HORIL

v.

KESHAV & ANR.

(Civil Appeal No. 776 of 2012)

JANUARY 20, 2012

[AFTAB ALAM AND RANJANA PRAKASH 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 bars 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] [6-H; 7-A]

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] [9-B-C]

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] [9-D-F]

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] [9-F-G]

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] [9-H; 10-A]

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] [10-B-D]

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.

Ujjal Singh, J.P. Singh, Parvinderjit Singh (for R.C. Kaushik) for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated November 11, 2003 passed by the Allahabad High Court by which it allowed the writ petition filed by respondent nos. 1 and 2, set aside the order passed by the District Judge, affirming the order of the Munsif, and held that the suit filed by the appellant was not maintainable being barred in terms of Order XXIII Rule 3-A of the Code of Civil Procedure.

3. The appellant filed a suit (No. 43 of 1980) in the court of Munsif, Karwi (Banda) 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 was fraudulent, inoperative and not binding upon him. According to the appellant, the defendants had instituted the suit before the Assistant Collector in which his father namely Chunkai was made as one of the opposite party. In that suit, a compromise petition was filed on October 7, 1971 with the fake signature of Chunkai and on that basis a compromise decree finally came to be passed on April 25, 1979. It is the case of the appellant that no notice of the suit was ever served upon his father Chunkai. He never appeared in the proceeding and was not even aware of it. He did not sign any compromise petition and his alleged signature on the compromise petition dated October 7, 1971 was faked. He had died much earlier and was not even alive in 1979 when the decree was passed. The appellant, accordingly, sought a declaration that the decree dated April 25, 1979 passed by the Assistant Collector, Class-I, Karwi, may be cancelled or it may be declared as void *ab initio,* inoperative and not binding upon him.

4. The defendants (respondents 1 and 2 before this Court) filed a written statement in which they questioned the maintainability of the suit as well. It was contended on their behalf that as the suit related to agricultural lands it was beyond the jurisdiction and competence of the civil court and it could only be tried by the revenue authorities. The Munsif by his order dated October 1, 1985 upheld the defendants' objection and held that the suit was not maintainable before a civil court. Against the order passed by the Munsif, the appellant preferred an appeal (M.C.A.No.21 of 1985) which was allowed by the judgment and order dated April 14, 1987 passed by the Additional District Judge, Karwi, (Banda). The Additional District Judge rightly pointed out that the suit filed by the appellant was based on the allegation that the decree passed by the Assistant Collector was based on a fraudulent compromise petition and it did not involve any adjudication of rights or interests in the agricultural lands. Hence, the suit was maintainable before a civil court. It, accordingly, set aside the order passed by the Munsif and directed him to proceed with the suit in accordance with law.

5. When the matter came before the Munsif on remand, the defendants once again objected to the maintainability of the suit, this time raising the contention that it was barred under the provisions of Order XXIII Rule 3-A of the Code of Civil Procedure. The Munsif by his order dated January 7, 1988 dismissed the objection and found and held that the suit was maintainable. The defendants-respondents took the matter in revision (Civil Revision No. Nil of 1988) which was dismissed by the District Judge, Banda, by his order dated February 17, 1988. Against the orders passed by the Munsif and the District Judge, the defendants preferred a writ petition before the High Court and the High Court, as noted above, allowed the writ petition holding that the suit was not maintainable. It is a brief order in which the High Court referred to the provisions of Order XXIII Rule 3-A, and relying upon a decision of the Allahabad High Court allowed the writ petition.

6. It is true that a compromise forming the basis of the decree can only be questioned before the same court that recorded the comprise and a fresh suit for setting aside a compromise decree is expressly barred under Order XXIII Rule

3-A. It is equally true 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.

