deed dated 22.02.2001 whereby respondent No.1 is purported to have acquired a portion of the tenanted premises. Significantly, respondent No.1 is the business partner of L. Suresh, son of Lingaiah.

(e) Thereafter, late M. Channappa initiated contempt proceedings against Lingaiah, his son Suresh and H.P. Udayakumar, respondent No.1 herein. Since respondent No.1 and Suresh were not parties to the earlier petition, contempt proceedings were dropped against them and the High Court by its order dated 06.02.2004 convicted and sentenced Mr. Lingaiah to undergo simple imprisonment for three days. Being aggrieved with the order of the High Court, late Channappa filed an appeal before this Court for enhancement of the sentence awarded to Mr. Lingaiah which is still pending.

(f) As Mr. Lingaiah failed to vacate the tenanted premises, late Channappa also filed execution proceedings before the Court of Small Causes, Bangalore under Order 21 of CPC. The Court of Small Causes issued delivery warrant for delivery of possession of the tenanted premises.

(g) While the matter was pending, on 18.12.2004, the respondent No.1 herein filed an application under Order 21 Rule 97 to 101 read with Section 151 CPC in Execution Petition No. 2658 of 2004 seeking adjudication of his right, title and interest in respect of the property in question contending that he was the absolute owner of the said property in terms of the sale deed dated 22.02.2001 and that late M. Channappa had no interest in the said property. He also contended that as late M. Channappa attempted to interfere with the property, he filed O.S.No. 15265 of 2002 before the Civil Court for permanent injunction wherein the court had granted an ad interim order of status quo.

(h) It is evident that respondent No.1 is the business partner of the son of Lingaiah and he has been set up to file application to protract the proceedings.

(i) In the light of the stand taken by respondent No.1, Channappa filed O.S. No. 3814 of 2005 against respondent No.1 for delivery of the vacant possession of the property.

(j) The Executing Court vide judgment dated 08.06.2005 dismissed the application filed by respondent No.1 after adverting to the material on record. Respondent No.1 questioned the said order before the High Court by filing HRRP No. 285 of 2005.

(k) The High Court by judgment dated 30.06.2005 dismissed the said petition on the ground that eviction order having passed in the year 1996, respondent No.1 who was obstructing the execution of the decree having purchased the property subsequently in the year 2001 interfered with the order of the Executing Court which is not warranted.

(l) On 26.09.2005, respondent No.1 and his brother H.P. Ashok Kumar, respondent No.2 filed another application in the said Execution Petition opposing the same.

(m) In the circumstances, late M. Channappa filed a petition under Section 11(2) of the Contempt of Courts Act, 1971 before the High Court. After hearing both the parties, the High Court by its order dated 09.06.2006 held that there was a prima facie case against the respondents to proceed further and frame charge and try them for criminal contempt for abuse of the process of the law. On 17.01.2008 M. Channappa passed away and the High Court permitted the petitioners therein to come on record.

(n) The High Court, by final impugned judgment dated 18.06.2008 dismissed Crl. CCC No. 32 of 2005 and acquitted the respondents by holding that the grounds made out in the

second application is under different circumstances, the identity of the property is disputed and that the respondents cannot be attributed with unlawful intention for abuse of the process of the court.

(o) Being aggrieved, the appellants herein preferred this appeal by way of special leave.

4. Heard Mr. Basava Prabhu S. Patil, learned senior counsel for the petitioners and none appeared for the respondents.

5. The point for consideration is whether the impugned judgment of the High Court dismissing Crl. CCC No. 32 of 2005 after recording that prima facie case was made against the respondents, thereafter framing charges and recording evidence of the parties, without adverting to the plea of the parties and evidence on record, by concluding that the second application was under different circumstance being contrary to Rule 13 of the High Court of Karnataka (Contempt of Court Proceedings) Rules 1981 (in short 'the Rules') read with Section 264 occurring in Chapter XXI of the Code of Criminal Procedure, 1973 (in short 'the Code) is legally sustainable.

6. Since we have already narrated the facts of the case, there is no need to refer the same once again. Mr. Basava Prabhu S. Patil. learned senior counsel for the appellants submitted that even as early as on 09.06.2006, the Division Bench of the High Court based on the materials placed concluded that a prima facie case against the respondents/ accused have been made out for proceeding further and directed framing of charge to try them for criminal contempt for abuse of process of law, another coordinate Bench while passing the impugned order dated 18.06.2008, without reference to any of the materials, simply dismissed the petition filed by the petitioners therein-appellants herein. Perusal of the initial order dated 09.06.2006 shows that the Division Bench considered the contempt petition filed against the accused after obtaining the consent of the learned Advocate General in writing

under Section 15-1(a) of Contempt of Courts Act, 1971. Pursuant to service of notice on the respondents, they submitted their objections along with certain documents in support of their defence. It was contended that the action complained of do not constitute abuse of process of the Court for taking cognizance in the matter and to proceed further for framing the charge.

7. As rightly pointed out by the Division Bench in the order dated 09.06.2006 in terms of Rule 8(ii)(a) of Contempt of Courts Rules, 1981, the matter was heard initially to find out whether there is a prima facie case to frame the charge against the accused persons. The complainant placed strong reliance on the allegations made in the complaint and also the order passed by the trial Court in the earlier application filed by the first accused-Udaya Kumar in respect of property against which a decree is sought to be executed by the complainant in the execution proceedings. In the preliminary order, the Court had also referred to the observation of the Executing Court dated 08.01.2005. Ultimately, the Executing Court has convicted the judgment debtor and others. The matter is still pending before this Court. The complainant has also alleged that after the order passed on the application filed by the first accused became final, a decree was sought to be executed to take the possession of the premises. At this juncture, the second accused has filed another application taking another plea and according to his counsel, the subject matter covered in the application is different from the earlier one and that the identity covered in the eviction petition and the claim made in the application filed by the first accused before the Executing Court is entirely different. In other words, it is the defence that the order passed on the earlier application filed by the first accused does not come in the way of Executing Court to independently consider the application of the second accused in order to determine the rights of the parties. In the preliminary order, the Division Bench rejected the said contention and prima facie found that it is untenable in law in view of the earlier application

filed under Order XXI Rule 9 of Civil Procedure Code, 1908 by the first accused and concluded that the earlier application and the present application have to be treated as one and the same. After adverting to the respective stand of the parties, various decisions of this Court, in the preliminary order dated 09.06.2006, the Division Bench has concluded thus:

> "10. We have carefully perused the record and the documents produced by the complainant and also the accused persons. After careful perusal of the averments made in the complaint and the statement of objections and the orders passed by this court in the eviction proceedings and also the order passed in the proceedings and the law laid down by the Supreme Court in the cases referred to supra, upon which strong reliance is rightly placed by the complainant, we feel that there is prima facie case against the accused to proceed further, frame charge and to try them for criminal contempt for abuse of the process of law.
>
> 11. Call after two weeks for framing charges against the accused."

That was the position on 09.06.2006. Meanwhile, Mr. M. Channappa, who was the complainant in CCC No. 32 of 2005 passed away and his children were brought on record as his legal representatives. Inasmuch as the impugned order does not contain adequate reasons and materials as found in the preliminary order by another coordinate Bench dated 09.06.2006, it is useful to extract the exact impugned order of the Division Bench which is as follows:

> "Without reference to merit of the contents taken in the second application, we hold to suffice that the grounds made out in the second application is under different circumstances. The identity of the property is disputed. Factually, we find that the accused cannot be attributed with unlawful intention of abuse of process of the court. In the view of the matter we do not find any good ground to hold the contempt u/s 2(e) of the Contempt of Courts Act.

> Accordingly, petition is dismissed and the accused is acquitted."

8. We have already referred to the stand of the complainant, his specific assertion with reference to earlier orders and the defence of the respondents/accused as well as the prima facie conclusion by the Division Bench that the complainant has made out a case against the accused to proceed further and adjourned the matter for two weeks for framing charges. When such is the position, it is not understandable how another coordinate Bench after two years without any discussion and adverting to the relevant materials relied on by earlier coordinate Bench passed a cryptic order by dismissing the contempt petition. We are satisfied that when the coordinate Bench on earlier occasion, that is, on 09.06.2006, based on the acceptable materials prima facie concluded that charges have to be framed, it is but proper by the present Bench to arrive and take a final decision in the light of the materials formulated by the earlier Bench. We are not saying that the complainant has made out a case for guilty of contempt of courts but the prima facie conclusion arrived by the earlier Bench in the year 2006, based on the acceptable materials, cannot be ignored by another Bench at the time of the passing the final order as if it is an Appellate Court. In view of the same, we have no other option except setting aside the impugned order and remitting the matter to the High Court for passing fresh order.

9. In the light of what is stated above, the impugned order of the High Court dated 18.06.2008 made in Crl. CCC No. 32 of 2005 is set aside and the matter is remitted to it for fresh disposal. We request the High Court to restore Crl. CCC No. 32 of 2005 on its file and dispose of the same on merits in accordance with law by passing a speaking order after affording opportunity to both the parties. The appeal is allowed to this extent.

B.B.B. Appeal allowed

M/S. NATIONAL SEEDS CORPORATION LTD.
v.
M. MADHUSUDHAN REDDY AND ANOTHER
(CIVIL APPEAL NO. 7543 OF 2004)

JANUARY 16, 2012

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

Consumer Protection Act, 1986:

ss. 12 and 2(d)(i) – Complaints filed by farmers/growers of seeds before the District Forums alleging failure of the crops/less yield on account of defective seeds supplied by the Government Company-appellant and praying for award of compensation – Maintainability of – Held: The Seeds Act is a special legislation enacted for ensuring that there is no compromise with the quality of seeds sold to the farmers and others and provisions have been made for imposition of substantive punishment on a person found guilty – However, there is no provision for compensating the farmers etc. who may suffer adversely due to loss of crop/less yield on account of defective seeds supplied by a person authorised to sell the seeds – Seeds Act and the Rules do not exclude farmers from the ambit of the Consumer Act who are otherwise covered by the wide definition of 'consumer' u/s. 2(d) – Since the farmers/ growers purchased seeds by paying a price to the appellant, they would certainly fall within the ambit of s. 2(d)(i) – They cannot be denied the remedies available to other consumers of goods and services – Thus, the District Forums have the jurisdiction to entertain the complaints filed by the farmers – Seeds Act, 1966.

s. 3 – Failure of crops/financial loss to farmers/growers of seeds on account of use of defective seeds sold/supplied by appellant-Government Company – Appropriate remedy for the aggrieved farmers/growers – Filing of complaint under the

Act or to apply for arbitration for the alleged breach of the terms of agreement – Held: An aggrieved farmer/grower is not remedied by prosecuting the seller/supplier of the seeds, since he does not get anything even if the seller/supplier is found guilty and sentenced to imprisonment – Thus, the so-called remedy available to an aggrieved farmer/grower to lodge a complaint with the Seed Inspector for prosecution of the seller/supplier of the seed cannot but be treated as illusory and he cannot be denied relief under the Consumer Act on the ground of availability of an alternative remedy – Remedy of arbitration is not the only remedy available to a grower, rather, an optional remedy – He can seek reference to an arbitrator or file a complaint under the Act – Language of s.3 makes it clear that the remedy available in the Act is in addition to and not in derogation of the provisions of any other law for the time being in force – Arbitration – Alternative remedy.

s. 2(d)(i) – Government company entered into an agreement with selected farmers for growing seeds and the company was to purchase the entire crop – Complaint by farmers alleging sale of defective seeds – Whether a grower is excluded from the definition of 'consumer' – Held: Evidence on record shows that the growers had agreed to produce seeds on behalf of the Government company for the purpose of earning their livelihood by using their skills and labour – It cannot be said that the growers had purchased the seeds for resale or for any commercial purpose and they are excluded from the definition of the term 'consumer' – Since the farmers/ growers purchased seeds by paying a price to the appellant, they would fall within the ambit of s. 2(d)(i) – Remedies available to other consumers of goods and services cannot be denied.

s. 13(1)(c) – Sale of defective seeds to farmers – Award of compensation to farmers by District Forums – Procedure prescribed u/s. 13(1)(c) – Compliance of – Held: Procedure

adopted by the District Forum not contrary to s.13(1)(c) – District Forums appointed agricultural experts for ascertaining the status of the crops – On basis of the report of experts, the District Forums were satisfied that the seeds were defective and thus, did not call upon the complainants to provide samples of the seeds for getting the same analysed/tested in an appropriate laboratory – Further the farmers are illiterate and they have no idea about the Seeds Act and the Rules framed thereunder, and the Protection of Plant Varieties and Farmers' Rights Act, 2011 that after purchasing the seeds for sowing, he should retain a sample – In the normal course, a farmer would use the entire quantity of seeds purchased by him for the purpose of sowing – Also the Company did not keep the samples of the varieties of seeds sold/supplied to the farmers – They neither assisted the District Forum by providing samples of the varieties of seeds sold to the respondents nor did they collect the samples and got them tested in a designated laboratory – Seeds Act, 1966.

s. 2(d) – Definition of consumer – Scope of.

In the instant appeals, appellant-Government Company was engaged in arranging for production of quality seeds of different varieties in farms of registered growers and supply of the same to farmers. Respondents in the various appeals were engaged in agriculture/seed production. The respondents purchased seeds from the appellant. It is alleged that the respondents suffered loss due to failure of the crops/less yield because the seeds sold/supplied by the appellants were defective. The respondents filed separate complaints under the Consumer Protection Act and prayed for award of compensation. The District Consumer Disputes Redressal Forums allowed the complaints and awarded compensation to the respondents. In number of these cases, the District Forums appointed Commissioner or referred the matter to the officers of the Agricultural

Department for their opinion about the quality of seeds and they submitted the report. The appellants filed appeals and revisions and the same were dismissed by the State Consumer Disputes Redressal Forums and the National Consumer Disputes Redressal Forums respectively. Therefore, the appellant filed the instant appeals.

The appellant questioned the orders of the National Commission, the State Commission and the District Forums on the grounds that the District Forums did not have the jurisdiction to entertain complaints filed by the respondents because the issues relating to the quality of seeds are governed by the provisions contained in the Seeds Act, 1966 and any complaint about the sale or supply of defective seeds can be filed only under the Seeds Act and not under the Consumer Protection Act, 1986; that the District Forums could not have adjudicated upon the complaints filed by the respondents and awarded compensation to them without following the procedure prescribed under Section 13(1)(c) of the Consumer Act; and that the growers of seeds, who had entered into agreements with it, are not covered by the definition of 'consumer' under Section 2(d) of the Consumer Act because they had purchased the seeds for commercial purpose.

Dismissing the appeals, the Court

HELD: 1.1. An analysis of Sections 6, 7, 9, 10, 11, 14(1)(a) and (b), 16, 20, 21 of the Seeds Act, 1966 shows that for achieving the object of regulating the quality of certain seeds to be sold for the purposes of agriculture including horticulture, the legislature has made provisions for specifying the minimum limits of germination and purity of notified kind or variety of seeds and the affixation of mark or label to indicate that such seed conforms to those limits, for restricting sale, etc., of

any notified kind or variety of seed unless the same is identifiable as to its kind or variety and conforms to the minimum limits of germination and purity; grant of certificate by the certification agency to certain category of person; revocation of the certificate; appointment of Seed Analysts and Seed Inspectors with power to the latter to take sample of any seed of any notified kind or variety from any person selling such seed or a producer of seeds and send the same for analysis by the State Seed Laboratory or the Central Seed Laboratory. The Seed Inspector can launch prosecution for violation of any provision of the Seeds Act or any Rule made thereunder. If a person is found guilty then he can be punished with imprisonment upto a maximum period of six months or he can be visited with a penalty of fine upto Rs.1,000/- or with both. If an offence is committed by a company, then every person who, at the time of commission of offence was incharge of and was responsible to the company of the conduct of its business can be punished. Rule 13 of the Seeds Rules, 1968 casts a duty on very person selling, keeping for sale, offering to sell, bartering or otherwise supplying any seed of notified kind or variety to keep complete record of each lot of seeds sold for a period of three years. He is also required to keep sample of the seed, which can be tested for determining the purity. [Para 16]

1.2. Though, the Seeds Act is a special legislation enacted for ensuring that there is no compromise with the quality of seeds sold to the farmers and others and provisions have been made for imposition of substantive punishment on a person found guilty of violating the provisions relating the quality of the seeds, the legislature has not put in place any adjudicatory mechanism for compensating the farmers/growers of seeds and other similarly situated persons who may suffer loss of crop or who may get insufficient yield due to use of defective

seeds sold/supplied by the appellant or any other authorised person. No one can dispute that the agriculturists and horticulturists are the largest consumers of seeds. They suffer loss of crop due to various reasons, one of which is the use of defective/sub-standard seeds. The Seeds Act is totally silent on the issue of payment of compensation for the loss of crop on account of use of defective seeds supplied by the appellant and others who may obtain certificate under Section 9 of the Seeds Act. A farmer who may suffer loss of crop due to defective seeds can approach the Seed Inspector and make a request for prosecution of the person from whom he purchased the seeds. If found guilty, such person can be imprisoned, but this cannot redeem the loss suffered by the farmer. [Para 17]

1.3. India is a signatory to the resolution passed by the General Assembly which is known as Consumer Protection Resolution No.39/248. With a view to fulfill the objectives enshrined in the guidelines adopted by the General Assembly of the United Nations and keeping in view the proliferation of international trade and commerce and vast expansion of business and trade which resulted in availability of variety of consumer goods in the market, the Consumer Protection Bill was introduced to provide for better protection of the interest of consumers. The salient features of the Consumer Protection Bill were to promote and protect the rights of consumers. The preamble to the Consumer Protection Act, 1986 shows that this legislation is meant to provide for better protection of the interests of consumers and for that purpose to make provision for establishment of consumer councils and other authorities for the settlement of consumer disputes and for matters connected therewith. [Paras 19, 20]

Lucknow Development Authority v. M.K. Gupta **(1994) 1 SCC 243: 1993 (3) Suppl. SCR 615;** *Fair Air Engineers (P) Ltd. v. N.K. Modi* **(1996) 6 SCC 385: 1996 (4) Suppl. SCR 820;** *State of Karnataka v. Vishwabharathi House Building Coop. Society* **(2003) 2 SCC 412: 2003 (1) SCR 397;** *Skypay Couriers Limited v. Tata Chemicals Limited* **(2000) 5 SCC 294: 2000 (1) Suppl. SCR 324;** *Vishwabharthy CCF Secretary, Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha* **(2004) 1 SCC 305: 2003 (6) Suppl. SCR 659;** *H.N. Shankara Shastry v. Assistant Director of Agriculture, Karnataka* **(2004) 6 SCC 230: 2004 (2) Suppl. SCR 406;** *Trans Mediterranean Airways v. Universal Exports and Anr.* **(2011) 10 SCC 316 – referred to.**

1.4. In the context of farmers/growers and other consumer of seeds, the Seeds Act is a special legislation insofar as the provisions contained therein ensure that those engaged in agriculture and horticulture get quality seeds and any person who violates the provisions of the Act and/or the Rules is brought before the law and punished. However, there is no provision in that Act and the Rules framed thereunder for compensating the farmers etc. who may suffer adversely due to loss of crop or deficient yield on account of defective seeds supplied by a person authorised to sell the seeds. That apart, there is nothing in the Seeds Act and the Rules which may give an indication that the provisions of the Consumer Act are not available to the farmers who are otherwise covered by the wide definition of 'consumer' under Section 2(d) of the Consumer Act. As a matter of fact, any attempt to exclude the farmers from the ambit of the Consumer Act by implication will make that Act vulnerable to an attack of unconstitutionality on the ground of discrimination and there is no reason why the provisions of the Consumer Act should be so interpreted. [Para 23]

1.5. The definition of 'consumer' contained in Section 2(d) of the Consumer Act is very wide. Sub-clause (i) of the definition takes within its fold any person who buys any goods for a consideration paid or promised or partly paid and partly promised, or under any system of deferred payment. It also includes any person who uses the goods though he may not be buyer thereof provided that such use is with the approval of the buyer. The last part of the definition contained in Section 2(d)(i) excludes a person who obtains the goods for resale or for any commercial purpose. By virtue of the explanation which was added w.e.f. 18.6.1993 by the Consumer Protection (Amendment) Act 50 of 1993, it was clarified that the expression 'commercial purpose' used in sub-clause (i) does not include use by a consumer of goods bought and used by him for the purpose of earning his livelihood by means of self-employment. Since the farmers/growers purchased seeds by paying a price to the appellant, they would certainly fall within the ambit of Section 2(d)(i) of the Consumer Act and there is no reason to deny them the remedies which are available to other consumers of goods and services. [Paras 25 and 26]

Kishore Lal v. Chairman, Employees' State Insurance Corporation **(2007) 4 SCC 579: 2007 (6) SCR 139;** *Spring Meadows Hospital v. Harjol Ahluwalia* **(1998) 4 SCC 39;** *State of Karnataka v. Vishwabharathi House Building Coop. Society* **(2003) 2 SCC 412: 2003 (1) SCR 397;** *Secretary, Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha* **(2004) 1 SCC 305: 2003 (6) Suppl. SCR 659;** *Lucknow Development Authority v. M.K. Gupta* **(1994) 1 SCC 243: 1993 (3) Suppl. SCR 615 - referred to.**

2.1. As regrds the issue whether the growers of seeds were not entitled to file complaint under the Consumer Act and the only remedy available to them for the alleged breach of the terms of agreement was to apply

for arbitration, the grievance of a farmer/grower who has suffered financially due to loss or failure of crop on account of use of defective seeds sold/supplied by the appellant or by an authorised person is not remedied by prosecuting the seller/supplier of the seeds. Even if such person is found guilty and sentenced to imprisonment, the aggrieved farmer/grower does not get anything. Therefore, the so-called remedy available to an aggrieved farmer/grower to lodge a complaint with the concerned Seed Inspector for prosecution of the seller/supplier of the seed cannot but be treated as illusory and he cannot be denied relief under the Consumer Act on the ground of availability of an alternative remedy. [Para 28]