7. In *Banwari Lal Vs. Chando Devi* (1993) 1 SCC 581, this Court examined the provisions of Order XXIII Rule 3-A in some detail and in light of the amendments introduced in the Code and in paragraph 7 of the judgment came to hold as follows:

> "7. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the court which had recorded the compromise in question. That court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree on basis of a compromise saying:
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> > "3-A. Bar to suit.- No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

It further held in paragraphs 13 and 14 as follows:-

> "13. When the amending Act introduced a proviso along with an explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at,"the Court

> shall decide the question", the Court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise "which is void or voidable under the Indian Contract Act…." shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even Rule 1(m) of Order 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1-A of Order 43 of the Code."
>
> 14. ……..The court before which it is alleged by one of the parties to the alleged compromise that no such compromise had been entered between the parties that court has to decide whether the agreement or compromise in question was lawful and not void or voidable under the Indian Contract Act. If the agreement or the compromise itself is fraudulent then it shall be deemed to be void within the meaning of the explanation to the proviso to Rule 3 and as such not lawful. The learned Subordinate Judge was perfectly justified in entertaining the application filed on behalf of the appellant and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the court could have recorded such agreement or compromise on February 27, 1991. Having come to the conclusion on the material produced that the compromise was not lawful within the

meaning of Rule 3, there was no option left except to recall that order."

8. In light of the decision in *Banwari Lal* it would *prima facie* appear that the High Court was right in holding that the appellant's suit was hit by the provisions of Order XXIII Rule 3-A and was not maintainable. But the 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 (hereinafter the Act).

9. Section 331 of the Act 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.

10. Though the provisions of the Code Of Civil Procedure have been made applicable to the proceedings under the Act 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.

11. We are of the view that 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.

12. It is also well settled that under section 9 of the Civil Procedure Code, 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. We find 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.

13. In our view in the facts of the case the provision of Order XXIII shall not act as a bar against the suit filed by the appellant. We, accordingly set aside the order of the High Court. As a consequence, the suit will be restored before the Munsif who is directed to accord it priority having regard to the fact that for the last 31 years it is stuck up on the issue of maintainability. The trial court should try to dispose of the suit without any delay, and in any case, not later than one year from the date of receipt/production of a copy of this order.

14. In the result, the appeal is allowed but with no order as to costs.

B.B.B. Appeal allowed.

DEEPA THOMAS & ORS.

v.

MEDICAL COUNCIL OF INDIA & ORS.

(Civil Appeal No. 1015 of 2012)

JANUARY 25, 2012

[CYRIAC JOSEPH AND GYAN SUDHA MISRA, JJ.]

Education – Medical Education – MBBS course – Admission – Irregular admission – Relief under Art.142 of Constitution – Whether respondents including the MCI, the University of Calicut and the Mahatma Gandhi University, Kottayam should be directed to permit the appellants-students to continue and complete the MBBS course to which they were admitted in the different Private Unaided Medical Colleges in Kerala in the academic year 2007-08, though they were not eligible for such admissions as per the Regulations of the MCI, but had satisfied all the eligibility criteria stipulated in the "Prospectus for MBBS Admission, 2007" issued by the respondent-Medical Colleges – Held: The instant case is an eminently fit case for invoking Supreme Court's powers under Article 142 of the Constitution – On the strength of the interim orders passed by the High Court and subsequently by Supreme Court, the appellants continued their studies for 4½ years and appeared in the University examinations – Although the admissions of appellants were irregular as they did not satisfy the requirement of securing not less than 50% marks in the CEE as prescribed in the MCI Regulations, in the special facts and circumstances, the appellants should be allowed to continue and complete their MBBS course and also permitted to appear in the University examinations as if they had been regularly admitted to the course – Such an order is necessary for doing complete justice in the matter – However, since irregular admissions were made by respondent-Colleges in violation of the MCI Regulations, though due to the mistake or omission in the Prospectus

issued by the respondent colleges, they should be directed to surrender from the management quota, number of seats equal to the number of such irregular admissions – In facts and circumstances of the case, suggestion on behalf of MCI to impose penalty on the Colleges not accepted – Constitution of India, 1950 – Article 142.

The appellants are stated to be victims of a mistake or omission crept in the "Prospectus for MBBS Admission, 2007" issued by the respondent-Medical Colleges as regards the eligibility criteria for admission. When the Medical Council of India (MCI) Regulations insist on a minimum of 50% marks both in the qualifying examination and in the Competitive Entrance Examination ('CEE') separately, the Prospectus did not specify that separate 50% marks were required in the CEE also. Though the appellants secured more than 50% marks in the qualifying examination, they secured less than 50% marks in the CEE. Without noticing and without being aware of the difference between the MCI Regulations and the Prospectus in respect of the eligibility criteria, the appellants took admission in the medical colleges. Immediately after the admission the colleges sent the list of admitted students and their marks to the MCI. There was no objection from the MCI and the appellants continued their studies. However, several months thereafter, MCI directed the colleges concerned to discharge the appellants on the ground that they were not eligible for admission as they had secured less than 50% marks in the CEE. Though the appellants and the colleges represented to the MCI and requested to reconsider its decision, the MCI refused to change its stand. The appellants thereafter approached the High Court for redressal of their grievance and on the basis of interim orders passed by the High Court in the writ petitions filed by them, continued their studies and appeared in the examinations conducted by the

University. However, the writ petitions filed by the appellants were ultimately dismissed by the High Court. The High Court held that the regulations framed by the MCI were mandatory in nature; that the admission of the appellants was irregular and the MCI was justified in directing the colleges to discharge the appellants.