2.2. The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996 Act. Moreover, the plain language of Section 3 of the Consumer Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force. [Para 29]

Fair Air Engineers (P) Ltd. v. N.K. Modi **(1996) 6 SCC 385: 1996 (4) Suppl. SCR 820;** *Skypay Couriers Limited v. Tata Chemicals Limited* **(2000) 5 SCC 294: 2000 (1) Suppl. SCR 324;** *Trans Mediterranean Airways v. Universal Exports and Anr.* **(2011) 10 SCC 316 - referred to.**

3.1. As regards the issue whether a grower is excluded from the definition of 'consumer' because the

seeds produced by him are required to be supplied to the appellant, the submission that foundation seeds were supplied to the growers for commercial purpose and as such their cases would fall in the exclusion part of the definition of 'consumer', cannot be accepted. The appellant had selected a set of farmers in the area for growing seeds on its behalf. After entering into agreements with the selected farmers, the appellant supplied foundation seeds to them for a price, with an assurance that within few months they will be able to earn profit. The seeds sown under the supervision of the expert deputed by the appellant. The entire crop was to be purchased by the appellant. The agreements entered into between the appellant and the growers clearly postulated supply of the foundation seeds by the appellant with an assurance that the crop will be purchased by it. It is neither the pleaded case of the appellant nor any evidence was produced before any of the Consumer Forums that the growers had the freedom to sell the seeds in the open market or to any person other than the appellant. Therefore, it is not possible to take the view that the growers had purchased the seeds for resale or for any commercial purpose and they are excluded from the definition of the term 'consumer'. As a matter of fact, the evidence brought on record shows that the growers had agreed to produce seeds on behalf of the appellant for the purpose of earning their livelihood by using their skills and labour. [Paras 32 and 33]

Laxmi Engineering Works v. P.S.G. Industrial Institute **(1995) 3 SCC 583: 1995 (3) SCR 174 – referred to.**

3.2. A reading of the plain language of Section 13 (1)(c) shows that the District Forum can call upon the complainant to provide a sample of goods if it is satisfied that the defect in the goods cannot be determined without proper analysis or test. After the sample is obtained, the

same is required to be sent to an appropriate laboratory for analysis or test for the purpose of finding out whether the goods suffer from any defect as alleged in the complaint or from any other defect. In some of these cases, the District Forums had appointed agricultural experts as Court Commissioners and directed them to inspect the fields of the respondents and submit report about the status of the crops. In one or two cases the Court appointed Advocate Commissioner with liberty to him to avail the services of agricultural experts for ascertaining the true status of the crops. The reports of the agricultural experts produced before the District Forum unmistakably revealed that the crops had failed because of defective seeds/foundation seeds. After examining the reports the District Forums felt satisfied that the seeds were defective and this is the reason why the complainants were not called upon to provide samples of the seeds for getting the same analysed/ tested in an appropriate laboratory. The procedure adopted by the District Forum was in no way contrary to Section 13(1)(c) of the Consumer Act and the appellant cannot seek annulment of well-reasoned orders passed by three Consumer Forums on the specious ground that the procedure prescribed under Section 13(1)(c) of the Consumer Act had not been followed. [Para 34]

3.3. Majority of the farmers in the country remain illiterate throughout their life because they do not have access to the system of education. They have no idea about the Seeds Act and the Rules framed thereunder and other legislations, like, Protection of Plant Varieties and Farmers' Rights Act, 2011. They mainly rely on the information supplied by the Agricultural Department and Government agencies, like the appellant. Ordinarily, nobody would tell a farmer that after purchasing the seeds for sowing, he should retain a sample thereof so that in the event of loss of crop or less yield on account

of defect in the seeds, he may claim compensation from the seller/supplier. In the normal course, a farmer would use the entire quantity of seeds purchased by him for the purpose of sowing and by the time he discovers that the crop has failed because the seeds purchased by him were defective nothing remains with him which could be tested in a laboratory. In some of the cases, the respondents had categorically stated that they had sown the entire quantity of seeds purchased from the appellant. Therefore, it is naïve to blame the District Forum for not having called upon the respondents to provide the samples of seeds and send them for analysis or test in the laboratory. [Para 35]

3.4. There was abject failure on the appellant's part to assist the District Forum by providing samples of the varieties of seeds sold to the respondents. Rule 13(3) casts a duty on every person selling, keeping for sale, offering to sell, bartering or otherwise supplying any seed of notified kind or variety to keep over a period of three years a complete record of each lot of seeds sold except that any seed sample may be discarded one year after the entire lot represented by such sample has been disposed of. The sample of seed kept as part of the complete record has got to be of similar size and if required to be tested, the same shall be tested for determining the purity. The appellant is a large supplier of seeds to the farmers/growers and growers. Therefore, it was expected to keep the samples of the varieties of seeds sold/ supplied to the respondents. Such samples could have been easily made available to the District Forums for being sent to an appropriate laboratory for the purpose of analysis or test. Why the appellant did not adopt that course has not been explained. Not only this, the officers of the appellant, who inspected the fields of the respondents could have collected the samples and got

them tested in a designated laboratory for ascertaining the purity of the seeds and/or the extent of germination, etc. Why this was not done has also not been explained by the appellant. These omissions lend support to the plea of the respondents that the seeds sold/supplied by the appellant were defective. [Para 36]

Maharashtra Hybrid Seeds Co. Ltd. v. Alavalapati Chandra Reddy **(1998) 6 SCC 738 – relied on.**

N.S.C. Ltd. v. Guruswamy **(2002) CPJ 13;** *E.I.D. Parry (I) Ltd. v. Gourishankar* **(2006) CPJ 178;** *India Seed House v. Ramjilal Sharma* **(2008) 3 CPJ 96 – approved.**

CCI Chambers Housing Cooperative Society Ltd. v. Development Credit Bank Ltd. **(2003) 7 SCC 233: 2003 (3) Suppl. SCR 139;** *Indochem Electronic v. Additional Collector of Customs* **(2006) 3 SCC 721: 2006 (2) SCR 584 – referred.**

Case Law Reference:

1996 (4) Suppl. SCR 820	**Referred to.**	**Para 6.6, 22, 28**
2003 (1) SCR 397	**Referred to.**	**Para 6.6, 22, 24**
2003 (3) Suppl. SCR 139	**Referred to.**	**Para 6.6**
2006 (2) SCR 584	**Referred to.**	**Para 6.6**
1993 (3) Suppl. SCR 615	**Referred to.**	**Para 22**
2000 (1) Suppl. SCR 324	**Referred to.**	**Para 22, 30**
2003 (6) Suppl. SCR 659	**Referred to.**	**Para 22, 24**
2004 (2) Suppl. SCR 406	**Referred to.**	**Para 22**
(2011) 10 SCC 316	**Referred to.**	**Para 22, 31**
2007 (6) SCR 139	**Referred to.**	**Para 24**

(1998) 4 SCC 39	**Referred to.**	**Para 24**
1995 (3) SCR 174	**Referred to.**	**Para 32**
(1998) 6 SCC 738	**Relied on.**	**Para 39**
(2002) CPJ 13	**Approved.**	**Para 39**
(2006) CPJ 178	**Approved.**	**Para 39**
(2008) 3 CPJ 96	**Approved.**	**Para 39**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7543 of 2004 etc.

From the Judgment & Order dated 24.03.2003 of National Consumer Disputes Redressal Commission in Revision Petition No. 508 of 2003.

WITH

SLP (C) No. 32750 of 2009, C.A. Nos. 3498, 3499 of 2009, SLP (C) No. 35350 of 2009, C.A. Nos. 3596, 3598, 4509, 4510, 4511, 4512, 4513, 4514, 4515, 4516, 4517, 4518, 4519, 4520, 4521, 4522, 4704, 4798, 4824, 4954, 4955, 4957, 4959, 4962, 4963, 4964, 4967 of 2009 & C.A. No. 7542 of 2004.

Pallav Shishodia, Sudhir Kulshreshtha, M.Y. Deshmukh, Sachin Katariya, Rameshwar Prasad Goyal, M.J. Paul, Manoj Swarup, Devesh KUmar Tripathi, Ashok Anand, Kamal Mohan Gupta, Nitin S. Tambwekar, B.S. Sai, K. Rajeev for the Appellant.

R. Venkataramani, G.N. Reddy, Aljo K. Joseph, Ravi Shankar, Gouri Karuna Das, Anu Gupta, Shanti Kumar Jaisani, Bhakti Pasrija, Sanjeev Kumar Sharma (for Rani Jethmalani), E.R. Sumathy, Shobha, Sunil Kumar Verma, Ranjith K.C., Abhijit Sengupta, K. Rajeev, Rohit Kumar Singh, Venkateswara Rao Anumolu for the Respondents.

The Judgment of the Court was delivered by

G. S. SINGHVI, J. 1. Leave granted in SLP (C) Nos.32750 of 2009 and 35350 of 2009.

2. Appellant – M/s. National Seeds Corporation Ltd. (NSCL) is a Government of India company. Its main functions are to arrange for production of quality seeds of different varieties in the farms of registered growers and supply the same to the farmers. The respondents own lands in different districts of Andhra Pradesh and are engaged in agriculture/ seed production. They filed complaints with the allegation that they had suffered loss due to failure of the crops/less yield because the seeds sold/supplied by the appellant were defective. District Consumer Disputes Redressal Forums, Kurnool, Mehboob Nagar, Guntur, Khamman and Kakinada allowed the complaints and awarded compensation to the respondents. The appeals and the revisions filed by the appellant were dismissed by the Andhra Pradesh State Consumer Disputes Redressal Commission (for short, 'the State Commission') and the National Consumer Disputes Redressal Commission respectively.

3. The appellant has questioned the orders of the National Commission, which also implies its challenge to the orders of the State Commission and the District Forums mainly on the following grounds:

(a) the District Forums did not have the jurisdiction to entertain complaints filed by the respondents because the issues relating to the quality of seeds are governed by the provisions contained in the Seeds Act, 1966 (for short, 'the Seeds Act') and any complaint about the sale or supply of defective seeds can be filed only under the Seeds Act and not under the Consumer Protection Act, 1986 (for short, 'the Consumer Act').

(b) the District Forums could not have adjudicated upon the complaints filed by the respondents and awarded compensation to them without following the procedure prescribed under Section 13(1)(c) of the Consumer Act.

(c) the growers of seeds, who had entered into agreements with it, are not covered by the definition of 'consumer' under Section 2(d) of the Consumer Act because they had purchased the seeds for commercial purpose.

4. For the sake of convenience, we may advert to the facts leading to the passing of orders by three Consumer Forums, which have been impugned in Civil Appeal Nos. 7543 of 2004, 3499 of 2009 and 4519 of 2009. We may also mention that in their complaints the respondents had impleaded the officers of the appellant as parties but for the purpose of this judgment we shall only refer to them as the appellant.

Civil Appeal No.7543 of 2004

5.1 Respondents M. Madhusudan Reddy and K. Rambhupal Reddy claim to have purchased 46 kg. of KBSH-1 Sunflower seeds from Area Manager of the appellant at Kurnool. They undertook cultivation by adopting the recognized modes of preparing the field and irrigation and also used the prescribed fertilizer but there was germination only in 60% seeds and the height of the plants was uneven. The germination in the remaining 40% plants was slow. Not only this, flowering did not take place simultaneously. At the request of the respondents, Area Manager of the appellant inspected their field on 19.11.1999. He is said to have agreed that there was less germination and the growth of the plants was uneven, but declined to give any assurance for payment of compensation.

5.2 Dissatisfied with the response of the Area Manager, the respondents filed a complaint under Section 12 of the Consumer Act and prayed for award of compensation of Rs.1,79,505/- towards the cost of seeds, fertilizer and

pesticides and value of the lost crop with interest at the rate of 12 per cent per annum by alleging that they did not get the expected yield because the seeds sold by the appellant were defective.

5.3 In the reply filed on behalf of the appellant, it was pleaded that the seeds were purchased by respondent no. 1 alone and there was no evidence of joint cultivation by the respondents. The appellant denied that the seeds were defective and pleaded that respondent No. 1 did not get the expected yield because sufficient quantity of seeds had not been used for cultivation and there were no rain during the relevant period. It was also claimed that there was no complaint from any other farmer, who had purchased the same variety of seeds.

5.4 By an order dated 1.12.1999 passed in IA No.141 of 1999, District Forum, Kurnool appointed Shri D. C. Rama Rao, retired Assistant Director of Agriculture as Commissioner and directed him to submit a report after inspecting the field of the respondents. The Commissioner conducted the inspection and submitted report dated 1.12.1999, the relevant portions of which are extracted below -

> "The sunflower crop is raised under rainfed conditions. The soil is black and suitable for the Sunflower Crop. The cultivation aspects as observed is very satisfactory. The field is clean and free. The variety is said to be KBSJI the crop may be of 80 days above. Flowering is seen but it is not uniform. About 55% of the plants have flowers. About 25% of the plants have the head natured and about 10% of the plants are in the bud stage, while rest of the plants do not have flowers and there is no possibility for these plants to get flower, as they are only 3 feet height and the crop period to give flowers is over.
>
> The following are the variation, I have noticed.

No.	Observed %	Height of the Plants	Flowers Stage	Remarks
1.	45%	6 feet	Flowering and grain setting is in progress	Only two to three rows of flowers in head is setting seed. (Conve and flat heads)
2.	10%	4 feet	Flowering and the seed setting is started	No possibility for further growth.
3.	20%	6 feet	Head dropping since seed setting is over.	No growth is possible
4.	5%	4 feet	Head dropping since seed setting is over.	-do-
5.	10%	4 to 6 feet	In bud stage not be	Growth can expected further.
6.	10%	3 to 4 feet	No flowering is seen.	Growth also is stunted.

> Presence of leaf heairyness is seen in all the items except item (3) above to a certain extent i.e., 3 to 4 %.
>
> *In all the cases I have noticed difference in Head shape i.e, a few or convex a few a flat and a few are concave*.
>
> In all the cases I have seen the heads are not uniform in size. Twenty five percent of heads which are *dropping* because of full maturity are bigger in size while many are of medium size.

I have noticed 0.1% of flowers with multiple heads.

There are gaps which are may be due to faulty seed or may be due to non germination of the seed.

In the heads which are flat and concave are having three rows of seed setting while in the convex heads the filling or setting of seed is satisfactory.

I have also seen two different plots of sunflower grown adjacent to the plot in question and are exhibiting uniformity of the plant, in height, size and opening of flower etcetra. This is an indication of a standard seed.

Similar uniformity is lacking in the plot in question. In all the three plots, there prevailed uniform physical and climatelogical factors.

Hence the wide variation in all the aspects as explained in the earlier paras gives a scope this seed is not standard up to the mark.

Particularly Hybrid seed be having with such a wide variation is not ideal.

From this I estimate the yield may be around 150 to 200 kgs/Ac as against the 600 to 700 kgs/Ac expected from the variety."

(emphasis supplied)

5.5 The appellant filed objections against the Commissioner's report and claimed that the assessment made by him was not based on any scientific method and the comparison with the adjacent field without having regard to the nature of soil, water facility etc. was unacceptable. The appellant also contested the Commissioner's observation regarding satisfactory nature of cultivation by asserting that as per Vyavasaya Panchangam of Acharya N. G. Ranga Agriculture University, Hyderabad, 10 to 12 kgs. seeds were required for

one hectare but respondent No.1 had used substantially less quantity of seeds for his holding of 21.10 acres.

5.6 The respondents filed their affidavits along with copies of Invoice bill H.No.000691 dated 11.6.1999, No.3 Adangal, letter dated 6.11.1999 given to the appellant, bill dated 29.6.1999 showing the purchase of fertilizers from Chaitanya Chemicals & Fertilizers, Kurnool and the photographs showing the unevenness in the plants. On behalf of the appellant, an affidavit was filed along with copies of the documents mentioned therein.

5.7 The District Forum rejected the appellant's objection to the Commissioner's report and held that the complainants (the respondents herein) have succeeded in proving that the seeds sold to them were defective resulting in loss of crop. Accordingly, the complaint of the respondents was allowed and the appellant was directed to pay Rs.1,00,000/- towards loss of crop and Rs.10,000/- towards the cost of fertilizer, pesticides, labour etc. with a stipulation that if the amount is not paid within one month, the appellant shall be liable to pay interest @ 9% per annum.

5.8 The State Commission dismissed the appeal and held that Commissioner's report was rightly accepted by the District Forum because the appellant had not produced any evidence to controvert the findings contained therein that the respondent had taken proper steps for cultivation but did not get the expected yield due to faulty seeds.

5.9 The National Commission rejected the appellant's plea that the only remedy available to the respondents was to file a complaint under the Seeds Act, which is a special legislation vis-à-vis the Consumer Act, by observing that there is no provision in that Act for compensating a farmer whose crop may be adversely affected due to use of defective seeds sold by the appellant. The argument that the District Forum could not have decided the complaint without complying with the mandate

of Section 13(1)(c) of the Consumer Act was negatived by the National Commission and it was held that the report of the Commissioner, who was an expert in agriculture, was rightly relied upon by the District Forum for coming to the conclusion that the crop had failed due to the use of defective seeds.

Civil Appeal No.3499 of 2000

6.1 Respondent P. V. Krishna Reddy is a grower having land in Khanpur village of Manopad Mandal of Mahabubnagar District of Andhra Pradesh. He was one of the persons selected by the appellant in March 2000 for growing 'bitter gourd' seeds. The appellant entered into an agreement with the respondent and assured him that by producing seeds on its behalf he will get minimum net profit of Rs.38,000/- per acre within a span of three months. In furtherance of the terms of agreement, the appellant supplied 5 kgs. of 'bitter gourd' foundation seeds to the respondent by charging Rs.1,852.50 towards cost of the seeds, inspection fee etc. The appellant also appointed a supervisor and the respondent sowed seeds under his supervision by spending a sum of Rs.22,470/- towards labour charges, fertilizers and pesticides. In September, 2000, officials of the appellant visited the field of the respondent and others, who had entered into similar agreements, and rejected the seeds grown by them on the pretext that the same were not fit for certification.

6.2 On receipt of the inspection report prepared by the officials of the appellant, the respondent contacted the Horticulture Officer, who also inspected the field and submitted a report with the conclusion that the crop had failed because the seeds were defective. The respondent then filed a complaint under the Consumer Act and prayed for issue of a direction to the appellant to pay compensation of Rs.1,38,322/- with interest at the rate of 18% per annum and compensation of Rs.1,00,000/- by alleging that he had suffered loss because the foundation seeds supplied by the appellant were defective.

6.3 In the reply filed on behalf of the appellant, the following objections were taken to the maintainability of the complaint:

(i) that in view of the arbitration clause contained in the agreement, the only remedy available to the respondent was to apply for arbitration and the District Forum did not have the jurisdiction to entertain the complaint.

(ii) that the respondent had entered into an agreement for commercial production of the seeds and, as such, he cannot be treated as a 'consumer' within the meaning of Section 2(d) of the Consumer Act.

On merits, it was pleaded that Shri M. V. Narsimha Rao, Seed Officer of NSC Kurnool had advised the respondent and other growers to remove off-types and diseased plants, which were liable to be rejected but the growers ignored his advice. It was then averred that during their visit on 8.9.2000, Shri M. V. Narsimha Rao, Shri M. V. Sudhakar and Area Manager, NSCL, Kurnool found 7% off-types seeds which were more than the prescribed standards and, therefore, their crops were rejected. The report of the Horticulture Officer was contested on the premise that the respondent did not get the seeds tested in any government laboratory.

6.4 District Forum, Mahabubnagar overruled the objections of the appellant by observing that the respondent had purchased the seeds for earning livelihood by self-employment and not for any commercial purpose and that availability of remedy by way of arbitration does not operate as a bar to the entertaining of a complaint filed under the Consumer Act. The District Forum also referred to the appellant's plea that issue relating to quality of the seeds can be determined only by getting the samples tested in a laboratory and rejected the same by making the following observations:

"The complainant purchased 5 kgs of bitter gourd seeds under Ex.A-1 and sowed the seeds in an extent of 3 acres

in his land. *He sowed the entire seeds purchased by him. At the time of sowing, he might not have known that he had to keep back some seeds out of the seeds purchased by him as sample in the event of his approaching Forum if the seed crop was ultimately rejected by NSC. As all the seeds were sowed, he could not have taken out any seeds from the soil and produce them before the District Forum for following the procedure contemplated under Section 13(1) of C.P. Act. In those circumstances, the sample of seeds could not be sent to the appropriate Laboratory for analysis as contemplated under Section 13 of C.P. Act by the District Forum*."

(emphasis supplied)

6.5. The District Forum also opined that the appellant had failed to substantiate its assertion that the respondent had not removed off types and diseased plants despite the advice given by the Seed Officer by observing that no evidence had been produced in that regard. The District Forum finally concluded that the foundation seeds supplied to the respondent were faulty and the appellant was liable to compensate him.

6.6 The State Commission dismissed the appeal filed by the appellant and confirmed the order passed by the District Forum. The National Commission considered the objections raised by the appellant to the maintainability of the complaint, referred to the judgments of this Court in Fair Air Engineers (P) Ltd. v. N.K. Modi (1996) 6 SCC 385, State of Karnataka v. Vishwabharathi House Building Coop. Society (2003) 2 SCC 412, CCI Chambers Housing Cooperative Society Ltd. v. Development Credit Bank Ltd. (2003) 7 SCC 233 and Indochem Electronic v. Additional Collector of Customs (2006) 3 SCC 721 and held that the complaint filed by the respondent was maintainable because the jurisdiction of the consumer forums is in addition to other remedies which may be available to him. The National Commission further held that the

respondent is covered by the definition of 'consumer' contained in Section 2(d) of the Consumer Act because he did not purchase the seeds for any commercial purpose. The appellant's plea that the District Forum could not have awarded compensation to the respondents without complying with Section 13(1)(c) of the Consumer Act was negatived by the National Commission by observing that after having used all the seeds for sowing the respondent was not in a position to provide sample for testing and the report of the Horticulture Officer was sufficient for proving that the foundation seeds supplied by the appellant were defective.

Civil Appeal No.4519 of 2009

7.1 The respondent is an agricultural labourer. He used to take the lands of other farmers on lease and cultivate the same for his livelihood. He purchased tomato seeds from the appellant in the name of the landowners. When the respondent noticed that there was no yield from the plants, he approached the appellant's Manager at Vijayawada and requested him to inspect the field and assess the damages, but the latter did not respond. He then filed a complaint for award of compensation of Rs.60,000/- with interest at the rate of 12% per annum by alleging that he had suffered loss because the seeds sold by the appellant were defective.

7.2 The appellant controverted the claim of the respondent and pleaded that the complaint was liable to be dismissed because the District Forum was not competent to decide the issue relating to the quality of seeds. It was also pleaded that the crop had failed because while sowing the seeds the respondent did not take necessary precaution.

7.3 By an order dated 27.12.1995, District Forum, Khammam appointed Shri A. Jeevan Babu, Advocate as Commissioner to inspect the field of the respondent and estimate the loss, if any, sustained by him. The Advocate Commissioner requested the Principal, Agriculture College,

Aswaraopet and Mandal Revenue Officer, Yerrupalem to depute an expert and an Administrative Officer of Peddagopavaram and Yerrupalem to assist him. The Principal deputed Shri P. Sesha Reddy, Associate Professor and the M.R.O. deputed two executive officers to assist the Advocate Commissioner. Notice of the date of inspection was given to the appellant but no one appeared on its behalf on the appointed day. After conducting inspection with the assistance of Shri P. Sesha Reddy and other officers, the Advocate Commissioner submitted report dated 31.1.1996, the relevant portions of which are extracted below:

> "The field and the tomato fruits were examined by me and the Agriculture Officer and all the persons. The petitioner was also present, who told that he purchased the tomato seeds from the opposite party/respondent as usual and transplanted the same in the month of Sep. 1995 and also manured and applied pesticides as previous. The plants were sown at a distance of 3 feets from each plant. The tomato trees were grown upto 3 to 5 feets height, but no progress in the tomato fruits. The tomato fruits are small just like small bolls. There is no saleable value in the market for the said tomato fruits. The Agrl. Associate Professor Sri P . Seshi Reddy has collected the earth in the field and also trees along with the tomato fruits for testing purpose. On enquiry the petitioner told regarding the mode of cultivation that he adopted in sowing 'Naru' applying manure and pesticides. The petitioner complainant told that he was purchasing the tomato seeds from National Seeds Corporation Ltd., Vijayawada since more than 5 years and he sustained heavy loss this year due to non-production of the tomato yield since he supply of with inferior quality of tomato seeds. I conducted Panchanama at the field to that effect on 4.1.1996.
>
> Number of villagers gathered and they also opined that the petitioner complainant has sustained heavy loss this year.

> *He has shown empty tomato seeds packet, which is available with him. Sri P. Sesha Reddy, Associate Professor, Agrl. College, Aswaraopet has sent a report which is being submitted herewith. He opined that the seed 'Pusa Early Dwarf' supplied by, NSC, Vijayawada to the farmers of Yerrupalem and Pedergopalem villages may not be true type and crop failure to yield true type may be due to defective seed. I returned back to Khammam on 4-1-1996 at 9-30 p.m. by passengers train."*
>
> (emphasis supplied)

7.4 The District Forum considered the material produced before it including the Commissioner's report, allowed the complaint of the respondent and directed the appellant to pay him Rs.36,200/-. The State Commission and the National Commission approved the conclusion recorded by the District Forum that the respondent had suffered loss because the seeds sold by the appellant were defective. The National Commission dealt with the appellant's plea that the District Forum had not complied with Section 13(1)(c) and that there was violation of the Andhra Pradesh Seeds (Control) Order, 1983 and held:

> "It is well settled by now that under Section 13 of the Consumer Protection Act, 1986 (hereinafter referred to as 'the Act' for short), the burden to prove the deficiency, if any, on the part of the respondent, is on the complainant. Section 13(1)(c) provides that where a complainant alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it in the manner prescribed and refer the sample so sealed to the appropriate laboratory along with a direction to make an analysis/test, whichever may be necessary. *In other words, there has to be some expert opinion to prove the fact. In the present case, Dr. P. Sesha Reddy had inspected only*

9 fields, the details of which have been given by him in his Report and which have been referred to in the earlier paragraph. He did not inspect the fields of other respondents. His Report is relevant insofar as the respondents in Revision Petitions Nos. 131, 135, 136, 137, 140, 142, 143 and 150 of 2003 are concerned. Insofar as respondents in the other 12 Revision Petitions, i.e., Revision Petition Nos. 132, 133, 134,138, 139, 141, 144, 145, 146, 147, 148 and 149 of 2003 are concerned, they have failed to produce any expert opinion to show that the seeds did not germinate in their fields because the seeds supplied were defective.

Learned Counsel for the petitioner raised another objection that under the Seeds Control Order, 1983, the Divisional Officer, Seeds alone is competent to inspect and report about the causes of failure of the crop. It was submitted that Revision Petition Nos. 131, 135, 136, 137, 140, 142, 143 and 150 of 2003 are liable to be dismissed as the defects cannot be determined without analysis or tests, which the respondents in these Revision Petitions failed to get done. We find no substance in this submission. The Seeds Control Order, 1983 issued under G.O.M.s No. 97 F&A FP(2) dated 11.02.1985 does not debar any other agency from conducting an enquiry into the causes of failure of crop other than the officers mentioned therein. In the present case, it is at the instance of the District Forum that a Report was got from a Local Commissioner through Dr. P. Sesha Reddy, the expert who inspected the fields of 8 respondents and not others.

The petitioners had not sent their representatives to the fields of the complainant/respondents in spite of their making representations to that effect. Petitioner failed to take any step on the representations/complaints received from the respondents. The Report submitted by the Expert can certainly be taken into consideration even if there was

no analysis of the seeds from a laboratory. Non-examination of the seeds from the laboratory is not fatal to the case of the complainants whose fields were inspected by Dr. P. Sesha Reddy regarding which he gave an opinion as an expert. Nothing stopped the petitioner from sending the sample seeds for analysis to a laboratory. There is no explanation as to why it could not send the seeds for analysis."

(emphasis supplied)

8. Factual matrix of other cases is substantially similar except that some of the respondents had purchased Castor seeds while others had purchased Chilli seeds. In a number of cases, the District Forums appointed Commissioner or referred the matter to the officers of the Agriculture Department for their opinion about the quality of seeds and ordered payment of compensation by relying upon their reports.

9. We may also mention that in none of these cases, the appellant had offered to produce samples of the variety of the seeds sold/supplied to the respondents and made a prayer before the District Forum that the same may be got tested/ analysed in an appropriate laboratory.

10. Learned counsel for the appellant argued that the impugned orders are liable to be set aside because the District Forums did not have the jurisdiction to entertain the complaints filed by the respondents and the State and National Commissions committed grave error by brushing aside the appellant's objections to the maintainability of the complaints. Learned counsel emphasized that the Seeds Act is a special legislation enacted for regulating the quality of seeds and if the respondents had any grievance about the quality of the seeds then the only remedy available to them was to either file an application under Section 10 of the Seeds Act or to approach the concerned Seed Inspectors for taking action under Section 19 read with Section 21 of that Act. They further argued that

even if the complaints filed by the respondents under the Consumer Act are held to be maintainable, the finding recorded by the District Forums that the seeds sold/supplied by the appellant were defective is liable to be set aside because the procedure prescribed under Section 13(1)(c) of the Consumer Act was not followed. Learned counsel relied upon Section 8 of the Arbitration and Conciliation Act, 1996 and argued that in view of the arbitration clause contained in the agreements entered between the appellant and the growers, the latter could have applied for arbitration and the Consumer Forums should have non-suited them in view of Section 8 of the Arbitration and Conciliation Act, 1996. An ancillary argument made by the learned counsel is that the growers of seeds cannot be treated as 'consumer' within the meaning of Section 2(d) because they had purchased seeds for commercial purpose.

11. Learned counsel for the respondents supported the impugned orders and argued that the District Forums did not commit any illegality by entertaining the complaints filed under the Consumer Act because the Seeds Act and the Rules framed thereunder do not contain any provision for compensating a farmer whose crop is lost or who does not get the expected yield if the seeds sold/supplied by the appellant are defective. Learned counsel submitted that the remedy available under the Consumer Act is in addition to other remedies available to a consumer and the complaints filed by the respondents under that Act cannot be held as barred merely because they could also approach the Seed Inspector for taking action under Section 19 read with Section 21 of the Seeds Act. Learned counsel further argued that the growers of seeds are covered by the definition of consumer because they had agreed to undertake cultivation of seeds on behalf of the appellant for earning livelihood. On the issue of non compliance of Section 13(1)(c) of the Consumer Act, learned counsel submitted that the District Forums had rightly relied upon the reports of the Court Commissioners and other evidence for recording findings that the seeds sold/supplied by the appellant

were defective. Learned counsel emphasized that the respondents had used the entire quantity of seeds purchased by them for sowing and they had not retained samples by anticipating loss of crop or less yield. Learned counsel pointed out that the Commissioners had inspected the fields of the respondents and recorded categorical findings that the farmers had suffered losses because the seeds supplied by the appellant were defective and the District Forums did not commit any illegality by relying upon their reports. Learned counsel also submitted that the appellant could have produced samples of the seeds sold/supplied to the respondents and get them tested to prove that the same were not defective, but no such step was taken by it.

12. We shall first consider the question whether the Seeds Act is a special legislation vis-à-vis the Consumer Act and the District Forums could not have entertained and decided the complaints filed by the respondents because they could seeks redressal of their grievance regarding the quality of seeds sold by the appellant by lodging complaint with the concerned Seed Inspectors with a request for taking action under Section 19 read with Section 21 of the Seeds Act.

13. With a view to increase agricultural production in the country, the Central Government felt the necessity of regulating the quality of certain seeds to be sold for the purpose of agriculture including horticulture and for achieving that object, Parliament enacted the Seeds Act. The Statement of Objects and Reasons enshrined in the Bill, which led to the enactment of the Seeds Act read as under:

> "In the interest of increased agricultural production in the country, it is considered necessary to regulate the quality of certain seeds, such as seeds of food crops, cotton seeds, etc., to be sold for purpose of agriculture (including horticulture).
>
> The method by which the Bill seeks to achieve this object are-

(a) Constitution of a Central Committee consisting of representatives of the Central Government and the State Government, the National Seeds Corporation and other interests, to advise those Governments on all matters arising out of the proposed Legislation;

(b) fixing minimum standards of germination, purity and other quality factors;

(c) testing seeds for quality factors at the seed testing laboratories to be established by the Central Government and the State Governments;

(d) creating seed inspection and certification service in each State and grant of licences and certificates to dealers in seeds;

(e) compulsory labelling of seed containers to indicate the quality of seeds offered for sale, and

(f) restricting the export, import and inter-State movement of non-descript seeds."

14. Section 2 of the Seeds Act contains definitions of various terms including "Central Seed Laboratory", "Certification Agency", "Committee", "Seed", "Seed Analyst", "Seed Inspector" and "State Seed Laboratory". Section 3 casts a duty on the Central Government to constitute a Committee called the Central Seed Committee to advise it and the State Governments on matters arising out of the administration of the Act and to carry out other functions assigned to it by or under the Act. Section 4(1) empowers the Central Government to establish a Central Seed Laboratory or declare any seed laboratory as the Central Seed Laboratory to carry out the functions entrusted to such laboratory by or under the Act. Section 4 (2) contains similar provisions for establishment of State Seed Laboratories by the State Government. Section 6 empowers the Central Government to issue a notification, after

consulting the Committee constituted under Section 3 and specify the minimum limit of germination and purity with respect to any seed of any notified kind or variety and the mark or label to indicate that such seed conforms to the minimum limit of germination and purity. Section 7 regulates the sale of seeds of notified kinds or varieties. Under Section 8, the State Government can establish a certification agency for the State to carry out the functions entrusted to such agency by or under the Act. This power can also be exercised by the Central Government in consultation with the State Government. Sections 8-A to 8-E provide for establishment of the Central Seed Certification Board and appointment of other Committees by the Board. Section 9(1) provides for grant of certificate by certification agency to any person selling, keeping for sale, offering to sell, bartering or otherwise supplying any seed of any notified kind or variety. Sections 9(2) and 9(3) contain the procedure for grant of certificate. Section 10 provides for revocation of the certificate granted under Section 9. Any person aggrieved by an order made under Sections 9 or 10 can file an appeal under Section 11. Under Section 12, the State Government is empowered to issue notification for appointment of Seed Analysts and define the area of their jurisdiction. Similar provision is contained in Section 13 for appointment of Seed Inspectors. The powers of the Seed Inspector are enumerated in Section 14. Section 15(1) contains the procedure which is required to be followed by the Seed Inspector for taking samples. In terms of Section 15(2)(b), the sample taken by the Seed Inspector is required to be sent to the Seed Analyst for the purpose of analysis. Section 16 lays down the procedure for submission of the report by the State Seed Laboratory and Central Seed Laboratory. Section 19 specifies the acts which can be punished with an imprisonment upto six months or with fine of Rs.1,000/- or with both. Section 21 deals with offences by the companies. Sections 6, 7, 9, 10, 11, 14(1)(a) and (b), 16, 19, 20 and 21 of the Seeds Act, which have bearing on the decision of the first question raised by the appellant are reproduced below -

"**6. Power to specify minimum limits of germination and purity, etc.** –

The Central Government may, after consulting with the Committee and by notification in the Official Gazette, specify –

(a) the minimum limits of germination and purity with respect to any seed of any notified kind or variety;

(b) the mark or label to indicate that such seed conforms to the minimum limits of germination and purity specified under Cl.(a) and the particulars which such mark or label may contain.

7. Regulation or sale of seeds of notified kinds or varieties –

No person shall, himself or by any other person on his behalf, carry on the business of selling, keeping for sale, offering to sell, bartering or otherwise supplying any seed of any notified kind or variety, unless –

(a) such seed is identifiable as to its kind or variety;

(b) such seed conforms to the minimum limits of germination and purity specified Cl.(a) of Section 6;

(c) the container of such seed bears in the prescribed manner the mark or label containing the correct particulars thereof specified under Cl.(b) of Section 6; and

(d) he complies with such other requirements as may be prescribed.

9. Grant of certificate by certification agency - (1) Any person selling, keeping for sale, offering to sell, bartering or otherwise supplying any seed of any notified kind or variety may, if he desires to have such seed certified by the certification agency, apply to the certification agency

for the grant of a certificate for the purpose.

(2) Every application under sub-section (1) shall be made in such form, shall contain such particulars and shall be accompanied by such fees as may be prescribed.

(3) On receipt of any such application for the grant of a certificate, the certification agency may, after such enquiry as it thinks fit and after satisfying itself that the seed to which the application relates conforms to the prescribed standards grant a certificate in such form and on such conditions as may be prescribed.

Provided that such standards shall not be lower than the minimum limits of germination and purity specified for that seed under Cl. (a) of Sec.6.

10. Revocation of certificate - If the certification agency is satisfied, either on a reference made to it in this behalf or otherwise, that-

(a) the certificate granted by it under section 9 has been obtained by misrepresentation as to an essential fact; or

(b) the holder of the certificate has, without reasonable cause, failed to comply with the conditions subject to which the certificate has been granted or has contravened any of the provisions of this Act or the rules made thereunder,

then, without prejudice to any other penalty to which the holder of the certificate may be liable under this Act, the certification agency may, after giving the holder of the certificate an opportunity of showing cause, revoke the certificate.

11. Appeal - (1) Any person aggrieved by a decision of a certification agency under Section 9 or Section 10, may, within thirty days from the date on which the decision is communicated to him and on payment of such fees as

may be prescribed, prefer an appeal to such authority as may be specified by the State Government in this behalf:

Provided that the appellate authority may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) On receipt of an appeal under sub-section (1), the appellate authority shall, after giving the appellant an opportunity of being heard, dispose of the appeal as expeditiously as possible.

(3) Every order of the appellate authority under this section shall be final.

14. Powers of Seed Inspector. - (1) The Seed Inspector may-

(a) take samples of any seed of any notified kind or variety from-

(i) any person selling such seed; or

(ii) any person who is in the course of conveying, delivering or preparing to deliver such seed to a purchaser or a consignee; or

(iii) a purchaser or a consignee after delivery of such seed to him;

(b) send such sample for analysis to the Seed Analyst for the area within which such sample has been taken

16. Report of Seed Analyst. - (1) The Seed Analyst shall, as soon as may be after the receipt of the sample under sub-Section (2) of Section 15, analyse the sample at the State Seed Laboratory and deliver, in such form as may be prescribed, one copy of the report of the result of the analysis to the Seed Inspector and another copy thereof

to the person from whom the sample has been taken.

(2) After the institution of a prosecution under this Act, the accused vendor or the complainant may, on payment of the prescribed fee, make an application to the Court for sending any of the samples mentioned in clause (a) or clause (c) of sub-Section (2) of Section 15 to the Central Seed Laboratory for its report and on receipt of the application, the Court shall first ascertain that the mark and the seal or fastening as provided in clause (b) of sub-Section (1) of Section 15 are intact and may then despatch the sample under its own seal to the Central Seed Laboratory which shall thereupon send its report to the Court in the prescribed form within one month from the date of receipt of the sample, specifying the result of the analysis.

(3) The report sent by the Central Seed Laboratory under sub-Section (2) shall supersede the report given by the Seed Analyst under sub-Section (1).

(4) Where the report sent by the Central Seed Laboratory under sub-Section (2) is produced in any proceedings under Section 19, it shall not be necessary in such proceeding to produce any sample or part thereof taken for analysis.

19. Penalty. - If any person-

(a) contravenes any provision of this Act or any rule made thereunder; or

(b) prevents a Seed Inspector from taking sample under this Act; or

(c) prevents a Seed Inspector from exercising any other power conferred on him by or under this Act, he shall, on conviction, be punishable-

(i) for the first offence with fine which may extend to five hundred rupees, and

(ii) in the event of such person having been previously convicted of an offence under this section, with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

20. Forfeiture of property – When any person has been convicted under this Act for the contravention of any of the provisions of this Act or the rules made thereunder, the seed in respect of which the contravention has been committed may be forfeited to the Government.

21. Offences by companies. - (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment under this Act if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to

be proceeded against and punished accordingly.

Explanation. – For the purpose of this section,-

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

15. In exercise of the power vested in it under Section 25 of the Seeds Act, the Central Government framed the Seeds Rules, 1968 (for short, 'the Rules'). Rules 13, 23(a) to (d), (g) and 23–A of the Rules, which are also relevant for deciding the first question are reproduced below:

"13. Requirements to be complied with by a person carrying on the business referred to in Section 7 –

(a) No person shall sell, keep for sale, variety, after the date recorded on the container, mark or label as the date upto which the seed may be expected to retain the germination not less than that prescribed under Cl.(a) of Section 6 of the Act.

(2) No person shall alter, obliterate or deface any mark or label attached to the container of any seed.

(3) Every person selling, keeping for sale, offering to sell, bartering or otherwise supplying any seed of notified kind or variety under Section 7, shall keep over a period of three years a complete record of each lot of seed sold except that any seed sample may be discarded one year after the entire lot represented by such sample has been disposed of. The sample of seed kept as part of the complete record shall be as large as the size notified in the Official Gazette. This sample, if required to be tested, shall be tested only for determining the purity.

23. Duties of a Seed Inspector. – In addition to the

duties specified by the Act the Seed Inspector shall. -

(a) inspect as frequently as may be required by certification agency all places used for growing, storage or sale of any seed of any notified kind or variety;

(b) satisfy himself that the conditions of the certificates are being observed;

(c) procedure and send for analysis, if necessary, samples of any seeds, which he has reason to suspect are being produced stocked or sold or exhibited for sale in contravention of the provisions of the Act or these rules;

(d) investigate any complaint, which may be made to him in writing in respect of any contravention of the provisions of the Act or these rules;

(g) institute prosecutions in respect of breaches of the Act and these rules; and

23-A. Action to be taken by the Seed Inspector if a complaint is lodged with him. - (1) If farmer has lodged a complaint in writing that the failure of the crop is due to the defective quality of seeds of any notified kind or variety supplied to him, the Seed Inspector shall take in his possession the marks or labels, the seed containers and a sample of unused seeds to the extent possible from the complaintant for establishing the source of supply of seeds and shall investigate the causes of the failure of his crop by sending samples of the lot to the Seed Analyst for detailed analysis at the State Seed Testing Laboratory. He shall thereupon submit the report of his findings as soon as possible to the competent authority.

(2) In case, the Seed Inspector comes to the conclusion that the failure of the crop is due to the quality of seeds supplied to the farmer being less than the minimum standards notified by the Central Government, he shall

launch proceedings against the supplier for contravention of the provisions of the Act or these Rules."