Faced with the threat of discharge from the colleges, the appellants came up before this Court pleading that the indulgence shown to the students by this Court in the *Monika Ranka's* case may be extended to the appellants.

The question that arose for consideration was whether this Court should direct the respondents including the MCI, the University of Calicut and the Mahatma Gandhi University, Kottayam to permit the appellants to continue and complete the MBBS course to which they were admitted in the different Private Unaided Medical Colleges in Kerala in the academic year 2007-08, though they were not eligible for such admissions as per the Regulations of the MCI, but had satisfied all the eligibility criteria stipulated in the "Prospectus for MBBS Admission, 2007" issued by the respondent-Medical Colleges.

Disposing of the appeals, the Court

HELD:1.1. On the strength of the interim orders passed by the High Court and subsequently by this Court, the appellants continued their studies for 4½ years and appeared in the University examinations. In the light of the peculiar facts and circumstances of the case, it is quite unjust and unfair to discharge the appellants at this stage. This is an eminently fit case for invoking this Court's powers under Article 142 of the Constitution of India to permit the appellants to continue and complete the MBBS course to which they were admitted in the year 2007. Such an order is necessary for doing complete

justice in the matter. [Paras 20, 21] [26-G-H; 27-A-B]

1.2. In *Monika Ranka's* case, though the admission was held to be irregular, this Court showed indulgence to the students and permitted them to continue and complete the course on the ground that there was nothing on record to show that the students were informed of the marks secured by them in the entrance examination and the students had already completed one year of their MBBS course. In fact, the case of the appellants is much better than the case of the students in *Monika Ranka's* case. In *Monika Ranka's* case, there was no confusion regarding the eligibility criteria whereas in this case the Prospectus omitted to mention the requirement of securing minimum 50% marks for the CEE as provided in the MCI Regulations. The appellants in *Monika Ranka's* case had completed only one year of their course, whereas in this case the appellants are completing the 4th year of the MBBS course. As in *Monika Ranka's* case, the appellants also were not informed of the marks secured by them in the entrance examination. Though the appellants had specifically pleaded so in the writ petitions and also in these appeals, there is nothing on record to show that the marks secured by them in the entrance examination were communicated to them. The High Court has noted in the impugned judgment that since there was nothing on record to show that the appellants in *Monika Ranka's* case were informed of the marks secured by them in the entrance examination, the Apex Court indulged to give them the personal relief of permitting them to continue with the course. Even though the case of the appellants herein also is similar, the High Court has not given any reason for not extending the same relief to the appellants. There is also no finding anywhere in the judgment that the marks of the CEE were communicated to the appellants. [Para 21] [27-C-H; 28-A]

[Order dated 4th September, 2008 passed by Supreme Court in Civil Appeal Nos. 5518-5519 of 2008]; *Chowdhury Navin Hemabhai and Others* v. *State of Gujarat and Others* **(2011) 3 SCC 617: 2011 (2) SCR 1071 – relied on.**

2. Having regard to the special facts and circumstances of this case and the extra-ordinary situation arising in the case, this Court does not in any way feel inhibited to invoke its jurisdiction under Article 142 of the Constitution of India for doing complete justice. [Para 23] [29-G-H]

2.2. Although the admissions of the appellants were irregular as they did not satisfy the requirement of securing not less than 50% marks in the CEE as prescribed in the MCI Regulations, this Court is inclined to take a considerate view in the special facts and circumstances and hence it is directed that, as a special case, the appellants shall be allowed to continue and complete their MBBS course and also permit them to appear in the University examinations as if they had been regularly admitted to the course. [Para 24] [30-A-C]