16. An analysis of the above reproduced provisions shows that for achieving the object of regulating the quality of certain seeds to be sold for the purposes of agriculture including horticulture, the legislature has made provisions for specifying the minimum limits of germination and purity of notified kind or variety of seeds and the affixation of mark or label to indicate that such seed conforms to those limits, for restricting sale, etc., of any notified kind or variety of seed unless the same is identifiable as to its kind or variety and conforms to the minimum limits of germination and purity; grant of certificate by the certification agency to certain category of person; revocation of the certificate; appointment of Seed Analysts and Seed Inspectors with power to the latter to take sample of any seed of any notified kind or variety from any person selling such seed or a producer of seeds and send the same for analysis by the State Seed Laboratory or the Central Seed Laboratory. The Seed Inspector can launch prosecution for violation of any provision of the Seeds Act or any Rule made thereunder. If a person is found guilty then he can be punished with imprisonment upto a maximum period of six months or he can be visited with a penalty of fine upto Rs.1,000/- or with both. If an offence is committed by a company, then every person who, at the time of commission of offence was incharge of and was responsible to the company of the conduct of its business can be punished. Rule 13 of the Rules casts a duty on very person selling, keeping for sale, offering to sell, bartering or otherwise supplying any seed of notified kind or variety to keep complete record of each lot of seeds sold for a period of three years. He is also required to keep sample of the seed, which can be tested for determining the purity.

17. Though, the Seeds Act is a special legislation enacted for ensuring that there is no compromise with the quality of seeds sold to the farmers and others and provisions have been

made for imposition of substantive punishment on a person found guilty of violating the provisions relating the quality of the seeds, the legislature has not put in place any adjudicatory mechanism for compensating the farmers/growers of seeds and other similarly situated persons who may suffer loss of crop or who may get insufficient yield due to use of defective seeds sold/supplied by the appellant or any other authorised person. No one can dispute that the agriculturists and horticulturists are the largest consumers of seeds. They suffer loss of crop due to various reasons, one of which is the use of defective/sub-standard seeds. The Seeds Act is totally silent on the issue of payment of compensation for the loss of crop on account of use of defective seeds supplied by the appellant and others who may obtain certificate under Section 9 of the Seeds Act. A farmer who may suffer loss of crop due to defective seeds can approach the Seed Inspector and make a request for prosecution of the person from whom he purchased the seeds. If found guilty, such person can be imprisoned, but this cannot redeem the loss suffered by the farmer.

18. At this stage, we may notice the background in which the Consumer Act was enacted and its salient features. The General Assembly of the United Nations after extensive discussion and negotiations among Governments and taking into account the interest and needs of consumers in all countries, particularly those in developing countries, adopted the draft guidelines submitted by the Secretary General to the Economic and Social Council (UNESCO) in 1983. The objectives of these guidelines are:

(a) To assist countries in achieving or maintaining adequate protection for their population as consumers.

(b) To facilitate production and distribution patterns responsive to the needs and desires of consumers.

(c) To encourage high levels of ethical conduct for

those engaged in the production and distribution of goods and services to consumers.

(d) To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers.

(e) To facilitate the development of independent consumer groups.

(f) To further international cooperation in the field of consumer protection.

(g) To encourage the development of market conditions which provide consumers with greater choice at lower prices.

19. India is a signatory to the resolution passed by the General Assembly which is known as Consumer Protection Resolution No.39/248. With a view to fulfill the objectives enshrined in the guidelines adopted by the General Assembly of the United Nations and keeping in view the proliferation of international trade and commerce and vast expansion of business and trade which resulted in availability of variety of consumer goods in the market, the Consumer Protection Bill was introduced to provide for better protection of the interest of consumers. The salient features of the Consumer Protection Bill were to promote and protect the rights of consumers such as:

(a) the right to be protected against marketing of goods which are hazardous to life and property;

(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

(c) the right to be assured, wherever possible, access

to an authority of goods at competitive prices.

(d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;

(e) the right to seek Redressal against unfair trade practices or unscrupulous exploitation of consumers, and

(f) right to consumer education.

20. The preamble to the Act shows that this legislation is meant to provide for better protection of the interests of consumers and for that purpose to make provision for establishment of consumer councils and other authorities for the settlement of consumer disputes and for matters connected therewith. Section 2 of the Consumer Act contains definitions of various terms. Clauses (d) and (f) thereof read as under:

"2. (d) 'consumer' means any person who,—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such

services are availed of with the approval of the first-mentioned person but does not include a person who avails of such services for any commercial purpose;

Explanation.—For the purposes of sub-clause (i), 'commercial purpose' does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment; (The explanation was substituted w.e.f. 15.3.2003 by Consumer Protection (Amendment) Act 62, 2003)

(f) 'defect' means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods."

21. Section 3 declares that the provisions the Consumer Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Section 9 provides for establishment of the Consumer Forums at the District, State and National level. Section 11 relates to jurisdiction of the District Forum. Section 12 prescribed the manner in which the complaint can be filed before the District Forum and the procedure required to be followed for entertaining the same. Once the complaint is admitted, the procedure prescribed under Section 13 is required to be followed by the District Forum. Sub-section (1) of Section 13, which lays down the procedure to be followed after admission of the complaint reads as under:

"**13. Procedure on admission of complaint**. – (1) The District Forum shall, on admission of a complaint, if it relates to any goods,—

(a) refer a copy of the admitted complaint, within

twenty-one days from the date of its admission to the opposite party mentioned in the complaint directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum;

(b) where the opposite party on receipt of a complaint referred to him under clause *(a)* denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle the consumer dispute in the manner specified in clauses (c) to (g);

(c) where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it in the manner prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory make an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District Forum within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by the District Forum;

(d) before any sample of the goods is referred to any appropriate laboratory under clause (c), the District Forum may require the complainant to deposit to the credit of the Forum such fees as may be specified, for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question;

(e) the District Forum shall remit the amount deposited to its credit under clause (d) to the appropriate laboratory to enable it to carry out the analysis or test mentioned in clause (c) and on receipt of the report from the appropriate laboratory, the District Forum shall forward a copy of the report along with such remarks as the District Forum may feel appropriate to the opposite party;

(f) if any of the parties disputes the correctness of the findings of the appropriate laboratory, or disputes the correctness of the methods of analysis or test adopted by the appropriate laboratory, the District Forum shall require the opposite party or the complainant to submit in writing his objections in regard to the report made by the appropriate laboratory;

(g) the District Forum shall thereafter give a reasonable opportunity to the complainant as well as the opposite party of being heard as to the correctness or otherwise of the report made by the appropriate laboratory and also as to the objection made in relation thereto under clause (f) and issue an appropriate order under section 14."

22. The scope and reach of the Consumer Act has been considered in large number of judgments – *Lucknow Development Authority v. M.K. Gupta* (1994) 1 SCC 243, *Fair Air Engineers (P) Ltd. v. N. K. Modi* (supra), *Skypay Couriers Limited v. Tata Chemicals Limited* (2000) 5 SCC 294, *State of Karnataka v. Vishwabharathi House Building Cooperative Society* (supra), *CCI Chambers Cooperative Housing Society Limited v. Development Credit Bank Limited* (supra), *Secretary, Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha* (2004) 1 SCC 305, *H.N. Shankara Shastry v. Assistant Director of Agriculture, Karnataka* (2004) 6 SCC 230 *and Trans Mediterranean Airways v. Universal*

Exports and another (2011) 10 SCC 316. However, we do not consider it necessary to discuss all the judgments and it will be sufficient to notice some passages from the judgment in *Secretary, Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha* (supra). In that case, the 2-Judge Bench noticed the background, the objects and reasons, and the purpose for which the Consumer Act was enacted, referred to the judgments in *Lucknow Development Authority v. M. K. Gupta* (supra), *Fair Air Engineers Private Limited v. N. K. Modi* (supra) and proceeded to observe as under:

> "The preamble of the Act declares that it is an Act to provide for better protection of the interest of consumers and for that purpose to make provision for the establishment of Consumer Councils and other authorities for the settlement of consumer disputes and matters connected therewith. In Section 3 of the Act in clear and unambiguous terms it is stated that the provisions of the 1986 Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.
>
> From the Statement of Objects and Reasons and the scheme of the 1986 Act, it is apparent that the main objective of the Act is to provide for better protection of the interest of the consumer and for that purpose to provide for better redressal, mechanism through which cheaper, easier, expeditious and effective redressal is made available to consumers. To serve the purpose of the Act, various quasi-judicial forums are set up at the district, State and national level with wide range of powers vested in them. These quasi-judicial forums, observing the principles of natural justice, are empowered to give relief of a specific nature and to award, wherever appropriate, compensation to the consumers and to impose penalties for non-compliance with their orders."

23. It can thus be said that in the context of farmers/growers

and other consumer of seeds, the Seeds Act is a special legislation insofar as the provisions contained therein ensure that those engaged in agriculture and horticulture get quality seeds and any person who violates the provisions of the Act and/or the Rules is brought before the law and punished. However, there is no provision in that Act and the Rules framed thereunder for compensating the farmers etc. who may suffer adversely due to loss of crop or deficient yield on account of defective seeds supplied by a person authorised to sell the seeds. That apart, there is nothing in the Seeds Act and the Rules which may give an indication that the provisions of the Consumer Act are not available to the farmers who are otherwise covered by the wide definition of 'consumer' under Section 2(d) of the Consumer Act. As a matter of fact, any attempt to exclude the farmers from the ambit of the Consumer Act by implication will make that Act vulnerable to an attack of unconstitutionality on the ground of discrimination and there is no reason why the provisions of the Consumer Act should be so interpreted.

24. In *Kishore Lal v. Chairman, Employees' State Insurance Corporation* (2007) 4 SCC 579, this Court was called upon to consider the question whether a person (appellant) who got his wife treated in ESI dispensary could file a complaint under the Consumer Act for award of compensation by alleging negligence on the part of the doctors in the dispensary. The District Forum, the State Commission and the National Commission declined relief to the appellant on the ground that the medical services provided in ESI dispensary were gratituous. This Court referred to Sections 74 and 75 of the Employees State Insurance Act, 1948, the definition of the 'consumer' contained in Section 2(d) of the Consumer Act, referred to the judgments in *Spring Meadows Hospital v. Harjol Ahluwalia* (1998) 4 SCC 39, *State of Karnataka v. Vishwabharathi House Building Cooperative Society* (supra), *Secretary, Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha* (supra) and observed:

"The trend of the decisions of this Court is that the jurisdiction of the Consumer Forum should not and would not be curtailed unless there is an express provision prohibiting the Consumer Forum to take up the matter which falls within the jurisdiction of civil court or any other forum as established under some enactment. The Court had gone to the extent of saying that if two different fora have jurisdiction to entertain the dispute in regard to the same subject, the jurisdiction of the Consumer Forum would not be barred and the power of the Consumer Forum to adjudicate upon the dispute could not be negated."

25. The definition of 'consumer' contained in Section 2(d) of the Consumer Act is very wide. Sub-clause (i) of the definition takes within its fold any person who buys any goods for a consideration paid or promised or partly paid and partly promised, or under any system of deferred payment. It also includes any person who uses the goods though he may not be buyer thereof provided that such use is with the approval of the buyer. The last part of the definition contained in Section 2(d)(i) excludes a person who obtains the goods for resale or for any commercial purpose. By virtue of the explanation which was added w.e.f. 18.6.1993 by the Consumer Protection (Amendment) Act 50 of 1993, it was clarified that the expression 'commercial purpose' used in sub-clause (i) does not include use by a consumer of goods bought and used by him for the purpose of earning his livelihood by means of self-employment. The definition of 'consumer' was interpreted in *Lucknow Development Authority v. M.K. Gupta* (supra). The Court referred to the dictionary meanings of the word 'consumer', definition contained in Section 2(d) and proceeded to observe:

"It is in two parts. The first deals with goods and the other with services. Both parts first declare the meaning of goods and services by use of wide expressions. Their ambit is

further enlarged by use of inclusive clause. For instance, it is not only purchaser of goods or hirer of services but even those who use the goods or who are beneficiaries of services with approval of the person who purchased the goods or who hired services are included in it. The legislature has taken precaution not only to define 'complaint', 'complainant', 'consumer' but even to mention in detail what would amount to unfair trade practice by giving an elaborate definition in clause (r) and even to define 'defect' and 'deficiency' by clauses (f) and (g) for which a consumer can approach the Commission. *The Act thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services. The common characteristics of goods and services are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. But the defect in one and deficiency in other may have to be removed and compensated differently. The former is, normally, capable of being replaced and repaired whereas the other may be required to be compensated by award of the just equivalent of the value or damages for loss.*"

(emphasis supplied)

26. Since the farmers/growers purchased seeds by paying a price to the appellant, they would certainly fall within the ambit of Section 2(d)(i) of the Consumer Act and there is no reason to deny them the remedies which are available to other consumers of goods and services.

27. The next question which needs consideration is whether the growers of seeds were not entitled to file complaint under the Consumer Act and the only remedy available to them for the alleged breach of the terms of agreement was to apply for arbitration. According to the learned counsel for the appellant, if the growers had applied for arbitration then in terms

of Section 8 of the Arbitration and Conciliation Act the dispute arising out of the arbitration clause had to be referred to an appropriate arbitrator and the District Consumer Forums were not entitled to entertain their complaint. This contention represents an extension of the main objection of the appellant that the only remedy available to the farmers and growers who claim to have suffered loss on account of use of defective seeds sold/supplied by the appellant was to file complaints with the concerned Seed Inspectors for taking action under Sections 19 and/or 21 of the Seeds Act.

28. The consideration of this issue needs to be prefaced with an observation that the grievance of a farmer/grower who has suffered financially due to loss or failure of crop on account of use of defective seeds sold/supplied by the appellant or by an authorised person is not remedied by prosecuting the seller/supplier of the seeds. Even if such person is found guilty and sentenced to imprisonment, the aggrieved farmer/grower does not get anything. Therefore, the so-called remedy available to an aggrieved farmer/grower to lodge a complaint with the concerned Seed Inspector for prosecution of the seller/supplier of the seed cannot but be treated as illusory and he cannot be denied relief under the Consumer Act on the ground of availability of an alternative remedy.

29. The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996 Act. Moreover, the plain language of Section 3 of the Consumer Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of

any other law for the time being in force. In *Fair Air Engineers (P) Ltd. v. N.K. Modi* (supra), the 2-Judge Bench interpreted that section and held as under:

> "the provisions of the Act are to be construed widely to give effect to the object and purpose of the Act. It is seen that Section 3 envisages that the provisions of the Act are in addition to and are not in derogation of any other law in force. It is true, as rightly contended by Shri Suri, that the words "in derogation of the provisions of any other law for the time being in force" would be given proper meaning and effect and if the complaint is not stayed and the parties are not relegated to the arbitration, the Act purports to operate in derogation of the provisions of the Arbitration Act. Prima facie, the contention appears to be plausible but on construction and conspectus of the provisions of the Act we think that the contention is not well founded. *Parliament is aware of the provisions of the Arbitration Act and the Contract Act, 1872 and the consequential remedy available under Section 9 of the Code of Civil Procedure, i.e., to avail of right of civil action in a competent court of civil jurisdiction. Nonetheless, the Act provides the additional remedy.*
>
> It would, therefore, be clear that the legislature intended to provide a remedy in addition to the consentient arbitration which could be enforced under the Arbitration Act or the civil action in a suit under the provisions of the Code of Civil Procedure. Thereby, as seen, Section 34 of the Act does not confer an automatic right nor create an automatic embargo on the exercise of the power by the judicial authority under the Act. *It is a matter of discretion. Considered from this perspective, we hold that though the District Forum, State Commission and National Commission are judicial authorities, for the purpose of Section 34 of the Arbitration Act, in view of the object of the Act and by operation of Section 3 thereof, we are of*

the considered view that it would be appropriate that these forums created under the Act are at liberty to proceed with the matters in accordance with the provisions of the Act rather than relegating the parties to an arbitration proceedings pursuant to a contract entered into between the parties. The reason is that the Act intends to relieve the consumers of the cumbersome arbitration proceedings or civil action unless the forums on their own and on the peculiar facts and circumstances of a particular case, come to the conclusion that the appropriate forum for adjudication of the disputes would be otherwise those given in the Act."

(emphasis supplied)

30. In *Skypay Couriers Limited v. Tata Chemicals Limited* (supra) this Court observed:

"Even if there exists an arbitration clause in an agreement and a complaint is made by the consumer, in relation to a certain deficiency of service, then the existence of an arbitration clause will not be a bar to the entertainment of the complaint by the Redressal Agency, constituted under the Consumer Protection Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force."

31. In *Trans Mediterranean Airways v. Universal Exports* (supra) it was observed:

"In our view, the protection provided under the CP Act to consumers is in addition to the remedies available under any other statute. It does not extinguish the remedies under another statute but provides an additional or alternative remedy."

32. The aforementioned judgments present a clear answer to the appellant's challenge to the impugned orders on the

ground that the growers had not availed the remedy of arbitration. An ancillary point which may not detain us for long but needs consideration is whether a grower is excluded from the definition of 'consumer' because the seeds produced by him are required to be supplied to the appellant. The argument of the learned counsel for the appellant is that the foundation seeds were supplied to the growers for commercial purpose and as such their cases would fall in the exclusion part of the definition of 'consumer'. In the first blush, this argument appears attractive but on a deeper examination, we do not find any merit in it. The expression "any commercial purpose" was considered in *Laxmi Engineering Works v. P.S.G. Industrial Institute* (1995) 3 SCC 583. The two-Judge Bench referred to the amended definition of 'consumer' contained in Section 2 (d) and observed:

"Now coming back to the definition of the expression 'consumer' in Section 2(*d*), a consumer means insofar as is relevant for the purpose of this appeal, (*i*) a person who buys any goods for consideration; it is immaterial whether the consideration is paid or promised, or partly paid and partly promised, or whether the payment of consideration is deferred; (*ii*) a person who uses such goods with the approval of the person who buys such goods for consideration; (*iii*) but does not include a person who buys such goods for resale or for any commercial purpose. The expression 'resale' is clear enough. Controversy has, however, arisen with respect to meaning of the expression "commercial purpose". It is also not defined in the Act. In the absence of a definition, we have to go by its ordinary meaning. 'Commercial' denotes "pertaining to commerce" (*Chamber's Twentieth Century Dictionary*); it means "connected with, or engaged in commerce; mercantile; having profit as the main aim" (*Collins English Dictionary*) whereas the word 'commerce' means "financial transactions especially buying and selling of merchandise, on a large scale" (*Concise Oxford Dictionary*). The

National Commission appears to have been taking a consistent view that where a person purchases goods "with a view to using such goods for carrying on any activity on a large scale for the purpose of earning profit" he will not be a 'consumer' within the meaning of Section 2(*d*)(*i*) of the Act. Broadly affirming the said view and more particularly with a view to obviate any confusion — the expression "large scale" is not a very precise expression — Parliament stepped in and added the explanation to Section 2(*d*)(*i*) by Ordinance/Amendment Act, 1993."

33. What needs to be emphasized is that the appellant had selected a set of farmers in the area for growing seeds on its behalf. After entering into agreements with the selected farmers, the appellant supplied foundation seeds to them for a price, with an assurance that within few months they will be able to earn profit. The seeds sown under the supervision of the expert deputed by the appellant. The entire crop was to be purchased by the appellant. The agreements entered into between the appellant and the growers clearly postulated supply of the foundation seeds by the appellant with an assurance that the crop will be purchased by it. It is neither the pleaded case of the appellant nor any evidence was produced before any of the Consumer Forums that the growers had the freedom to sell the seeds in the open market or to any person other than the appellant. Therefore, it is not possible to take the view that the growers had purchased the seeds for resale or for any commercial purpose and they are excluded from the definition of the term 'consumer'. As a matter of fact, the evidence brought on record shows that the growers had agreed to produce seeds on behalf of the appellant for the purpose of earning their livelihood by using their skills and labour.

34. We shall now deal with the question whether the District Forum committed a jurisdictional error by awarding compensation to the respondents without complying with the procedure prescribed under Section 13(1)(c). A reading of the

plain language of that section shows that the District Forum can call upon the complainant to provide a sample of goods if it is satisfied that the defect in the goods cannot be determined without proper analysis or test. After the sample is obtained, the same is required to be sent to an appropriate laboratory for analysis or test for the purpose of finding out whether the goods suffer from any defect as alleged in the complaint or from any other defect. In some of these cases, the District Forums had appointed agricultural experts as Court Commissioners and directed them to inspect the fields of the respondents and submit report about the status of the crops. In one or two cases the Court appointed Advocate Commissioner with liberty to him to avail the services of agricultural experts for ascertaining the true status of the crops. The reports of the agricultural experts produced before the District Forum unmistakably revealed that the crops had failed because of defective seeds/foundation seeds. After examining the reports the District Forums felt satisfied that the seeds were defective and this is the reason why the complainants were not called upon to provide samples of the seeds for getting the same analysed/tested in an appropriate laboratory. In our view, the procedure adopted by the District Forum was in no way contrary to Section 13(1)(c) of the Consumer Act and the appellant cannot seek annulment of well-reasoned orders passed by three Consumer Forums on the specious ground that the procedure prescribed under Section 13(1)(c) of the Consumer Act had not been followed.

35. The issue deserves to be considered from another angle. Majority of the farmers in the country remain illiterate throughout their life because they do not have access to the system of education. They have no idea about the Seeds Act and the Rules framed thereunder and other legislations, like, Protection of Plant Varieties and Farmers' Rights Act, 2011. They mainly rely on the information supplied by the Agricultural Department and Government agencies, like the appellant. Ordinarily, nobody would tell a farmer that after purchasing the seeds for sowing, he should retain a sample thereof so that in

the event of loss of crop or less yield on account of defect in the seeds, he may claim compensation from the seller/supplier. In the normal course, a farmer would use the entire quantity of seeds purchased by him for the purpose of sowing and by the time he discovers that the crop has failed because the seeds purchased by him were defective nothing remains with him which could be tested in a laboratory. In some of the cases, the respondents had categorically stated that they had sown the entire quantity of seeds purchased from the appellant. Therefore, it is naïve to blame the District Forum for not having called upon the respondents to provide the samples of seeds and send them for analysis or test in the laboratory.