2.3. Since irregular admissions were made by the respondent -Colleges in violation of the MCI Regulations, though due to the mistake or omission in the Prospectus issued by the respondent colleges, they should be directed to surrender from the management quota, number of seats equal to the number of such irregular admissions. Such surrenders shall be made in a phased manner starting with the admissions of the year 2012. However, any of the respondent-Colleges shall not be required to surrender more than eight (8) seats in one academic year. [Para 25] [30-D-E]

Supreme Court Bar Association v. *Union of India and Another* **(1998) 4 SCC 409 : 1998 (2) SCR 795 – relied on.**

3. Though on behalf of the MCI it was pleaded that as a deterrent against irregular admissions in future a penalty or fine should be imposed on the respondent-Colleges and for the said purpose it was suggested that the respondent-Colleges may be directed to deposit with the Legal Services Authority the entire amount of fees collected by the colleges from the appellant–students, having regard to the facts and circumstances of the case, there is no sufficient justification for such a harsh treatment as the irregularity in the admissions occurred due to an inadvertent and bona fide mistake or omission on the part of the Colleges while issuing the Prospectus. Since the mistake or omission occurred even before the applications were invited, it is not possible to attribute any malafides on the part of the respondent-Colleges as it does not appear to be a deliberate act to violate the MCI Regulations and since the irregular admissions have not resulted in any pecuniary gain for the management. Even if the appellants were not admitted, the Colleges could have admitted equal number of other candidates from the management quota and collected from them the very same fees applicable to management quota students. There was also no attempt to favour the appellants, as the Colleges could not have anticipated that the appellants would apply and fail to secure 50% marks in the CEE. Moreover the respondent-Colleges inspite of bonafide lapse are adequately punished as they have been directed to surrender equal number of seats from the management quota in the coming years. As a result of such surrender of management quota seats, there will be considerable reduction in the income of the Colleges from the fees of the students, because, the fees to be paid by a student admitted in the management quota are admittedly much higher than the fees to be paid by the student admitted in the Government quota. Hence in the facts and circumstances of this case, the suggestion on

behalf of MCI to impose a penalty on the Colleges is not accepted. [Para 26] [30-E-H; 31-A-E]

Case Law Reference:

2011 (2) SCR 1071	**relied on**	**Para 22**
1998 (2) SCR 795	**relied on**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1015 of 2012.

From the Judgment & Order dated 16.9.2010 of the High Court of Kerala in W.P. (C) No. 34270 of 2009.

WITH

C.A. Nos. 1016-1017, 1018 & 1027 of 2012

Rajeev Dhawan, K.V. Viswanathan, A. Sharan, Shyam Diwan, Romy Chacko, Satya Mitra, E.M.S. Anam Fazlin Anam, Manoj V. George, Alex Joseph, K. Gireesh Kumar, Shilpa M. George, Ansar Ahmad Chaudhary, Raghenth Basant, Arjun Singh Bhati, Senthil Jagadeesan, Amit Kumar, Avijit Mani Tripathi, Ashish Kumar, Somesh Chanda Jha, Kedar Nath Tripathy, V. Mohana, P.V. Dinesh for the appearing parties.

The Judgment of the Court was delivered by

CYRIAC JOSEPH, J. 1. Leave granted.

2. The short question that arises for consideration in these Civil Appeals is whether this Court should direct the respondents including the Medical Council of India (for short 'MCI'), the University of Calicut and the Mahatma Gandhi University, Kottayam to permit the appellants to continue and complete the MBBS course to which they were admitted in the different Private Unaided Medical Colleges in Kerala in the academic year 2007-08, though they were not eligible for such admissions as per the Regulations of the MCI, but had satisfied

all the eligibility criteria stipulated in the "Prospectus for MBBS Admission, 2007" issued by the respondent-Medical Colleges. The appellants are stated to be victims of a mistake or omission crept in the Prospectus as regards the eligibility criteria for admission. When the MCI Regulations insist on a minimum of 50% marks both in the qualifying examination and in the Competitive Entrance Examination (for short 'CEE') separately, the Prospectus did not specify that separate 50% marks were required in the CEE also. Though the appellants had secured more than 50% marks in the qualifying examination, they could secure only less than 50% marks in the CEE. Without noticing and without being aware of the difference between the MCI Regulations and the Prospectus in respect of the eligibility criteria, the appellants took admission in the medical colleges. Immediately after the admission the colleges sent the list of admitted students and their marks to the MCI. There was no objection from the MCI and the appellants continued their studies. However, several months thereafter, MCI directed the colleges concerned to discharge the appellants on the ground that they were not eligible for admission as they had secured only less than 50% marks in the CEE. Though the appellants and the colleges represented to the MCI and requested to reconsider its decision, the MCI refused to change its stand. Hence, the appellants were constrained to approach the High Court of Kerala for redressal of their grievance and on the basis of interim orders passed by the High Court in the writ petitions filed by them, the appellants continued their studies and appeared in the examinations conducted by the University. However, the writ petitions filed by the appellants were ultimately dismissed by the High Court on 16th September, 2010. Faced with the threat of discharge from the colleges, the appellants have filed these appeals by special leave. On the strength of the interim orders passed by this Court, the appellants continued their studies and appeared in the examinations and they are now in the fourth year of the MBBS course. The appellants claim that they are innocent victims of

an inadvertent and bona fide mistake or omission crept in the Prospectus as regards the eligibility criteria for admission. They contend that even if there was some discrepancy between the eligibility criteria mentioned in the Prospectus and the eligibility criteria mentioned in the MCI Regulations, they were not in any way responsible for such discrepancy and they may not be penalised for no fault of theirs. The appellants seek intervention of this Court to save their career and future.

3. The appellants are students of Jubilee Medical Mission College and Research Institute, Thrissur, M.E.S. Medical College, Perinthalmanna, Malankara Orthodox Syrian Church Medical College, Kolenchery and Pushapagiri Institute of Medical Sciences & Research Centre, Thiruvalla. Admittedly all these medical colleges are members of the Kerala Private Medical College Management Association (for short, 'Management Association') and the Prospectus for admission to MBBS course, 2007 issued by the Management Association was followed by these medical colleges except the M.E.S. Medical College. The prospectus issued by the M.E.S. Medical College also contained identical provisions relating to eligibility criteria for admission.

4. As per Clause 1.1 of the Prospectus, it was made clear that the Management Association had decided to introduce a separate selection procedure for admission to MBBS course, 2007-2008 in the member colleges of the Management Association as per the directions of the Supreme Court in the matter.

As per Clause 2.2(i), the academic qualification required for admission was "Pass in Higher Secondary Examination of the Board of Higher Secondary Education of Kerala or examination recognised equivalent thereto with 60% marks in Biology separately and 60% marks in Physics, Chemistry and Biology put together or equivalent grade".

Clause 4.1 of the Prospectus provided as follows:

> *"Preparation of Merit List and Allotment of Candidates:* Admission will be on the basis of marks obtained in the entrance examination and marks obtained for Physics, Chemistry and Biology in the qualifying examination. The marks will be apportioned in the ratio of 50:50. After the entrance test, the marks obtained for the Physics, Chemistry and Biology at the qualifying examination will be added to the marks obtained at the entrance test and a combined merit list will be published. Separate merit list also will be published for categories for which seats are reserved. Allotment to colleges and admission will be on the basis of centralized counselling."

As per the above provisions in the Prospectus, even though a candidate was required to pass the Higher Secondary Examination of the Board of Higher Secondary Education of Kerala or examination recognised equivalent thereto with 60% marks in Biology separately and 60% marks in Physics, Chemistry and Biology put together, there was no requirement of any minimum marks in the entrance examination.

5. It cannot be disputed that admissions to MBBS Course in the respondent-Medical Colleges are governed by the MCI Regulations on Graduate Medical Education, 1997 (for short 'MCI Regulations').

6. According to Regulation 4(2) of the MCI Regulations, no candidate shall be allowed to be admitted to the MBBS course until he/she has passed one of the qualifying examinations mentioned therein. According to Regulation 5(2) of the MCI Regulations, in States having more than one University/Board/ Examination Body conducting the qualifying examination or where there is more than one medical college under the administrative control of one authority, a competitive entrance examination should be held so as to achieve a uniform evaluation as there may be variation of standards of qualifying examinations conducted by the different agencies.