36. It may also be mentioned that there was abject failure on the appellant's part to assist the District Forum by providing samples of the varieties of seeds sold to the respondents. Rule 13(3) casts a duty on every person selling, keeping for sale, offering to sell, bartering or otherwise supplying any seed of notified kind or variety to keep over a period of three years a complete record of each lot of seeds sold except that any seed sample may be discarded one year after the entire lot represented by such sample has been disposed of. The sample of seed kept as part of the complete record has got to be of similar size and if required to be tested, the same shall be tested for determining the purity. The appellant is a large supplier of seeds to the farmers/growers and growers. Therefore, it was expected to keep the samples of the varieties of seeds sold/supplied to the respondents. Such samples could have been easily made available to the District Forums for being sent to an appropriate laboratory for the purpose of analysis or test. Why the appellant did not adopt that course has not been explained. Not only this, the officers of the appellant, who inspected the fields of the respondents could have collected the samples and got them tested in a designated laboratory for ascertaining the purity of the seeds and/or the extent of germination, etc. Why this was not done has also not been explained by the appellant. These omissions lend support

to the plea of the respondents that the seeds sold/supplied by the appellant were defective.

37. In *Maharashtra Hybrid Seeds Co. Ltd. v. Alavalapati Chandra Reddy* (1998) 6 SCC 738, this Court did not decide the issue relating to the alleged non-compliance of Section 13(1)(c) of the Consumer Act, but approved the reasoning of the State Commission which found fault with the appellant for not taking steps to get the seeds tested in an appropriate laboratory. In that case, the respondent had complained that the sunflower seeds purchased by him did not germinate because the same were defective. The complaint was contested by the appellant on several grounds. The District Forum allowed the complaint and declared that the respondent was entitled to compensation @ Rs.2,000/- per acre in addition to the cost of the seeds. The State Commission rejected the objection of the appellant that the District Forum had not collected the sample of the seeds and sent them for analysis or test for determining the quality. The National Commission summarily dismissed the revision filed by the appellant. In paragraph 4 of the judgment, this Court extracted the finding recorded by the State Commission for upholding the order of the District Forum and declined to interfere with the award of compensation to the respondent. The relevant portions of paragraph 4 are reproduced below:

> "Thus, it is clear that it is on the permit granted by the Agricultural Officer that the complainants purchased seeds from the opposite parties and that the same Agricultural Officer visited the land and found that there was no germination. In view of the letter written by the Agricultural Officer to the opposite parties to which they sent no reply, it is clear that the same seeds that were purchased from the opposite parties were sown and they did not germinate. In view of the aforesaid letter of the Agricultural Officer, the District Forum felt that the seeds need not be sent for analysis. Moreover, if the opposite parties have

disputed that the seeds *were not defective they would have applied to the District Forum to send the samples of seeds from the said batch for analysis by appropriate laboratory. But the opposite parties have not chosen to file any application for sending the seeds to any laboratory. Since it is probable that the complainants have sown all the seeds purchased by them, they were not in a position to send seeds for analysis. In these circumstances, the order of the District Forum is not vitiated by the circumstance that it has not on its own accord sent the seeds for analysis by an appropriate laboratory.*

* * *

It is clear from the letter of the Agricultural Officer that the opposite parties in spite of their promise, never visited the fields of the complainants. The opposite parties did not adduce any material to show that the complainants did not manure properly or that there is some defect in the field. In the absence of such evidence and in view of the conduct of the opposite parties not visiting the fields and having regard to the allegation in the complaint that there were rains in the month of September 1991 and the complainants sowed the seeds, it cannot be said that there is any defect either in the manure or in the preparation of the soil for sowing sunflower seeds."

(emphasis supplied)

38. Reference can usefully be made to the orders of the *National Commission in N.S.C. Ltd. v. Guruswamy* (2002) CPJ 13*, E.I.D. Parry (I) Ltd. v. Gourishankar* (2006) CPJ 178 and *India Seed House v. Ramjilal Sharma* (2008) 3 CPJ 96. In these cases the National Commission considered the issue relating to non-compliance of Section 13(1)(c) in the context of the complaints made by the farmers that their crops had failed due to supply of defective seeds and held that the District

Forum and State Commission did not commit any error by entertaining the complaint of the farmers and awarding compensation to them. In the first case, the National Commission noted that the entire quantity of seeds had been sown by the farmer and observed:

"There is no doubt in our mind that where complainant alleges a defect in goods which cannot be determined without proper analysis or test of the goods, then, the sample need to be taken and sent to a laboratory for analysis or test. But, the ground reality in the instant case is that reposing faith in the seller, in this case the leading Public Sector Company dealing in seed production and sale, the petitioner sowed whole of the seed purchased by him. Where was the question of any sample seed to be sent to any laboratory in the case? Whatever the Respondent/Complainant had, was sown. One could have appreciated the bonafides better, if sample from the crop was taken during the visit of Assistant Seed Officer of Petitioner - N.S.C. and sent for analysis. Their failure is unexceptionable. In our view, it is the Petitioner Company which failed to comply with the provisions of Section 13 (c) of the Act. By the time, complainant could be filed even this opportunity had passed. If the Petitioner Company was little more sensitive or alert to the complaint of the Respondent/Complainant, this situation might not have arisen. Petitioner has to pay for his insensitivity. The Respondent/Complainant led evidence of State's agricultural authorities in support who made their statements after seeing the crop in the field. The onus passes on to the Petitioner to prove that the crop which grew in the field of the complainant was of 'Arkajyothi' of which the seed was sold and not of 'Sugar Baby', as alleged. He cannot take shelter under Section 13 (c) of the CP Act. Learned Counsel's plea that Respondent/ Complainant should have kept portion of seeds purchased by him to be used for sampling purposes, is not only

unsustainable in law but to say the least, is very unbecoming of a leading Public Sector Seed Company to expect this arrangement."

In the second case, the National Commission took cognizance of the objection raised by the appellant that the procedure prescribed under Section 13(1)(c) of the Consumer Act had not been followed and observed:

"Testimony of the complainant would show that whatever seed was purchased from respondent No. 2 was sown by him in the land. Thus, there was no occasion for complainant to have sent the sample of seed for testing to the laboratory. It is in the deposition of Jagadish Gauda that after testing the seed the petitioner company packed and sent it to the market. However, the testing report of the disputed seed has not been filed. Since petitioner company is engaged in business of sunflower seed on large scale, it must be having the seed of the lot which was sold to complainant. In order to prove that the seed sold to complainant was not sub-standard/defective, the petitioner company could have sent the sample for testing to the laboratory which it failed to do. Thus, no adverse inference can be drawn against complainant on ground of his having not sent the sample of seed for testing to a laboratory."

In the third case, the National Commission held:

"Holding in favour of the complainant, the National Commission stated that, "it is not expected from every buyer of the seeds to set apart some quantity of seeds for testing on the presumption that seeds would be defective and he would be called upon to prove the same through laboratory testing. On the other hand a senior officer of the Government had visited the field and inspected the crop and given report under his hand and seal, clearly certifying that the seeds were defective."

39. The reasons assigned by the National Commission in the aforementioned three cases are similar to the reasons assigned by the State Commission which were approved by this Court in *Maharashtra Hybrid Seeds Company Ltd. v. Alavalapati Chandra Reddy* (supra) and in our view the proposition laid down in those cases represent the correct legal position.

40. In the result, the appeals are dismissed. The appellant shall pay cost of Rs.25,000/- to each of the respondents. The amount of cost shall be paid within a period of 60 days from today.

N.J. Appeals dismissed.

STATE OF GUJARAT & OTHERS
v.
ESSAR OIL LIMITED AND ANOTHER
(Civil Appeal No. 599 of 2012)

JANUARY 17, 2012

[ASOK KUMAR GANGULY AND JAGDISH SINGH KHEHAR, JJ.]

Sales Tax – Tax incentive scheme – For new industrial units – Units seeking benefit under the scheme were required to commence commercial production within a particular time frame – Respondent sought to set up a new Oil refinery project – Pipelines for the project were required to be laid through forest land including national park and sanctuary area – Respondent could not obtain requisite permission/licence from the State Government for laying down the pipelines in view of injunction/restraint orders passed by the High Court in certain PILs – High Court orders subsequently set aside by Supreme Court and requisite permission/licence thereafter granted to respondent – Respondent commenced commercial production, albeit after the time frame stipulated under the incentive scheme – It filed writ petition contending that the delay in commencement of commercial production was on account of the injunction granted by the High Court; that this situation continued till respondent was granted permission/licence pursuant to the judgment of Supreme Court, and therefore it was entitled to get benefit of exclusion of the intervening period for calculating the time limit for commencement of commercial production – High Court excluded the intervening period and granted respondent the benefit of the incentive scheme on the principle of restitution and on the ground that respondent could not be made to lose benefit under the scheme, for an act of Court – Justification of – Held: Not justified – Principle of restitution was not applicable against the appellant-State Government since it

was nobody's case that it received any unjust benefit or any unjust enrichment in view of stay orders passed by the High Court on the PILs – Order passed by High Court in the PILs was overturned by Supreme Court on a different interpretation of s.29 of the WPA – In case of a mere erroneous judgment of a Court the principle of "actus curiae" cannot be invoked – A mere mistake or error committed by Court cannot be a ground for restitution – The exercise undertaken by the High Court in the impugned judgment by directing various adjustments which virtually re-wrote the State's exemption scheme, was an exercise which was neither warranted in law nor supported by precedents – There was no question of equity – Wildlife Protection Act – ss.29 and 35.

Doctrines – Doctrine of Restitution – Principles and applicability of – Discussed – Held: The concept of restitution is basically founded on the idea that when a decree is reversed, law imposes an obligation on the party who received an unjust benefit of the erroneous decree to restitute the other party for what the other party lost during the period the erroneous decree was in operation – The Court while granting restitution is required to restore the parties as far as possible to their same position as they were in at the time when the Court by its erroneous action displaced them – A person who has conferred a benefit upon another in compliance with a judgment or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set-aside, unless restitution would be inequitable.

Maxims – "actus curiae neminem gravabit" – Concept and applicability of.

Taxation – Sales tax – Exception/Exemption provision – Interpretation of – Held: The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee, does not apply to the construction of an exception or an exempting provision, as the same have to be construed strictly – Further a person invoking an exception

or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision and in case of doubt or ambiguity, benefit of it must go to the State – An exemption is a stand alone process – Either an industry claiming exemption comes within it or it does not.

In 1995, the appellant-State Government introduced a Capital Investment Incentive Scheme which envisaged grant of Sales Tax incentives by way of sales tax exemption/ deferment for new industrial units. Units seeking benefit of sales tax exemption /deferment under the scheme were required to commence commercial production within a particular time frame, i.e. upto 15-8-2003. Respondent no.1-Essar, which sought to set up a 100% export oriented unit for refining of petroleum products, had opted for the sales-tax deferment scheme. It had filed application for right of way over 15.49 hectares of forest land for laying pipelines for establishment of the said oil Refinery Project. The said 15.49 hectares of forest land included 8.79 hectares of Marine National Park and Sanctuary. Permission under Section 2 of the Forest Conservation Act ("FCA") was required for the entire 15.49 hectares, which was granted to respondent no.1.

However, respondent no.1 also required permission of the State Government under the Wildlife Protection Act ("WPA") for the said 8.79 hectares of Marine National Park and Sanctuary. But, in view of the orders of the High Court dated 13.07.2000/ 03.08.2000 in certain Public Interest Litigations (PILs), whereby the State Government was restrained from granting further permission under the WPA, Respondent no.1-Essar was not given permission to lay down pipelines by the State Government.

Respondent no.1-Essar challenged the said orders of the High Court before this Court. This Court initially stayed the High Court order insofar as Essar was

concerned and ultimately set aside the judgment of High Court and directed the State Government to issue authorization to Essar under Sections 29 and 35 of the Wild Life (Protection) Act after disapproving the interpretation placed by the High Court on the provisions of the Wild Life (Protection) Act, 1972. Consequently, on 27-2-2004, Essar was given permission for laying pipeline in the National Marine Park/Sanctuary area and thereafter, on 26-11-2006, respondent no.1-Essar commenced commercial production.

Respondent no.1 filed writ petition before the High Court contending that the reason for delay in commencement of commercial production was on account of the injunction granted by the High Court on 13.07.2000 /03.08.2000; that this situation continued till 27.02.2004, when pursuant to the judgmentof this Court, Essar was granted requisite permission under the Wildlife Protection Act; and therefore Essar was entitled to get benefit of the exclusion of the said intervening period of from 13.07.2000 to 27.02.2004 in calculating the time limit for commencement of commercial production for purpose of availing benefit under the said tax deferment scheme.

The High Court excluded the aforesaid intervening period and granted respondent no.1 the benefit of the said sales tax incentive scheme on two basic line of reasoning- that the respondents were entitled to the benefit of sales tax waiver scheme firstly on the principle of restitution and secondly, that the respondents could not be made to lose benefit under the sales tax waiver scheme, for an act of Court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The concept of restitution is basically founded on the idea that when a decree is reversed, law

imposes an obligation on the party who received an unjust benefit of the erroneous decree to restitute the other party for what the other party has lost during the period the erroneous decree was in operation. Therefore, the Court while granting restitution is required to restore the parties as far as possible to their same position as they were in at the time when the Court by its erroneous action displaced them. [Para 60]

1.2. The concept of restitution is virtually a common law principle and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the Court which prevents a party from retaining money or some benefit derived from another which he has received by way of an erroneous decree of Court. Such remedy in English Law is generally different from a remedy in contract or in tort and falls within a third category of common law remedy which is called quasi contract or restitution. [Para 62]

1.3. The obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit. [Para 63]

1.4. A person is enriched if he has received a benefit and similarly a person is unjustly enriched if the retention of the benefit would be unjust. Now the question is what constitutes a benefit. A person confers benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other or in a way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another but also where he saves the other from expense or loss. Thus the word "benefit" therefore denotes any form of advantage. Ordinarily in cases of restitution if there is a benefit to one, there is a corresponding loss to other and

in such cases; the benefiting party is also under a duty to give to the losing party, the amount by which he has been enriched. A person who has conferred a benefit upon another in compliance with a judgment or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set-aside, unless restitution would be inequitable. [Paras 64, 65 and 66]

1.5. Equity demands that if one party has not been unjustly enriched, no order of recovery can be made against that party. Other situation would be when a party acquires benefits lawfully, which are not conferred by the party claiming restitution, Court cannot order restitution. [Para 67]

Lal Bhagwant Singh v. Sri Kishen Das **AIR 1953 SC 136 and** *Binayak Swain v. Ramesh Chandra Panigrahi and another* **AIR 1966 SC 948 : 1966 SCR 24 – relied on.**

Halsbury's Laws of England, **Fourth Edition, Volume 9, page 434 and** *Restatement of the Law of Restitution* **by American Law Institute (1937 American Law Institute Publishers, St. Paul) – referred to.**

2.1. From the facts of the case, it is debatable whether the respondent's inability to avail benefit under the said Scheme is because of its own act or because of the act of the appellant. There is a reasonable basis in the argument of the appellant that after this Court granted the stay order on 11.5.2001 on the special leave petition filed by Essar, the respondents should have made an effort of obtaining the necessary licence by again coming to the Court. Admittedly Essar did not do it. Essar merely represented to the State for grant of licence. Assuming that the State had not responded favourably to the representation of Essar by giving the clearance, it was open to Essar to approach this Court for some order as its special leave petition was pending before this Court.

Essar did not do it. Therefore, the question remains whether Essar acted with due diligence in obtaining the equitable remedy of restitution. It is well known that due diligence must be exhibited by the party to seek equity. [Para 68]

2.2. Now, if the case of Essar is taken on a higher plain that it has done its duty even then it has been denied of the benefit of the said scheme, even then there is no question of restitution by the State for the simple reason that it is nobody's case that State has received any unjust benefit or any unjust enrichment in view of stay order given by the High Court in the PILs filed in the High Court. On the contrary, it is clear from the record that the State contested those proceedings and specially, challenging the orders of the Gujarat High Court dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 on the PILs, the State has filed its SLP. Therefore, the State has not at all gained or received any benefit as a result of the orders passed by the High Court on the PILs. Therefore, the principle of restitution cannot be applied against the State, the appellant. The judgment of the High Court to that extent is erroneous. [Para 69]

2.3. The principle that an act of court cannot prejudice anyone, based on latin maxim "actus curiae neminem gravabit" is also encompassed partly within the doctrine of restitution. This actus curiae principle is founded upon justice and good sense and is a guide for the administration of law. [Para 70]

2.4. When Court passes an order, which is rendered per incuriam, and the party suffered because of the mistake of the Court, it is the Court's duty to rectify the said mistake. It is in that context that the concept of actus curiae can be invoked. In the instant case the order passed by the High Court in the PILs was overturned by

this Court by its order-dated 19.01.2004 on a different interpretation of section 29 of the WPA. This Court while giving a different interpretation of section 29 of WPA never held that High Court acted per incuriam in rendering its judgment. Therefore in the case of a mere erroneous judgment of a Court the principle of "actus curiae" cannot be invoked. A mere mistake or error committed by Court cannot be a ground for restitution. [Paras 73, 74 and 77]

2.5. In the instant case, it is clear that the appellant had also challenged this restraint order (passed by the High Court) before this Court. It cannot be said by this restraining order the appellant had gained any undue advantage. On the contrary, twin objects of development of the backward areas and employment opportunities, which were sought to be achieved by the appellant by floating the said scheme, were adversely affected. [Para 78]

2.6. No inaction on the part of appellant was pleaded by Essar. In fact before the High Court, Essar expressly gave up its plea of delay against the appellant. In fact the High Court passed the injunction order not because of the inaction of the appellant but the said order was passed in a proceedings which was opposed by appellant right upto this Court. [Para 84]

A.R. Antulay v. R.S. Nayak & another **(1988) 2 SCC 602 : 1988 (1) Suppl. SCR 1 – relied on.**

South Eastern Coalfields Ltd. v. State of M.P. & others **(2003) 8 SCC 648 : 2003 (4) Suppl. SCR 651;** *Mumbai International Airport Pvt. Ltd v. Golden Chariot Airport & another,* **(2010) 10 SCC 422 : 2010 (12) SCR 326;** *Karnataka Rare Earth & Anr. v. Senior Geologist, Department of Mines & Geology and Anr.,* **(2004) 2 SCC 783 : 2004 (1) SCR 965**

and *Bareilly Development Authority v. Methodist Church of India & Anr.* **(1988) Supp SCC 174 – held inapplicable.**

Hitech Electrothermics & Hydro Power Ltd. v. State of Kerala & Ors. **(2003) 2 SCC 716 : 2002 (5) Suppl. SCR 128 and** *Ishwar Dutt v. Land Acquisition Collector & another* **(2005) 7 SCC 190: 2005 (1) Suppl. SCR 903 – distinguished.**

R.S. Nayak v. A.R. Antuley, **(1984) 2 SCC 183 : 1984 (2) SCR 495 and** *The State of West Bengal v. Anwar Ali Sarkar & another* **AIR 1952 SC 75 : 1952 SCR 284 – referred to.**

Rodger v. Comptoir D'escompte De Paris, **(1869-71) LR 3 PC 465 – referred to.**

3.1. The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee, does not apply to the construction of an exception or an exempting provision, as the same have to be construed strictly. Further a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision and in case of doubt or ambiguity, benefit of it must go to the State. [Para 88]

3.2. In this case, Essar was categorically told by letter dated 28.05.2002, which is much prior to the expiry of the period, that time for availing the exemption cannot be extended. Admittedly, Essar failed to meet the deadline. In that factual scenario, the exercise undertaken by the High Court in the impugned judgment by directing various adjustments which virtually re-wrote the State's exemption scheme, is an exercise which is neither warranted in law nor supported by precedents. There is no question of equity here, an exemption is a stand alone process. Either an industry claiming exemption comes within it or it does not. [Para 89]

Novopan India Ltd. Hyderabad v. Collector of Central Excise and Customs, Hyderabad **(1994) Supp 3 SCC 606 : 1994 (3) Suppl. SCR 549 – relied on.**

Union of India & others v. Wood Papers Ltd & another **(1990) 4 SCC 256 : 1990 (2) SCR 659 – referred to.**

Case Law Reference:

AIR 1953 SC 136	**relied on**	**Para 60**
1966 SCR 24	**relied on**	**Para 61**
1988 (1) Suppl. SCR 1	**relied on**	**Para 71**
(1869-71) LR 3 PC 465	**referred to**	**Para 71**
1984 (2) SCR 495	**referred to**	**Para 72**
1952 SCR 284	**referred to**	**Para 72**
2003 (4) Suppl. SCR 651	**held inapplicable**	**Para 75**
2010 (12) SCR 326	**held inapplicable**	**Para 80**
2004 (1) SCR 965	**held inapplicable**	**Para 81**
(1988) Supp SCC 174	**held inapplicable**	**Para 82**
2002 (5) Suppl. SCR 128	**distinguished**	**Para 83**
2005 (1) Suppl. SCR 903	**distinguished**	**Para 85**
1994 (3) Suppl. SCR 549	**relied on**	**Para 87**
1990 (2) SCR 659	**referred to**	**Para 87**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 599 of 2012.

From the Judgment & Order dated 22.04.2008 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 24233 of 2007.

Parag M. Tripathi, ASG, Hemantika Wahi, Ena Toli Sema, Mahima Gupta, Suveni Banerjee, Rojalin Pradhan for the Appellants.

Gopal Subramanium, Dewal Banerjee, Harish N. Salve, Mahesh Agarwal, Devansh Mohta, Neeha Nagpal, E.C. Agarwala for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. This appeal is directed against the judgment of the High Court of Gujarat dated 22.04.2008 in Special Civil Application No.24233/2007, whereby the Respondent No. 1 herein, Essar Oil Limited (hereinafter "Essar") was given the benefit of Sales Tax incentive under the Government of Gujarat "Capital Investment Incentive to Premier/Prestigious Unit Scheme, 1995-2000" (hereinafter "the said Scheme")

3. The State Government in the Industries and Mines Department vide Resolution dated 11.09.1995 introduced the said scheme to accelerate development of the backward area of the State and to create large-scale employment opportunities.