Clause 5(ii) of Regulation 5 reads as follows:

"5. Procedure for selection to MBBS course shall be as follows:

(i) xxx xxxx xxx

(ii) In case of admission on the basis of competitive entrance examination under clause (2) to (4) of this regulation, a candidate must have passed in the subjects of Physics, Chemistry, Biology and English individually and must have obtained a minimum of 50% of marks taken together in Physics Chemistry and Biology at the qualifying examination as mentioned in clause (2) of regulation 4 and in addition must have come in the merit list prepared as a result of such competitive entrance examination by securing not less then 50% marks in Physics, Chemistry and Biology taken together competitive examination. In respect of candidates belonging to Schedule Caste, Schedule Tribes or other Backward Classes the marks obtained in Physics, Chemistry and Biology taken together in qualifying examination and competitive entrance examination be 40% instead of 50% as stated above:

Provided that a candidate who has appeared in the qualifying examination the result of which has not been declared, he may be provisionally permitted to take up the competitive entrance examination and in case of selection for admission to the MBBS course, he shall not be admitted to that course until he fulfils the eligibility criteria under regulation 4."

Thus, as per the MCI Regulations, in the case of admission on the basis of competitive entrance examination, a candidate must have obtained a minimum of 50% marks taken together in Physics, Chemistry and Biology at the qualifying examination and in addition, must have secured not less than 50% marks in Physics, Chemistry and Biology taken together in the

competitive examination. However such a requirement of minimum 50% marks in Physics, Chemistry and Biology taken together in the competitive examination was not mentioned in the Prospectus issued by the colleges.

7. Admittedly the appellants were eligible for admission as per the criteria laid down in the Prospectus, but they were not eligible for admission as per the criteria laid down in the MCI Regulations, as they secured only less than 50% marks in Physics, Chemistry and Biology taken together in the competitive examination.

8. In the impugned judgment, the High Court has held that the regulations framed by the MCI are mandatory in nature. For this purpose, the High Court relied on the judgment dated 14th July, 2008 of the High Court of Madhya Pradesh in Writ Petition No. 13379 of 2007 and connected cases. In the said judgment, the High Court of Madhya Pradesh held that the Regulations framed by the MCI are mandatory in nature. In the order dated 4th September, 2008 passed in Civil Appeal Nos. 5518-5519 of 2008 (*Monika Ranka & Ors. v Medical Council of India & Ors.*) and Civil Appeal Nos.5520-5521 of 2008, this Court upheld the principle laid down by the High Court of Madhya Pradesh, though the appellants therein were granted personal relief treating it as a special case. Learned counsel for the appellants in these appeals did not seriously contest the proposition that the MCI regulations are mandatory in nature. They only pleaded that the indulgence shown to the students by this Court in the above-mentioned Monika Ranka's case may be extended to the appellants, as their case is better than the case of the students in Monika Ranka's case. Learned counsel for the appellants also did not dispute that the appellants had secured only less than 50% marks in the CEE. Therefore, the High Court was right in holding that the admission of the appellants was irregular and the MCI was justified in directing the colleges to discharge the appellants.

9. Therefore, the only question to be considered in these

appeals is whether, having regard to the facts and circumstances of these cases, the appellants should be allowed to continue and complete the MBBS course as was done by this Court in Monika Ranka's case. We may now refer to some of the aspects which are relevant for answering the above question.

10. The appellants had applied for admission in response to the Prospectus for admission to MBBS 2007 issued by the colleges. It was not disputed that the Prospectus was approved by the Admission Supervisory Committee constituted by the Government of Kerala under the Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Act 19 of 2006. The CEE was conducted and the merit list was prepared under the supervision of the said Committee.

11. However, there was a minor discrepancy between the eligibility criteria for admission prescribed by the MCI Regulations and the eligibility criteria mentioned in the Prospectus. The requirement of securing not less than 50% marks in the CEE was not mentioned in the Prospectus. According to the appellants and the colleges, it was only an inadvertent and bona fide mistake or omission while preparing the Prospectus. It was contended that Regulation 5(5)(ii) is clumsily worded, with the words "taken together" appearing in several places giving an impression that minimum 50% is required when the marks of qualifying examination and the marks of the CEE are taken together. It was also contended that such an omission or mistake occurred due to lack of sufficient clarity in Regulation 5(5)(ii). There is some substance in the contention.

12. It was pointed out that, when the MCI Regulations require only minimum 50% marks in the qualifying examination, the Prospectus issued by the Management Association

stipulated a higher standard of minimum 60% marks in the qualifying examination and the appellants did satisfy the said requirement by securing 60% to 99% in the qualifying examination. Hence, it cannot be said that the appellants were not meritorious candidates, though unfortunately they could secure only less than 50% marks in the CEE. The Prospectus however did not mention the requirement of minimum 50% marks in the CEE separately. The Prospectus was submitted to the Admission Supervisory Committee constituted under Act 19 of 2006 but the Committee did not raise any objection to the eligibility criteria mentioned in the Prospectus. Possibly, the Admission Supervisory Committee also failed to notice the omission.

13. It was specifically averred by the appellants that the marks obtained in the CEE were not communicated to the candidates and consequently the appellants were not aware that they had secured only less than 50% marks in the CEE. Hence it cannot be said that the appellants took admission knowing that they were not eligible for admission. The CEE was conducted under the supervision of the Admission Supervisory Committee which scrutinized and approved the merit list. It was also averred that though the list of selected candidates was submitted by the colleges to the Admission Supervisory Committee, no objection was raised by the Committee to the admission of the appellants for a very long time. In this context, it may be remembered that Section 4(6) of Act 19 of 2006 provides as hereunder:

> "The Admission Supervisory Committee shall supervise and guide the entire process of admission of students to the unaided professional colleges or institutions with a view to ensure that the process is fair, transparent, merit based and non exploitative under the provisions of the Act".

In such circumstances, the appellants had no reason to suspect that they were ineligible for admission. The list of admitted candidates, along with the marks obtained by them

in the qualifying examination and the CEE, was submitted by the colleges to the MCI immediately after the admissions. It was from the list of admitted candidates and their marks that the MCI found that the appellants had secured only less than 50% marks in the CEE. Possibly, in view of the delay in conducting the scrutiny, the above irregularity was brought to the notice of the colleges by the MCI long after they were admitted to the course. Having realised the mistake or omission in the Prospectus for the year 2007, the colleges rectified the mistake/ omission in the prospectus for the subsequent years.

14. The appellants have secured 60% to 99% marks in the qualifying examination as against the 50% required under the MCI Regulations. They have also secured more than 50% of the aggregate marks, if the marks of the qualifying examination and the CEE are taken together.

15. The High Court has noticed in the impugned judgment that the appellants in Writ Petition (C) Nos. 13810, 13817, 13818, 13819 and 21534 of 2010 contended that though they had not obtained 50% in the CEE, they had obtained more than 50% marks in other Competitive Entrance Examinations like the Entrance Test conducted by Christian Medical College, Ludhiana, the Karnataka Common Entrance Examination for Private Colleges and the Common Entrance Examination conducted by the Commissioner for Entrance Examinations, Government of Kerala. Some of the appellants claimed that in view of their admission in the respondent-Colleges, they gave up admissions offered to them in medical colleges outside Kerala.

16. Long before the MCI directed the colleges to discharge the appellants, admissions for the academic year 2007-2008 had been closed everywhere.

17. The respondent - Colleges or the MCI had not received any complaint against the admission of the appellants from any other candidate who sought admission to MBBS.

18. Realising that the admissions given to the appellants were irregular and that such irregularity occurred due to the inadvertent omission to include in the Prospectus the requirement of minimum 50% marks in the CEE, the respondent-Colleges except the M.E.S. College, through their counsel offered before the High Court to surrender equal number of seats from the management quota to the Government quota in the next year. Though the offer has been noted by the High Court in paragraph 13 of the impugned judgment, it was not accepted by the High Court. Learned counsel for all the respondent – Colleges including the M.E.S. College stated before this Court that the said Colleges are willing to surrender from the management quota number of seats equal to the number of students sought to be discharged. However, learned counsel for the M.E.S. College further submitted that considering that the number of seats to be so surrendered by them is 27, the said college may be permitted to surrender them over a reasonable period.

19. The learned counsel for respondent-Colleges also submitted that the MCI has not been implementing the Regulations uniformly. For example, admissions to MBBS course in the State of Tamilnadu are allowed to be made without any entrance test and only based on the marks in the qualifying examination. This was not disputed by the learned counsel for the MCI. It was also alleged that in State of Kerala itself the MCI had regularized the irregular admissions in other Private Medical Colleges like the Gokulam Medical College, but the correctness of the allegation could not be verified by the learned counsel for MCI for want of time.

20. On the strength of the interim orders passed by the High Court and subsequently by this Court, the appellants have continued their studies for 4½ years and have appeared in the University examinations.