4. The operative period of the said scheme was from 16.08.1995 upto 15.08.2000, during which new units have to go into commercial production.

5. The Scheme envisaged grant of Sales Tax incentives by way of Sales Tax Exemption or Sales Tax Deferment or Composite Schemes, for Premier/Prestigious Units according to the location, investment and status of the project. Essar fell in the category of premier unit i.e. new industrial unit having a project cost of more than Rs.1,000/- crores and employing 100 workers on a regular basis and following the employment policy of the State Government. Clause (v) of the Scheme defined premier unit in the following terms:-

"(v) PREMIER UNIT

A new industrial unit or industrial complex fulfilling the following criteria will be considered for granting status of a "Premier Unit".

(a) The industrial unit shall have a project cost of Rs.500 crores or more. Such units having project cost of Rs.1,000 crores and above shall be entitled for extended period to avail incentive as provided under para 6 B.

(b) Only one unit per taluka will be eligible for the Premier Unit status. In banned area no unit is permitted.

(c) The unit shall employ at least 100 workers on a regular basis and shall follow the employment policy of the State Government."

6. Part II of the said Scheme provided that the rate of incentive would depend on the location, investment and status of the project. The incentives offered were sales-tax exemption or sales-tax deferment or composite scheme. There is no dispute about the fact that Essar opted for sales-tax deferment scheme. As per clause 6(i)(B), the rate of incentive applicable to Essar was the rate available for the most backward area. The extent of exemption was 125% of eligible fixed capital investment.

7. Part II Clause (iii) (b) provided that Under the Sales Tax Deferment incentive scheme, the recovery of sales tax connected by the unit on sale of goods manufactured by it including intermediate products, by products and scrap/waste generated as incidental to manufacturing activities and turnover tax, leviable to Government will be deferred and amount so deferred will be recovered in six equal annual installments by Sales Tax Department beginning from the financial year subsequent to the year in which the unit exhausts limit of incentive granted to it under the scheme or after the expiry of

relevant period or time limit during which deferment is available or whichever is earlier.

8. Since Essar's investment was going to be more than Rs.1,000 crores, the duration of incentive of sales-tax deferment was to be for a period of 17 years from the date of commercial production.

9. Clause 6(v) of the said Scheme provided for effective steps for extending date of commercial production in the following terms :

"6(v) Effective steps for extending date of commercial production :

The unit which cannot go into commercial production before expiry of the scheme will be allowed to go into commercial production beyond the last date of the scheme provided it has taken the following effective steps:

(1) The industrial unit should have obtained provisional registration as a Prestigious/Premier unit before 15th August 2000.

(2) 25% of project cost should have been incurred before 15th August 2000. The unit which has taken above effective steps will be allowed to go into commercial production as shown below:

(a) The unit with project cost above Rs.100 crores but below Rs.300 crores should go into commercial production on or before 15th August 2002.

(b) The unit with project cost more than Rs.300 crores should go into commercial production on or before 15th February 2003.

Such units shall have to apply to industries Commissioner for extending date of commercial production by 31st August 2000."

10. A High Power State Level Committee (hereinafter "HPSLC") was the Sanctioning Authority for granting permanent registration of all the Prestigious/Premier Units

11. Part III provides the procedure for Registration for Premier/Prestigious Status, the relevant clause of the said Part in respect of instant case is set out below:

"An Industrial unit eligible for Prestigious/Premier status under the scheme will apply to Industries Commissioner in prescribed form before expiry of the scheme along with details of following effective steps.

(i) Possession of plot or shed in GIDC Estate. For units located outside GIDC Estate, the unit must be in legal possession of land with valid non-agricultural use permission of industrial use or as per Revenue Act as modified from time to time.

(ii) The Letter of intent/Letter of Approval or Registration/ obtained receipt against filling of IEM to the appropriate authority.

(iii) NOC of GPCB (Gujarat Pollution Control Board)

(iv) Detailed Project Report.

The following procedure will be adopted for granting the temporary and permanent Prestigious/Premier registration.

(a) The Industries Commissioner shall give provisional registration to the eligible prestigious/premier unit after approval of committee where applicable.

(b) The eligible unit after completion of project will apply to Industries Commissioner for permanent prestigious/ premier registration, Industries Commissioner will carryout the assets verification and submit a verification report to the High Power State Level Committee, for granting permanent registration."

12. Some relevant facts which arose prior to the floating of the Scheme and which are necessary for appreciating the said Scheme, as contended by Essar and which the records also shows, are as under.

13. Essar was encouraged by the State Government to set up a major venture at Vadinar in Jamnagar District of Gujarat as a 100% export oriented unit for refining of petroleum products with a capacity of 9 Million Tons per annum at an estimated project cost of Rs. 1900 crores in collaboration with M/s Bechtel Inc., USA.

14. By letter dated 11th April, 1990, the then Chief Minister of the State of Gujarat wrote to the Ministry of Planning, Government of India, stating that the project was expected to generate foreign exchange earnings of over Rs.3000 crores within a period of 5 years and that it was expected to be set up in 36 months. It was anticipated by the State Government that the project would "completely change the face of the Vadinar area, which is traditionally a backward area of Gujarat offering direct and indirect employment and will encourage growth of various other ancillary industries in that region". The letter further said that the project had the full support of the Government of Gujarat and it was being accorded highest priority and that Essar's proposal for setting up the oil refinery should be cleared by the Government of India urgently. The clearance for setting up the oil refinery was then granted by the Government of India.

15. In January, 1993, Essar applied to the Gujarat Pollution Control Board (GPCB) for grant of a 'No Objection Certificate' to establish the refinery for manufacturing several kinds of petroleum products. By letter dated 15th February, 1993, the GPCB stated that it had no objection from the Environmental Pollution potential point of view in the setting up of the refinery project subject to certain environmental pollution control measures to be taken by the appellant. Essar's proposal regarding the environmental pollution control system was

approved by the GPCB on 17th April, 1993 and a Site Clearance Certificate was issued on that date.

16. On 10.11.1994, Essar filed an application for right of way over 15.49 hectares of forest land for laying Submarine Crude Oil Pipeline, Cooling Water/Return Water Pipeline and Product Jetty for establishment of its Refinery Project at Vadinar, District Jamnagar, to the Conservator of Forests, Marine National Park, Jamnagar. Undisputedly, 15.49 hectares of forest land applied for includes 8.79 hectares of Jamnagar Marine National Park and Sanctuary. Therefore, permission under Section 2 of the Forest Conservation Act ("FCA") was required for the entire 15.49 hectares. At the same time, permission of State Government was required under the Wildlife Protection Act ("WPA") for 8.79 hectares.

17. On 13.02.1995, the State Government requested the Chief Conservator of Forests, Regional Office, Western Region, Bhopal, to move the Government of India to issue suitable orders to allow Essar to make geophysical survey in Marine National Park/Sanctuary area. The proposal was forwarded by the Chief Conservator of Forests, Bhopal to the Government of India on 15.05.1995.

18. The Conservator of Forests recommended and forwarded the proposal of Essar for Right of Way to the Chief Conservator of Forests (WL) by letter dated 2nd June, 1995 along with an application in the prescribed form seeking prior approval from the Central Government under Section 2 of FCA. The application with its enclosures together with the recommendation of the State Government that 15.49 hectares of forest land be made available to the appellant, was forwarded to the Central Government by the Central Chief Conservator of Forests on 3rd February, 1997. Upon receipt of the proposal of the State Government, the Central Government constituted a team for joint inspection of the area. The report of the joint inspection team was that the proposed activity of the appellant would not have much ramification from

the forestry point of view and the damage would only be temporary in nature in a localized area during the construction phase.

19. On 08.09.1995, the State Government in its Forests and Environment Department informed the Government of India in the Ministry of Environment and Forests, inter alia, that the approval "in principle" was granted to Essar to install Single Buoy Mooring / Crude Oil Terminal / Jetty and connecting pipeline in the National Marine Park and Sanctuary area in Vadinar, District Jamnagar on the terms and conditions to be decided in due course by the State Government.

20. On 11.09.1995 the said Scheme was announced and thereafter on 01.02.1996 Essar applied in the new format to the Industries Commissioner, Gandhinagar for registering the Industrial Undertaking as a "Premier/Prestigious Unit" under the said Scheme.

21. On 29.05.1996 the Forest and Environment Department, State of Gujarat made a proposal to Government of India seeking approval under Section 2 of FCA for diversion of 15.49 hectares of forest land for construction and operation of certain offshore and onshore facilities for a grass root refinery project of Essar.

22. On the basis of the letter-dated 30.09.1997 of the Principal Chief Conservator of Forests, the State Government conveyed on 16.10.1997 its permission under section 29 of WPA to Essar's proposal of right to way through the National Park and Sanctuary subject to Essar's compliance with certain terms and conditions including obtaining permission of the Central Government under the FCA, 1980 (which was granted on 08.12.1999, mentioned later) and also getting clearance under the Coastal Regulation Zone (CRZ) Regulations, which was granted on 03.11.2000.

23. This permission was conveyed to Essar by the

Conservator of Forests under cover of his letter-dated 18.10.1997. The permission was, however, restricted to the Kandla Port Trust area. Kandla Port Trust granted permission to Essar to install "marine facilities" on 10.10.1997.

24. On 27.11.1997 the Ministry of Environment & Forest, Government of India granted "in-principle" approval to Essar under FCA, 1980 for diverting 15.49 hectares of forest land for non-forest purpose.

25. On 25.06.1999 Essar was issued the provisional Premier Registration Certificate by the Industries Commissioner. The provisional certificate was valid upto 15.08.2000 i.e. the last date of Scheme, within this time period Essar was obliged to start commercial production, failing which Essar would have to apply for extension of date of commercial production.

26. In the meantime in view of the permissions granted to install "marine facilities", Essar started construction work of laying of water in-take jetty and product jetty in the forest area of Marine National Park and Marine Sanctuary. Essar's grievances are that despite the aforesaid permissions being given to them for construction, the State Forest Department forced Essar to stop work and further lodged on 19.3.1999 a criminal complaint against Essar and its contractor, for offence committed under sections 17(A), 29, 35(6), 51(1) and 58 of the WPA and section 26 of the Indian Forests Act.

27. In April 1999, a writ petition being Special Civil Application No.2840/1999 in the nature of Public Interest Litigation was filed before the High Court of Gujarat by one Halar Utkarsh Samiti (hereinafter "Samiti") alleging serious violations of several environmental legislations on the part of Essar, who was impleaded as Respondent No.4 in the petition.

28. By interim order-dated 20.04.1999 passed in that PIL High Court directed Essar not to carry on any construction activity in the Marine National Sanctuary and Marine National

Park in violation of the statutory provisions including the provisions contained in Wild life (Protection) Act, 1972.

29. By order-dated 20.08.1999 the High Court disposed of the said PIL in which Essar undertook to file an Undertaking to the effect that they would not carry out any construction activities at the site in question, without obtaining the approval from the authorities. Pursuant to the said order, on 28.09.1999 Essar filed an undertaking to the following effect:

> "…no construction activities or marine facilities will be undertaken without obtaining the approval from the authorities including those which are under process before the authorities.
>
> This undertaking is given without prejudice to the rights and contentions of the Respondent No.4.
>
> This undertaking will come to an end as and when the permission is granted by the authorities."

30. In the meantime on 09.09.1999, a charge sheet was filed against the officers of Essar and its contractor in respect of earlier mentioned offences allegedly committed by them under the WPA and FCA.

31. On 08.12.1999 the Ministry of Environment and Forest, Government of India granted approval under section 2 of the FCA for the total land of 15.49 hectares of forest land.

32. In April 2000, said Samiti filed another PIL being Special Civil Application No.1778, and subsequently two other PILs were also filed by one Jan Sangarsh Manch and one Shri Alpesh Y. Kogje, being Civil Application Nos.5476 and 5928 of 2000, (hereinafter "second PILs") in the High Court of Gujarat challenging, inter alia, the permission granted by the State Government to one Bharat Oman Refineries Ltd. ('BORL') to lay pipeline in the Marine National Park and Sanctuary Area. It

is pertinent to note here that Essar was not a party to these petitions.

33. On 29.04.2000 the Government of Gujarat discontinued the said Scheme with effect from 01.01.2000. However, vide the same Government Resolution dated 29.04.2000, it was specifically mentioned that industry units in pipelines cases which have been registered should start production within two years from January 1, 2000 failing which such units shall be rendered ineligible for sales tax incentive. Therefore, the time to start commercial production was thus extended to 01.01.2002. It is common ground that Essar, being a registered unit, was entitled to the benefit of the said extension.

34. Before the High Court, when proceedings in respect of the second PILs were going on, the counsel of Government of Gujarat placed a copy of the letter-dated 25.07.2000. Relying on the letter, the High Court noted that there were two more pending proposals for laying pipeline in the Marine Park/ Sanctuary Area with the State Government – one from Essar and the other from one Gujarat Poshitra Port Ltd.

35. Before the High Court, the State Government submitted that the proposal from Essar for laying down pipelines in Marine National Park and Marine Sanctuary, Vadinar in Jamnagar District has been only approved 'in principle' vide letter-dated 08.09.1995. However, formal sanction under section 29 of the WPA, 1972 is yet to be given by the State Government.

36. By judgment and order dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 the High Court, in the second PILs, restrained the Government of Gujarat from granting any more authorization and permission for laying down any pipeline in any part of the sanctuary or the national park. As a result of this order, Essar was not given permission to lay down pipelines by the State Government.

37. Being aggrieved, inter alia, on the ground that it was not a party to the second PILs, Essar filed a review/recall application before the High Court being MCA No.250 of 2011 in SCA No.1778 of 2000, inter alia, seeking review and recall of the judgment and order dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 passed in the second PILs by the High Court and a further declaration to the effect that Essar's project at Vadinar was not affected in any manner by the said judgment.

38. By judgment and order dated 23.02.2001 the High Court rejected the said application for review on the ground that there was a factual controversy between Essar and the State Government and that therefore the grievance of Essar was beyond the scope of review.

39. Meanwhile, on 12.04.2001 the Government of Gujarat extended the time for going into commercial production upto 15.08.2003 for various pipeline units including Essar, vide Government Resolution dated 12.04.2001. By that time Essar had obtained Provisional Premier Unit Registration before 15.08.2000 and had also incurred 25% of the Project Cost before 15.08.2000 and therefore, it was entitled to the benefit of this extension.

40. Essar challenged the aforesaid judgment and order dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000, 03.08.2000 and 23.02.2001 of the High Court delivered in the second PILs and the rejection of its review petition in that second PILs respectively by way of filing Special Level Petition being (SLP) CC No.3654 of 2001 [later SLP No.9454-9455 of 2001] before this Hon'ble Court.

41. By interim order-dated 11.05.2001 this Court granted stay of the judgment of the High Court in so far as Essar was concerned in SLP No.9454-9455 of 2001 i.e. SLP filed by Essar. The text of the order of this Court is set out:

"Permission to file Special Leave Petition is granted.

Issue notice.

Stay of the High Court judgment in so far as the petitioner is concerned.

Counter affidavit be filed within four weeks. Rejoinder be filed within four weeks thereafter. List after eight weeks."

42. In view of the above stay order granted by this Court, Essar moved the State Government for permitting it to proceed with the construction of jetty and laying the pipeline. By letter dated 29.10.2001, the State Government in the Forests and Environment Department specifically called Essar to ensure that no construction activities were commenced before obtaining all necessary clearances from different Government departments, agencies and the conditions stipulated by the Ministry of Environment and Forests, Government of India as well as the Forests and Environment Department of the State Government were strictly complied with. However, Essar did not commence the construction of jetty or laying down the pipeline in the National Marine Park/Sanctuary area. One thing which is of some importance is that despite the stay of this Court and the Government letter dated 29.10.2001, Essar did not challenge the Government stand in the pending special leave petition filed by it in this Court.

43. It is also pertinent to note that the Government of Gujarat had also challenged the judgment and order dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 of the High Court passed in the second PILs by way of filing Special Leave Petition being (SLP) CC No.5123-5125 of 2001 (later SLP No.17694-96 of 2001) before this Court, wherein by interim order dated 24.09.2001 this Court passed the following operative order:

"Issue notice.

Tag with SLP(C) 9454-9455/2001.

There will be status quo as of today with the result that any permission which has been granted is not stayed. It will be open to the State Government to consider the granting of further permission which will be subject to the outcome of this appeal."

44. Essar just requested by its letter dated 11.04.2002 the Industries Commissioner to extend the date of commercial production to 30.11.2004 instead of 15.08.2003 for the purpose of availing the incentive benefit under the Scheme and cited that the delay in completing the project and consequent delay in starting commercial production was due to the factors beyond the control of Essar. Further by letter-dated 07.05.2002 Essar in continuation of the letter-dated 11.04.2002 requested the Industries Commissioner to extend the date of commercial production to August 2006.

45. The Industries Commissioner refused to grant any further extension of time vide its letter-dated 28.05.2002 and also made it clear to Essar to go into commercial production within the specified time i.e. till 15.08.2003. Essar, therefore, submitted a representation dated 19.06.2002 to the Chief Minister pointing out the circumstances which had delayed the completion of the project. Similar representations were thereafter made to different authorities of the State Government on 27.06.2002, 14.03.2003, 30.07.2003, 02.12.2003 and 26.12.2003. It appears that the said representations were not responded to.

46. By an order-dated 19.01.2004, this Court quashed and set aside the judgment dated 03.08.2000 of High Court and directed the State Government to issue the authorization to Essar in the requisite format under Sections 29 and 35 of the Wild Life (Protection) Act within a fortnight after disapproving the interpretation placed by the High Court on the provisions of the Wild Life (Protection) Act, 1972. This Court took the view

that the permission granted by the State Government on 16.10.1997 was the permission contemplated by Section 29 of the Wild Life (Protection) Act.

47. In compliance with the above judgment, by letter dated 12.02.2004, the State Government authorized the Chief Wild Life Warden, Gujarat State under Sections 29 and 35 (6) of the Wild Life (Protection) Act to permit Essar for laying oil pipeline in the National Marine Park/Sanctuary area. The Chief Wild Life Warden also issued the requisite permission on 27.02.2004.

48. In the meantime, the accused i.e. officials and contractors of Essar involved in the Criminal Case of 1999 moved an application for discharge before the Metropolitan Magistrate at Khambalia. By order-dated 27.05.2004 the Magistrate allowed the said application and discharged the accused persons from all the charges levelled against them.

49. In view of the above permission granted by the Chief Wild Life Warden under Sections 29 and 35 of the Wild Life (Protection) Act, Essar again sent representations dated 06.04.2004, 12.07.2004, 27.07.2004 and 22.12.2004 to the Government requesting extension of time limit for commencement of commercial production for the purpose of sales tax deferment incentive scheme. In view of the above representations, the State Government in the Industries and Mines Department vide Resolution dated 10.05.2006 constituted a Committee comprising of the Advisor to the Chief Minister, the then Additional Chief Secretary, Finance Department and the then Principal Secretary, Industries and Mines department. The Committee was constituted to consider various such representations of Essar and other Companies.

50. On 26.11.2006 Essar commenced commercial production and started paying sales tax on the products sold by it, under protest.

51. As nothing was heard from the said Committee

constituted in the year 2006 and the representations made by Essar in respect of granting Sales Tax Deferment were undecided, Essar filed a writ petition being Special Civil Application No. 24233/2007 before the High Court contending that for no fault of it, Essar was prevented from completing the project and that it was on account of being so prevented, Essar could not commence the commercial production within the time limit of 15.08.2003.

52. It is pertinent to note at this stage that before the High Court, Essar had expressly withdrawn the allegation that Department of Forest and Conservation, Government of Gujarat was guilty of delay. This is noted in para 6.2 of the High Court judgment which is set out below:

> "6.2 While in the memo of the petition some allegations/ submissions have been made attributing the delay to the Forests and Conservation Department of State Government, but the petitioner Company is not interested in pursuing those allegations and in fact would like to withdraw those allegations and the petitioner would like to invoke the following maxims of equity:-
>
> (i) "An act of the Court shall prejudice no man", and
>
> (ii) "The law does not compel a man to do that which he cannot possibly perform."

53. Before the High Court Essar contended that reason for delay in commencement of commercial production was on account of the injunction granted by the High Court on 13.07.2000/03.08.2000, restraining the State from granting further permission under Section 29 of the WPA in the second PILs (where Essar was not a party). And this situation continued till 27.02.2004, when pursuant to the judgment-dated 19.01.2004 of this Court the Chief Warden granted the said permission. Therefore Essar was entitled to get benefit of the exclusion of the said intervening period of from 13.07.2000 to

27.02.2004 i.e. three years and 230 days in calculating the time limit for commencement of commercial production.

54. By impugned order-dated 22.04.2008 the High Court excluded the aforesaid intervening period and as such extended the time limit for commencement of commercial production from 15.08.2003 to 02.04.2007 after observing in the impugned judgment as under:

> "17. …In the facts of the present case also, the State Government had granted the permission on 16.10.1997 and the Central Government had granted the permission on 08.12.1999. The very fact that the Chief Wild Life Warden issued the permission on 27.02.2004 after the decision of the Apex Court on 19.01.2004 is itself sufficient to show that the request made by the petitioner for excluding the intervening period between 13th July/ 3rd August, 2000 and 27.02.2004 is reasonable."

55. It is also pertinent to note herein that in the impugned order, a direction was given to the State Government that while considering Essar's application for the incentives, the State Government shall stipulate the following conditions, provided the final eligibility certificate is issued within one month from the date of receipt of the judgment:-

> "22. …
>
> (i) The petitioner shall not be given the benefit of deferment of Sales-tax/Value Added Tax beyond 14th August, 2020.
>
> (ii) The amount of Sales-tax/VAT already paid/payable by the petitioner for the period upto today shall not be refunded to the petitioner.
>
> (The above amount is stated by the petitioner company to be above Rs.300 crores)
>
> (iii) Without adjusting the Sales-tax/VAT paid for the period

upto today as aforesaid, the amount otherwise computable under the Incentive Scheme on the basis of the eligible capital investment made by the petitioner in the unit under consideration shall be reduced by Rs.700 crores."

56. The above direction is based on the submissions of the counsel of both the parties, which were made without prejudice to their respective cases. The counsel of Essar submitted a proposal that Essar was ready to make the above mentioned concessions no. (i) & (ii) if the State Government does not challenge the decision of the High Court and within one month from that day the State Government grants Essar the benefit of the Sales Tax/VAT deferment as per the said scheme. In response to the said proposal the learned counsel for the State Government replied that assuming that Essar was found to be eligible under the said Scheme, the amount otherwise computable under the Incentive Scheme on the basis of the eligible capital investment made by Essar in the unit under consideration shall be reduced by Rs.700 crores.

57. The learned counsel for the respondents made an attempt to urge that the judgment of the High Court was virtually rendered by way of a concession and the impugned judgment is a consent order. As such the appeal, at the instance of the State, is not maintainable. Learned counsel for the State strongly opposed this contention and submitted that the same contention was raised at the time of admission of the special leave petition. Then, further affidavit was filed by the State with the leave of the Court. The Court was satisfied and then issued notice.

58. Ultimately, the matter was argued on merits before this Court and it was common ground that the impugned judgment is not by consent.

59. The impugned judgment of the High Court is based on two basic line of reasoning that the respondents are entitled to the benefit of Sales Tax Waiver Scheme firstly on the

principle of restitution and secondly, that the respondents cannot be made to lose the benefit under the Sales Tax Waiver Scheme, for an act of Court. In this regard it has been urged that the respondents could not set up the plant for the purpose of commercial production within 15th August, 2003 as it was prevented from doing so by an order of injunction of the High Court. An order of injunction is an act of Court and an act of High Court cannot prejudice anyone. The loss of time suffered by the respondent as a result of the injunction order cannot cause any prejudice to the respondent.

60. Examining the aforesaid two contentions, this Court finds that there is an overlapping area between the two. The concept of restitution is basically founded on the idea that when a decree is reversed, law imposes an obligation on the party who received an unjust benefit of the erroneous decree to restitute the other party for what the other party has lost during the period the erroneous decree was in operation. Therefore, the Court while granting restitution is required to restore the parties as far as possible to their same position as they were in at the time when the Court by its erroneous action displaced them. In the case of *Lal Bhagwant Singh v. Sri Kishen Das* reported in AIR 1953 SC 136, Justice Mahajan speaking for a unanimous three-Judge Bench of this Court explained the doctrine of restitution in the following words:-

> "…the principles of the doctrine of restitution which is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case…"

61. Subsequently, in *Binayak Swain v. Ramesh Chandra Panigrahi and another* (AIR 1966 SC 948) this Court relied on the principles in Bhagwant Singh (supra) and explained the concept of restitution as follows:-

"…The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost."

62. The concept of restitution is virtually a common law principle and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the Court which prevents a party from retaining money or some benefit derived from another which he has received by way of an erroneous decree of Court. Such remedy in English Law is generally different from a remedy in contract or in tort and falls within a third category of common law remedy which is called quasi contract or restitution.

63. If we analyze the concept of restitution one thing emerges clearly that the obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit (See Halsbury's Laws of England, Fourth Edition, Volume 9, page 434).

64. If we look at Restatement of the Law of Restitution by American Law Institute (1937 American Law Institute Publishers, St. Paul) we get that a person is enriched if he has received a benefit and similarly a person is unjustly enriched if the retention of the benefit would be unjust. Now the question is what constitutes a benefit. A person confers benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other or in a way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another but also where he saves the other from expense or loss. Thus the word "benefit" therefore denotes any form of advantage (page 12 of the Restatement of the Law of Restitution by American Law Institute).

65. Ordinarily in cases of restitution if there is a benefit to one, there is a corresponding loss to other and in such cases; the benefiting party is also under a duty to give to the losing party, the amount by which he has been enriched.

66. We find that a person who has conferred a benefit upon another in compliance with a judgment or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set-aside, unless restitution would be inequitable (page 302 of the Restatement of the Law of Restitution by American Law Institute).

67. Equity demands that if one party has not been unjustly enriched, no order of recovery can be made against that party. Other situation would be when a party acquires benefits lawfully, which are not conferred by the party claiming restitution, Court cannot order restitution.

68. From the facts of the case which has been discussed above it is debatable whether the respondent's inability to avail benefit under the said Scheme is because of its own act or because of the act of the appellant. There is a reasonable basis in the argument of the appellant that after this Court granted the stay order on 11.5.2001 on the special leave petition filed by Essar, the respondents should have made an effort of obtaining the necessary licence by again coming to the Court. Admittedly Essar did not do it. Essar merely represented to the State for grant of licence. Assuming that the State had not responded favourably to the representation of Essar by giving the clearance, it was open to Essar to approach this Court for some order as its special leave petition was pending before this Court. Essar did not do it. Therefore, the question remains whether Essar acted with due diligence in obtaining the equitable remedy of restitution. It is well known that due diligence must be exhibited by the party to seek equity.

69. Now, if we take the case of Essar on a higher plain that it has done its duty even then it has been denied of the

benefit of the said scheme, even then there is no question of restitution by the State for the simple reason that it is nobody's case that State has received any unjust benefit or any unjust enrichment in view of stay order given by the High Court in the second PILs filed in the High Court. On the contrary, it is clear from the record that the State contested those proceedings and specially, challenging the orders of the Gujarat High Court dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 on the second PILs, the State has filed its SLP. Therefore, the State has not at all gained or received any benefit as a result of the orders passed by the High Court on the second PILs. Therefore, the principle of restitution cannot be applied against the State, the appellant before us. The judgment of the High Court to that extent is erroneous.

70. The second principle that an act of court cannot prejudice anyone, based on latin maxim "actus curiae neminem gravabit" is also encompassed partly within the doctrine of restitution. This actus curiae principle is founded upon justice and good sense and is a guide for the administration of law.

71. The aforesaid principle of "actus curiae" was applied in the case of *A.R. Antulay v. R.S. Nayak & another* reported in (1988) 2 SCC 602, wherein Sabyasachi Mukharji, J (as his lordship then was) giving the majority judgment for the Constitution Bench of this Court, explained its concept and application in para 83, page 672 of the report. His lordship quoted the observation of *Lord Cairns in Rodger v. Comptoir D'escompte De Paris,* [(1869-71) LR 3 PC 465 at page 475) which is set out below:

> "Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

72. In the *Antulay* case (supra), it was found that directions of this Court in its order-dated 16.02.1984 in the previous *Antulay* Case {*R.S. Nayak v. A.R. Antuley,* (1984) 2 SCC 183} was given per incuriam and without noticing the provisions of section 6 and 7 of the Criminal Law Amendment Act, 1952 and also the binding nature of the Larger Bench decision in *The State of West Bengal v. Anwar Ali Sarkar & another* (AIR 1952 SC 75).

73. It was made clear in the *Antulay* Case [(1988) 2 SCC 602] that when Court passes an order, which is rendered per incuriam, and the party suffered because of the mistake of the Court, it is the Court's duty to rectify the said mistake. It is in that context that the concept of actus curiae can be invoked. In the instant case the order passed by the High Court in the second PILs was overturned by this Court by its order-dated 19.01.2004 on a different interpretation of section 29 of the WPA.

74. This Court while giving a different interpretation of section 29 of WPA never held that High Court acted per incuriam in rendering its judgment on second PIL filed by the Samiti. Therefore in the case of a mere erroneous judgment of a Court the principle of "actus curiae" cannot be invoked.

75. The learned counsel for Essar in support of the applicability of Doctrine of Restitution has cited the case of *South Eastern Coalfields Ltd. v. State of M.P. & others* reported in (2003) 8 SCC 648 wherein this Court through R.C. Lahoti, J (as his Lordship then was) in para 27 had observed that:

"Section 144 C.P.C. is not the fountain source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties."

76. His Lordship at para 28 observed as under:

"That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made."

77. As discussed earlier a mere mistake or error committed by Court cannot be a ground for restitution. Now in view of the above, two questions arise for consideration:

(i) Whether the orders dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 of the High Court whereby the appellant was restrained from giving any further permission for laying pipelines has resulted in any undue advantage to appellant?

(ii) Whether in respect of the order dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 of the High Court, later on reversed by this Court on 19.01.2004 on a different interpretation of Section 29 of WPA, the actus curiae principle can be invoked.

78. Coming to the first question, as mentioned above, it is clear that the appellant had also challenged this restraining order before this Court. It cannot be said by this restraining order the appellant had gained any undue advantage. On the contrary, twin objects of development of the backward areas and employment opportunities, which were sought to be achieved by the appellant by floating the said scheme, were adversely affected.

79. Therefore the principles in *South Eastern Coalfield Ltd.* (supra) are not attracted here.

80. In *Mumbai International Airport Pvt. Ltd v. Golden Chariot Airport & another,* (2010) 10 SCC 422, after a Civil Court returned the plaint filed by respondent, the respondent came up in appeal against the said order before the High Court and expressly gave up its claim of irrevocable license in order to revive the suit and on such stand, the High Court remanded the suit for trial. Thereafter the respondent therein tried to urge the same plea of irrevocable license before the Trial Court and this Court. This Court did not accept the plea holding that the common law doctrine of approbation and reprobation is well established in our jurisprudence and applicable in our laws too. That principle has no application to the facts of this case.

81. The principles decided in the case of *Karnataka Rare Earth & Anr. v. Senior Geologist, Department of Mines & Geology and Anr.,* reported in (2004) 2 SCC 783 is equally of no assistance to Essar. In that case both the doctrines of "actus curiae" and "restitution" were discussed together. We have already held that these equitable doctrines are not applicable in the facts of the present case. In *Karnataka Rare Earth*

(supra), the appellants, on the basis of an interim order granted by this Court, extracted minerals and disposed of the same. Ultimately the interim order was vacated by this Court and the appeal filed by Karnataka Rare Earth was dismissed. In that context this Court held that the appellants cannot enjoy the benefits earned by them under the interim order of this Court and this Court held that the demand of the State for the price of mines and minerals from the appellant is neither unreasonable nor arbitrary.

82. Reliance was placed on the judgment of this Court in *Bareilly Development Authority v. Methodist Church of India & Anr.,* reported in (1988) Supp SCC 174. In that case no principle was decided but the case was decided on its facts. In *Bareilly Development Authority* (supra), a commercial complex was to be constructed within a time schedule. During the said period of construction, the work had to be stopped in view of the demolition order passed by the authority. This Court held that the said period has to be excluded in computing the period of completion. It was not a case of construing any exemption scheme. What was construed was condition 6 of the construction sanction plan. Therefore principles of *Bareilly Development Authority* (supra) cannot be applied.

83. In the case of *Hitech Electrothermics & Hydro Power Ltd. v. State of Kerala & Ors.,* reported in (2003) 2 SCC 716 it is true that this case is one relating to grant of concessional tariff rate. However the fact shows that in that case the Electricity Board provided power to the appellant only in the year 1998 and the Court found that the delay in giving power was for sheer inaction on the part of Electricity Board. In that context this Court held that literal construction to the entitlement of concessional tariff rate should not be done and the Court also noted that the appellant enjoyed concessional tariff rates on the basis of interim order of Court.

84. In the instant case, no inaction on the part of appellant was pleaded by Essar. In fact before the High Court, Essar

expressly gave up its plea of delay against the appellant. In fact the High Court passed the injunction order not because of the inaction of the appellant but the said order was passed in a proceedings which was opposed by appellant right upto this Court. Therefore, the case of *Hitech Electrothermics* (supra) is clearly distinguishable on facts.

85. The learned counsel for Essar relied on a decision of this Court in *Ishwar Dutt v. Land Acquisition Collector & another* reported in (2005) 7 SCC 190. But no question of issue estoppel was argued before the High Court and no such question actually has fallen for consideration in the course of argument before this Court. Therefore reliance on the principle of issue estoppel on the basis of *Ishawar Dutt* (supra) is not relevant at all.

86. In this case we are to interpret the provisions of exemption scheme.

87. In *Novopan India Ltd. Hyderabad v. Collector of Central Exercise and Customs, Hyderabad* [(1994) Supp 3 SCC 606] the question for consideration before this Court was that, in case of ambiguity, which rule of construction will be applicable to exemption provision. This Court relied on the case of *Union of India & others v. Wood Papers Ltd & another* reported in (1990) 4 SCC 256, wherein at para 4, page 260 this Court observed as under:

> "…Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction."

88. This Court held that the principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee, does not apply to the construction of an exception or an exempting provision, as the same have to be construed strictly. Further this Court also held that a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision and in case of doubt or ambiguity, benefit of it must go to the State.

89. In this case, Essar was categorically told by letter dated 28.05.2002, which is much prior to the expiry of the period, that time for availing the exemption cannot be extended. Admittedly, Essar failed to meet the deadline. In that factual scenario, the exercise undertaken by the High Court in the impugned judgment by directing various adjustments which virtually re-wrote the State's exemption scheme, is an exercise which is, with great respect, neither warranted in law nor supported by precedents. There is no question of equity here, an exemption is a stand alone process. Either an industry claiming exemption comes within it or it does not.

90. For the reasons aforesaid we allow the appeal. The High Court judgment is set aside.

91. The parties are left to bear their own costs.

B.B.B. Appeal allowed.

ONKAR & ANR.

v.

STATE OF U.P.

(CRIMINAL APPEAL NO. 1840 OF 2008)

JANUARY 18, 2012

[DR. B.S. CHAUHAN AND T.S. THAKUR, JJ.]

Penal Code, 1860 – ss.302/149, 307/149 and 452 – Common object – Armed assault by appellants and five other accused – Murder of PW2's uncle – Injuries to son and daughter of PW2 – Conviction of appellants by Courts below – Challenged – Held: PW2 fully supported the case of prosecution – His evidence was totally corroborated by PW3 and PW4 – Injury reports stood proved by Dr.(PW1) and Dr.(PW7) in the court and they corroborated the prosecution version – FIR was lodged most promptly within a period of 3 hours of the incident though the police station was at a distance of 3 miles from the place of occurrence – The appellants were specifically named – The other co-accused who were not the residents of the village where the offence was committed, had been duly identified in Test Identification Parade as well as in court by all the three eye-witnesses – Witnesses deposed that not a single article was looted nor any attempt had been made to commit dacoity, rather it was specifically stated that all the assailants/miscreants declared that no one would be left alive and had been exhorting one another to eliminate all – All the assailants came together and participated in the crime – The offence was committed at mid-night – From a collective reading of the entire evidence, inference can safely be drawn that the assailants had an object to commit murder of persons on the victims' side and they participated in the crime – Graveness of charges against the accused-appellants that they in concert with other accused to achieve a common object entered into the house of the PW2/

complainant stood proved – Conviction of appellants accordingly upheld.

Evidence – Witnesses – Related witnesses – Held: Evidence of closely related witnesses is required to be carefully scrutinised and appreciated – In case, the evidence has a ring of truth, is cogent, credible and trustworthy it can be relied upon.

According to the prosecution, the two appellants and five other accused in concert with each other and to achieve a common object entered into the house of the PW2, with the appellants armed with country-made pistols and the other accused armed with lathi, bhala etc. and caused the death of PW2's uncle ('O') and injuries to PW2's daughter ('T') and son ('C'). The trial court convicted all the accused. The appellants were convicted under Section 302/149; 307/149 and Section 452 IPC and sentenced to life imprisonment. On appeal, the High Court upheld the conviction and maintained the sentence.

The appellants challenged their conviction before this Court *inter alia* on grounds that only close relatives of the deceased 'O' were examined and that in the facts and circumstances of the case, the provisions of Section 149 IPC were not attracted and the prosecution failed to prove that there was unlawful assembly constituted for the purpose of executing a common object.

Dismissing the appeal, the Court

HELD:1. The prosecution examined 3 eye-witnesses. According to PW.2 (complainant), the victims' side had earlier filed criminal cases against some of the accused persons. In one case, they had been convicted and in another case they had been acquitted. In so far as this incident is concerned, PW.2 has fully supported the case

of the prosecution. This witness deposed that accused Bira was having a gun and the appellants were having country made pistols and the other accused were armed with lathi and ballom etc. In order to save himself from the assailants, PW.2 jumped in the house of his other uncle 'B' while 'O' climbed down from the roof. The accused had a scuffle with 'O' who suffered a gun shot injury. The accused also tried to break the door of the room of 'O' and when the door was not broken, they fired shot at the door and bullets from the ventilation of the home due to which 'C' and 'T' suffered fire injuries. In this incident, accused 'MS' also got injured. His evidence is totally corroborated by PW.3 and PW.4. [Para 7]

2. It is a settled legal proposition that evidence of closely related witnesses is required to be carefully scrutinised and appreciated before resting of conclusion as regards the convict/accused in a given case. In case, the evidence has a ring of truth, is cogent, credible and trustworthy it can be relied upon. There is nothing on record to show that at the time of cross-examination of the Investigating Officer (PW.6), any of the accused had put him a question as to why the other witnesses have not been examined. [Para 7]

Himanshu v. State (NCT of Delhi) **(2011) 2 SCC 36: 2011 (1) SCR 48 and** *Ranjit Singh & Ors. v. State of Madhya Pradesh* **(2011) 4 SCC 336: 2010 (14) SCR 133 – relied on.**

3. Injuries reports stood proved by Dr. (PW.1) and Dr. (PW.7) in the court and they corroborate the prosecution version. In spite of the fact that the accused 'MS' got injured but no grievance has ever been raised by him in this regard. The Trial Court has rightly taken note of it and reached the correct conclusion that it supports the case of the prosecution and establish the presence of 'MS' at the place of occurrence and he participated in the crime.

'MS' himself could not explain as under what circumstances such injuries have been caused to him. [Para 8]

4. The courts below reached the correct conclusion that it is highly improbable that the witnesses would screen and spare the real assailants and falsely enroped the appellants and others only because of old enmity. Had it been so, there could have been no reason to involve at least four other accused persons in the crime, particularly, 'MS', Suresh, Ahmad Sayeed and Omveer. Admittedly, the FIR was lodged most promptly within a period of 3 hours of the incident at 2.50 A.M. though the police station was at a distance of 3 miles from the place of occurrence. So far as the appellants are concerned, they have specifically been named. The other co-accused who were not the residents of the village where the offence has been committed, had been duly identified in Test Identification Parade as well as in court by all the three eye-witnesses. [Para 9]

5. There is no force in the submission that in the facts and circumstances of the case provisions of Section 149 IPC were not attracted, for the reason, that this court has been very cautious in the catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it may yet fall under second part of Section 149 IPC, which states that if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as to the number of persons involved in the crime; how many of them were merely passive witnesses; what arms and weapons they were

carrying alongwith them. Number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident. [Para 10]

Ramachandran & Ors. v. State of Kerala **(2011) 9 SCC 257;** *Chandra Bihari Gautam & Ors. v. State of Bihar* **AIR 2002 SC 1836 and** *Ramesh v. State of Haryana* **AIR 2011 SC 169 – relied on.**

6. The witnesses have deposed that not a single article was looted nor any attempt had been made to commit dacoity, rather it has been specifically stated that all the assailants/miscreants declared that no one would be left alive and had been exhorting one another to eliminate all. All the assailants came together and participated in the crime in which 'O' was killed, 'T' and 'C' were injured. The assailants tried to break open the door of the house but could not succeed, thus they fired from the ventilator and that is why 'T' and 'C' got injured. After commission of the offence a large number of persons gathered at the place of occurrence. The assailants ran away. The offence was committed at mid-night. Therefore, after reading the entire evidence collectively inference can safely be drawn that the assailants had an object to commit murder of persons on the victims' side and they participated in the crime. The graveness of charges against the appellants that they in concert with other accused to achieve a common object entered into the house of the complainant stood proved. [Paras 12, 13]

Case Law Reference:

2011 (1) SCR 48	**relied on**	**Para 7**
2010 (14) SCR 133	**relied on**	**Para 7**
(2011) 9 SCC 257	**relied on**	**Para 10**

AIR 2002 SC 1836	**relied on**	**Para 11**
AIR 2011 SC 169	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1840 of 2008.

From the Judgment & Order dated 23.08.2007 of the High Court of Judicature at Allahabad in Criminal Appeal No. 1096 of 1982.

S.B. Upadhyay, Shekhar Prit Jha, Pawan Kishore Singh, Vikrant Bhardwaj for the Appellants.

D.K. Goswami, Anuvrat Sharma Alka Sinha for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 23.8.2007 passed by the High Court of Allahabad in Criminal Appeal No. 1096 of 1982, qua the appellants by which the judgment and order of the Trial Court dated 16.4.1982 in Sessions Trial No. 277 of 1980, of their conviction under Section 302/149; 307 read with Section 149 and Section 452 of Indian Penal Code, 1860 (hereinafter called 'IPC') has been upheld and sentence awarded by the Trial Court for life imprisonment for the offence under Section 302/149; seven years for the offence under Section 307/149; and three years' rigorous imprisonment under Section 452 IPC has been maintained.

2. Facts and circumstances giving rise to this appeal are as under:

A. An FIR was filed on 23.3.1980 at 2.50 A.M. with the Police Station Harduwaganj, District Aligarh that on 22-23/3/1980 at about 12 O'clock, Jalsur (PW.2) – complainant and his Uncle Onkar Singh (deceased) were sleeping on the roof of

their house in their village Kidhara. The appellants came to the house of complainant alongwith other accused persons. One Jagdish who was having a shop in the outer room of the complainant's house, woke up after hearing the sound of the movement of appellants and accused persons and raised alarm and took to his heels. Jalsur (PW.2) and his uncle Onkar Singh (deceased) also woke up. Onkar Singh (deceased) climbed down from the roof towards Chabutara while Jalsur (PW.2) jumped in the adjoining house of his uncle Bahori and came out in the open and set fire to a "chappar" in front of his own house. It was in the light of the fire made on account of burning of "Chappar", that Jalsur (PW.2) saw the accused Bira, Tara, Onkar, Rati Ram and some 7-8 unknown persons. The appellants were armed with country made pistols and other assailants were armed with lathi, bhala and other lethal weapons. A scuffle took place between the assailants and Onkar Singh (deceased) and he received a gun shot injury on his chest and died. Some of the assailants climbed down into the house of the informant and tried to break open the doors of the rooms but on their failure to do so, they opened fire on the doors and some of them entered the rooms through ventilators. The firing caused injuries to the informant's son Chandra Bose and daughter Tarwati. On seeing pressure mounting, the culprits pushed the deceased (Onkar) into the fire of the "Chappar" which had been set ablaze by the informant.

B. On the basis of the said FIR, investigation commenced and I.O. N.P. Singh (PW.6) came at the place of occurrence and collected seven empty shells of 12 bore cartridges alleged to have been fired by the miscreants. He also recorded the statement of witnesses. Site plan was prepared. Blood stained earth and sample of ash of burnt Chappar was collected. The injured persons were sent for medical examination and treatment. Dead body of Onkar Singh was sent for post-mortem. The Investigating Officer arrested Mohd. Shafi, Ahmad Syeed and Suresh on 25.3.1980 and other accused persons subsequently. The Test Identification parade of four accused,

namely, Omveer, Suresh, Ahmad Sayeed, and Mohd. Shafi was conducted and the accused were identified by the witnesses, namely, Roshan Singh, Shishu Pal, Hukam Singh and Jalsur on 17.5.1980. The Investigating Officer filed chargesheet dated 14.1.1981 against 7 accused persons, namely, Bira, Tara, Onkar, Mohd. Shafi, Omveer, Ahmad Sayeed and Suresh.

C. The Trial Court framed the charges on 14.1.1981 against all the 7 accused persons under Sections 147, 302/149, 307/149 and 452 IPC. So far as the present appellants and accused Bira are concerned, an additional charge was framed against them under Section 148 IPC. To prove the case, prosecution examined large number of witnesses including Jalsur (PW.2), Shishu Pal (PW.3) and Bani Singh (PW.4) as eye-witnesses of the occurrence.

D. The accused persons, namely, Bira, Tara, Onkar and Omveer when examined under Section 313 of the Code of Criminal Procedure (hereinafter called Cr.P.C.) took the plea that they had falsely been implicated because of their previous enmity as 5-6 years prior to the incident, an attempt was made on the life of Shishupal, uncle of the complainant Jalsur (PW.2) and in that case accused Tara, his brother Mahabir and father Munshi faced trial and stood convicted under Section 307 IPC and they served the sentence. It was further submitted that Tara, Bira and Onkar were closely related to each other. In respect of another incident, Jalsur (PW.2) had filed a complaint against Tara and Mahabir under Section 395 IPC but the said case ended in acquittal. The other accused persons took the defence that they had enmity with the police and had falsely been implicated in the case.

E. After appreciating the evidence on record and considering all other facts and circumstances of the case, the Trial Court vide judgment and order dated 16.4.1982 convicted all the 7 accused persons and awarded the sentence as mentioned hereinabove in S.T. Case No.277 of 1980.

Aggrieved, all the 7 convicts preferred Criminal Appeal No.1096 of 1982 before the High Court of Allahabad.

F. During the pendency of the said appeal, Omveer, Ahmad Sayeed and Suresh died and thus, their appeal stood abated. At the time of hearing the appeal, it stood established that Bira was a child on the date of occurrence and therefore, his conviction was maintained but sentence was set aside giving benefit under the provisions of Section 2(4) of the U.P. Children Act, 1951. The appeal of remaining three convicts, namely, Tara, Onkar and Mohd. Shafi stood dismissed vide impugned judgment. Mohd. Shafi did not prefer any appeal.

Hence, this appeal only by two convicts.

3. Shri S.B. Upadhyay, learned Senior counsel appearing for the appellants has submitted that injured witnesses, namely, Tarawati and Chandra Bose have not been examined. Similarly, independent eye-witnesses, namely, Roshan Singh and Hukum Singh whose presence at the scene of occurrence had been witnessed by Jalsur (PW.2) himself were not examined. Jagdish who had raised hue and cry immediately after hearing the sound of coming of the accused persons on the spot has also not been examined. Only close relatives of Onkar Singh (deceased) have been examined. Therefore, the prosecution withheld the material evidence in its possession. In the facts and circumstances of the case, the provisions of Section 149 IPC were not attracted. The prosecution miserably failed to prove that there was unlawful assembly constituted for the purpose of executing a common object. The prosecution case itself had been that the prime object was to commit dacoity and not murder of Onkar Singh (deceased). In the deposition, Jalsur (PW.2) had made a statement in the court that Rati Ram was involved in the killing of Onkar Singh (deceased) and his name also finds place in the FIR lodged by Jalsur (PW.2) but no chargesheet has been filed against him. In view of the above, the appeal deserves to be allowed.

4. Per contra, Shri D.K. Goswami, learned counsel appearing for the State has vehemently opposed the appeal contending that the FIR had promptly been lodged within a period of 3 hours after mid-night though the police station was at a distance of 3 miles from the place of occurrence. The appellants had been named in the FIR. Roles attributed to each of them had been explained. Motive had also been mentioned. Injuries suffered by Tarawati and Chandra Bose had also been given. Law does not proscribe reliance upon the evidence of closely related witnesses. However, it requires that evidence of such witnesses must be appreciated with care and caution. Once the evidence is found reliable/trustworthy, it cannot be discarded merely on the ground that the witness has been closely related to the victim. The injuries found on the person of the deceased as well as on Tarawati, Chandra Bose and Mohd. Shafi corroborate the case of the prosecution and in such a fact-situation, the provisions of Section 149 IPC have rightly been applied. The issue of non-examination of the injured witnesses, namely, Tarawati and Chandra Bose and of eye-witnesses, namely, Roshan Singh, Hukum Singh and Jagdish has not been put to the Investigating Officer in cross-examination who could have furnished the explanation for their non-examination. Thus, the issue cannot be raised first time in appeal before this Court. The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. Before we enter into the merits of the case, it may be relevant to refer to the injuries caused to the victims.

(a) The post mortem examination of the dead body of Onkar Singh, son of Sher Singh, was conducted by Dr. Pradeep Kumar (P.W.7) on 23.3.1980 at about 5.15 a.m. and he found following ante mortem injuries on his person:-

1. Gun shot wound of entry of left nipple 1” x 1” x chest

cavity deep, margins inverted, blackening and tattooing present around the wound part of lung coming out of the wound.

2. Abrasion 3” x l» on the top of left shoulder.

3. Abrasion 1" x ½ on the right elbow.

4. Abrasion 2" x l» on the right iliac spine region.

5. Abrasion 1 ½ “x ½” on left iliac spine region.

6. Abrasion 3 “x 1” on upper part of right leg.

7. Abrasion ¼ “x ¼” on middle part of left leg.

8. Abrasion 2" x l» on the right side of back.

9. Superficial burn on left side of chest and abdomen.

On the internal examination, 3rd, 4th, 5th, 6th, 7th, ribs on the left side were found fractured. In the right lung 800 ml of dark blood and 12 pellets were recovered. Left lung was lacerated and 8 pieces of wadding were recovered. In large intestine gases and faecal matters were found. In the opinion of the doctor, death had occurred due to shock and haemorrhage due to ante mortem injuries and duration of death was ¾ day to one day.

(b) Dr. D.P. Singh (P.W.1) of PHC Harduwaganj had examined the injuries of Tarwati, daughter of Jalsur (PW.2) on 23.3.1980 at 1.15 p.m. and following injuries were found by him:-

1. Lacerated circular pellet wound 1/8" x 1/8"’ x muscle deep on the anterior aspect of scalp exactly in the midline of head.

2. Lacerated circular wound 1/8” x 1/8” x muscle deep on the left side of scalp away from the midline and 2 ¾” above

the left eye brow.

3. Lacerated circular wound 1/8" x 1/8" x muscle deep on the right of scalp, 1" behind the injury No.3.

The injuries, in the opinion of the doctor, were simple and were caused by fire arm and it was half day old.

(c) Chandra Bose, son of Jalsur (PW.2) was examined by Dr. D.P. Singh (PW.1) on 23.3.1980 at 1.20 p.m. and the following injuries were found by him:-

1. Lacerated circular wound 1/8" x 1/8" x muscle deep on the right side of face, 1 ½" in front of the lower angle of right mandible.

2. Lacerated circular wound 1/8" x 1/8" x muscle deep on the right side of scalp. 4 ½" above the base of right ear and 1 ½" away from mid line.

3. Lacerated circular wound 1/8" x 1/8" x muscle deep on the left side of scalp. ½" away from mid line and 2 ½ « above the left eye brow.

4. Lacerated circular wound 1/8" x 1/8" x muscle deep on the left side of scalp 1" behind the injury no.3.

All the injuries were simple in nature and were caused by fire arm and their duration was about half a day old.

(d) Dr. D.P. Singh (PW.1) examined the injuries of Mohd. Shafi on 26.3.1980 at 11.15 a.m. and the following injuries were found on his person:-

1. Circular wound 1/8" x 1/8" x muscle deep on the front aspect of right forearm 4" below the level of right elbow joint.

2. Multiple circular wound 1/8" x 1/8" x muscle deep on the

front and lateral aspect of right upper arm 12 in numbers in an area 8" x 5" between the shoulder and elbow joint.

3. Three circular wounds 1/8" x 1/8" x muscle deep each in an area of 3 ½ x 2" on the right shoulder joint.

4. Multiple circular wounds 1 /8" x 1/8" x muscle deep, 5 in numbers, extending in a linear fashion starting from 3 ½" above the right nipple to the lower part of 9th rib at a place 6 ½" away from mid line of back.

In the opinion of the doctor, all the injuries were simple and were caused by fire arm. Duration of these injures was found to be 3 ½ days which is corresponding to the date of incident.

7. The prosecution has examined 3 eye-witnesses. According to Jalsur (PW.2), the victims' side had earlier filed criminal cases against some of the accused persons. In one case, they had been convicted and in another case they had been acquitted. In so far as this incident is concerned, Jalsur (PW.2) has fully supported the case of the prosecution. This witness deposed that accused Bira was having a gun and the present appellants were having country made pistols and the other accused were armed with lathi and ballom etc. In order to save himself from the assailants, Jalsur (PW.2) jumped in the house of his uncle and Onkar Singh climbed down from the roof. The accused had a scuffle with Onkar Singh who suffered a gun shot injury. The accused also tried to break the door of the room of Onkar Singh and when the door was not broken, they fired the shot at the door and bullets from the ventilation of the home due to which Chandra Bose and Tarawati, son and daughter of Jalsur (PW.2) suffered fire injuries. In this incident, Mohd. Shafi also got injured. His evidence is totally corroborated by Shishu Pal (PW.3) and Bani Singh (PW.4).

It is a settled legal proposition that evidence of closely related witnesses is required to be carefully scrutinised and appreciated before resting of conclusion the convict/accused

in a given case. In case, the evidence has a ring of truth, is cogent, credible and trustworthy it can be relied upon. (Vide: *Himanshu v. State (NCT of Delhi),* (2011) 2 SCC 36; and *Ranjit Singh & Ors. v. State of Madhya Pradesh,* (2011) 4 SCC 336).

There is nothing on record to show that at the time of cross-examination of the Investigating Officer (PW.6), any of the accused had put him a question as to why the other witnesses have not been examined.

8. Injuries reports so referred to hereinabove stood proved by Dr. D.P. Singh (PW.1) and Dr. Pradeep Kumar (PW.7) in the court and they corroborate the prosecution version. In spite of the fact that the accused Mohd. Shafi got injured but no grievance has ever been raised by him in this regard. The Trial Court has rightly taken note of it and reached the correct conclusion that it supports the case of the prosecution and establish the presence of Mohd. Shafi at the place of occurrence and he participated in the crime. Mohd. Shafi himself could not explain as under what circumstances such injuries have been caused to him.

9. The courts below have reached the correct conclusion that it is highly improbable that the witnesses would screen and spare the real assailants and falsely enroped the appellants and others only because of old enmity. Had it been so, there could have been no reason to involve at least four other accused persons in the crime, particularly, Mohd. Shafi, Suresh, Ahmad Sayeed and Omveer.

Admittedly, he lodged the FIR most promptly within a period of 3 hours of the incident at 2.50 A.M. though the police station was at a distance of 3 miles from the place of occurrence. So far as the present appellants are concerned, they have specifically been named.

The other co-accused who were not the residents of the

village where the offence has been committed, had been duly identified in Test Identification Parade as well as in court by all the three eye-witnesses.

10. We do not find any force in the submission made by Shri Upadhyay, learned Senior counsel that in the facts and circumstances of the case provisions of Section 149 IPC were not attracted, for the reason, that this court has been very cautious in the catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it may yet fall under second part of Section 149 IPC, which states that if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as to the number of persons involved in the crime; how many of them were merely passive witnesses; what arms and weapons they were carrying alongwith them. Number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident.

(See : *Ramachandran & Ors. v. State of Kerala* (2011) 9 SCC 257).

11. In *Chandra Bihari Gautam & Ors. v. State of Bihar,* AIR 2002 SC 1836, this Court while dealing with a similar case held as under:

> "Section 149 has two parts. First part deals with the commission of an offence by a member of unlawful assembly in prosecution of the common object of that assembly and the second part deals with the liability of the members of the unlawful assembly who knew that an offence was likely to be committed in prosecution of the object for which they had assembled. Even if the common

object of the unlawful assembly is stated to be apprehending Nawlesh Singh only, the fact that the accused persons had attacked the house of the complainant at the dead of the night and were armed with deadly weapons including the guns, and used petrol bombs proves beyond doubt that they knew that in prosecution of the alleged initial common object murders were likely to be committed. The knowledge of the consequential action in furtherance of the initial common object is sufficient to attract the applicability of Section 149 for holding the members of the unlawful assembly guilty for the commission of the offence by any member of such assembly. In this case the appellants, along with others, have been proved to have formed unlawful assembly, the common object of which was to commit murder and arson and in prosecution of the said common object they raided the house of the informant armed with guns and committed offence. The Courts below have, therefore, rightly held that the accused persons formed an unlawful assembly, the common object of which was to commit murder of the informant and his family members and in prosecution of the said common object six persons were killed. The appellants were also proved to have hired the services of some extremists for the purposes of eliminating the family of the complainant."

(See also: *Ramesh v. State of Haryana,* AIR 2011 SC 169)

12. The witnesses have deposed that not a single article was looted nor any attempt had been made to commit dacoity, rather it has been specifically stated that all the assailants/ miscreants declared that no one would be left alive and had been exhorting one another to eliminate all. All the assailants came together and participated in the crime in which Onkar Singh was killed, Tarawati and Chandra Bose were injured. The assailants tried to break open the door of the house but could not succeed, thus they fired from the ventilator and that is why

Tarawati and Chandra Bose got injured. After commission of the offence a large number of persons gathered at the place of occurrence. The assailants ran away. The offence was committed at mid-night. Therefore, after reading the entire evidence collectively inference can safely be drawn that the assailants had an object to commit murder of persons on the victims' side and they participated in the crime.

13. Thus, the graveness of charges against the appellants that they in concert with other accused to achieve a common object entered into the house of the complainant stood proved.

14. In view of the above, we do not find any force in the appeal. Facts and circumstances of the case do not warrant any interference in the matter. The appeal lacks merit and is, accordingly, dismissed.

B.B.B. Appeal dismissed.

##NEXT FILE
HORIL
v.
KESHAV & ANR.
(CIVIL APPEAL NO. 776 OF 2012)

JANUARY 20, 2012

[AFTAB ALAM AND RANJANA PRASAD DESAI, JJ.]

Code of Civil Procedure, 1908 – Or.XXIII, r.3-A – Suit – Maintainability –Appellant filed suit seeking declaration that decree passed by the Assistant Collector, Class-I, in a suit u/ss.176, 178 and 182 of the Land Reforms Act was fraudulent, inoperative and not binding upon him – Allegation that decree passed by Assistant Collector was based on a fraudulent compromise petition – Defendants-respondents questioned the maintainability of the suit – Whether suit filed by appellant was barred in terms of Order XXIII Rule 3-A CPC – Held: A compromise forming the basis of the decree can only be questioned before the same court that recorded the compromise and a fresh suit for setting aside a compromise decree is expressly barred under Order XXIII Rule 3-A – However, in the instant case, the compromise decree alleged to be fraudulent was passed not by a civil court but by a revenue court in a suit u/s.176 of the Land Reforms Act – Revenue courts are neither equipped nor competent to effectively adjudicate on allegations of fraud that has overtones of criminality and the courts really skilled and experienced to try such issues are the courts constituted under the CPC – Further, under s.9 of CPC, the civil court has

inherent jurisdiction to try all types of civil disputes unless its jurisdiction is barred expressly or by necessary implication, by any statutory provision and conferred on any other tribunal or authority – Nothing in Order XXIII Rule 3-A to bar the institution of a suit before the civil court even in regard to decrees or orders passed in suits and/or proceedings under different statutes before a court, tribunal or authority of limited and restricted jurisdiction – In the facts of the case, provision of Order XXIII not a bar against the suit filed by the appellant – Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 – ss. 176, 178, 182, 331 and 341 and Schedule II.

The appellant filed suit seeking a declaration that the decree passed by the Assistant Collector, Class-I, in a suit under sections 176, 178 and 182 of the U.P. Zamindari Abolition & Land Reforms Act, 1950 was fraudulent, inoperative and not binding upon him. It was alleged that the decree passed by the Assistant Collector was based on a fraudulent compromise petition. The defendants-respondents questioned the maintainability of the suit raising the contention that it was barred under the provisions of Order XXIII Rule 3-A of CPC. The trial court dismissed the objection and held that the suit was maintainable. The defendants-respondents took the matter in revision which was dismissed by the District Judge. The respondents thereafter filed writ petition before the High Court which allowed the same holding that the suit filed by the appellant was not maintainable being barred in terms of Order XXIII Rule 3-A CPC.

Allowing the appeal, the Court

HELD:1.1. A compromise forming the basis of the decree can only be questioned before the same court that recorded the compromise and a fresh suit for setting aside a compromise decree is expressly barred under Order XXIII Rule 3-A. The expression "not lawful" used in Rule 3-A of Order XXIII also covers a decree based on

a fraudulent compromise hence, a challenge to a compromise decree on the ground that it was obtained by fraudulent means would also fall under the provisions of Rule 3-A of Order XXIII. [Para 6]

1.2. However, a significant distinguishing feature in this case is that the compromise decree which is alleged to be fraudulent and which is sought to be declared as nullity was passed not by a civil court but by a revenue court in a suit under section 176 of the U.P. Zamindari Abolition & Land Reforms Act, 1950. [Para 8]

Banwari Lal v. *Chando Devi* **(1993) 1 SCC 581: 1992 (3) Suppl. SCR 524 – distinguished.**

2.1. Section 331 of the U.P. Zamindari Abolition & Land Reforms Act, 1950 bars the jurisdiction of the civil court and provides that a suit under the Act can be entertained by no court other than that the courts specified in Schedule II to the Act. A reference to Schedule II would show that the court of original jurisdiction for a suit under section 176 of the Act for division of a holding of a Bhumidhar is Assistant Collector, First Class and the courts of First Appeal and Second Appeal are Commissioner and the Board of revenue respectively. Section 341 of the Act, of course, provides that unless otherwise expressly provided by or under the Act, the provisions of the Indian Court Fee Act, 1870, the Code of Civil Procedure, 1908 and the Limitation Act, 1963, including section 5 thereof would apply to the proceedings under the Act. [Para 9]

2.2. Though the provisions of the Code of Civil Procedure have been made applicable to the proceedings under the U.P. Zamindari Abolition & Land Reforms Act, 1950 but that would not make the authorities specified under Schedule II to the Act as 'court' under the Code and those authorities shall

continue to be "courts" of limited and restricted jurisdiction. [Para 10]

2.3. Revenue courts are neither equipped nor competent to effectively adjudicate on allegations of fraud that has overtones of criminality and the courts really skilled and experienced to try such issues are the courts constituted under the Code of Civil Procedure. [Para 11]

3. It is also well settled that under section 9 of CPC, the civil court has inherent jurisdiction to try all types of civil disputes unless its jurisdiction is barred expressly or by necessary implication, by any statutory provision and conferred on any other tribunal or authority. There is nothing in Order XXIII Rule 3-A to bar the institution of a suit before the civil court even in regard to decrees or orders passed in suits and/or proceedings under different statutes before a court, tribunal or authority of limited and restricted jurisdiction. In the facts of the case, the provision of Order XXIII shall not act as a bar against the suit filed by the appellant. The order of the High Court is accordingly set aside. As a consequence, the suit will be restored before the trial court. [Paras 12, 13]

Case Law Reference:

1992 (3) Suppl. SCR 524 distinguished Para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 776 of 2012.

From the Judgment & Order dated 11.11.2003 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 8107 of 1988 and order dated 16.02.2005 in Civil Misc. (Review) Application No. 40253 of 2004 in Civil Misc. Writ Petition No. 8107 of 1988.

Virag Gupta, Pallavi Sharma, (for Praveen Swarup) for the Appellant.