21. In the light of the peculiar facts and circumstances stated above, we are of the view that it is quite unjust and unfair

to discharge the appellants at this stage. This is an eminently fit case for invoking this Court's powers under Article 142 of the Constitution of India to permit the appellants to continue and complete the MBBS course to which they were admitted in the year 2007. Such an order is necessary for doing complete justice in the matter. In taking such a view, we are supported by the precedent in the order dated 4th September, 2008 passed by a 3-Judge Bench of this Court in Civil Appeal Nos. 5518-5519 of 2008 (*Monika Ranka & Ors. v. Medical Council of India & Ors.*). In that case though the admission was held to be irregular, this Court showed indulgence to the students and permitted them to continue and complete the course on the ground that there was nothing on record to show that the students were informed of the marks secured by them in the entrance examination and the students had already completed one year of their MBBS course. In fact, the facts and circumstances pointed out in the earlier paragraphs show that the case of the appellants is much better than the case of the students in Monika Ranka's case. In Monika Ranka's case, there was no confusion regarding the eligibility criteria whereas in this case the Prospectus omitted to mention the requirement of securing minimum 50% marks for the CEE as provided in the MCI Regulations. The appellants in Monika Ranka's case had completed only one year of their course, whereas in this case the appellants are completing the 4th year of the MBBS course. As in Monika Ranka's case, the appellants herein also were not informed of the marks secured by them in the entrance examination. Though the appellants had specifically pleaded so in the writ petitions and also in these appeals, there is nothing on record to show that the marks secured by them in the entrance examination were communicated to them. The High Court has noted in the impugned judgment that since there was nothing on record to show that the appellants in Monika Ranka's case were informed of the marks secured by them in the entrance examination, the Apex Court indulged to give them the personal relief of permitting them to continue with the course. Even though the case of the appellants herein also is similar,

the High Court has not given any reason for not extending the same relief to the appellants. There is also no finding anywhere in the judgment that the marks of the CEE were communicated to the appellants.

22. We also notice that an almost identical situation arose in *Chowdhury Navin Hemabhai and Others* v. *State of Gujarat and Others* [(2011) 3 SCC 617]. In that case, the conflict was between the provisions in the MCI Regulations and the provisions in the Gujarat Professional Medical Educational Colleges or Institutions (Regulation of Admission and Payment of Fees) Rules, 2008 (for short, "State Rules"). Under the MCI Regulations, the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes were required to secure in the common entrance test a minimum of 40% marks in Physics, Chemistry and Biology taken together, but in the State Rules there was no such requirement. Thus, the State Rules had prescribed a qualification standard which was less than that of the MCI. The appellants before this Court belonged to Scheduled Castes, Scheduled Tribes and Other Backward Classes and though they did not secure 40% marks in Physics, Chemistry and Biology taken together, they were given admission to the MBBS course. The High Court of Gujarat had struck down the provision in the State Rules which provided that a candidate who appeared in the common entrance test was eligible for admission to the MBBS course even if he obtained less than 40% marks in Physics, Chemistry and Biology taken together in the common entrance test and also upheld the directions given by the MCI to discharge the appellants from the college. This Court upheld the decision of the High Court observing that the qualification requirements prescribed by the State cannot be lower than those prescribed by the MCI. However, this Court also found that the admissions of the appellant-students took place due to the fault of the rule-making authority in not making the State Rules in conformity with the MCI Regulations and that if the appellants are discharged from the MBBS course for the fault of the rule-making authority,

they will suffer grave injustice. This Court further found that the appellants were not to be blamed for having secured admission in the MBBS course and that the fault was entirely on the rule-making authority in making the State Rules. Even though the appellants were not eligible for admission under the MCI Regulations, considering that the appellants had gone through the pains of appearing in the common entrance test and had been selected on the basis of their merit and admitted into the MBBS course in accordance with the State Rules and had pursued their studies for a year, this Court, for the purpose of doing complete justice in the matter, directed that the admissions of the appellants should not be disturbed. Though this Court observed that the said direction was not to be treated as a precedent, we find sufficient justification for giving a similar direction in the case of the appellants before us.

23. In *Supreme Court Bar Association* v. *Union of India and Another* [(1998) 4 SCC 409] (in para 48), a Constitution Bench of this Court held:

> "The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ***ordinarily*** it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. "

Having regard to the special facts and circumstances of this case and the extra-ordinary situation arising in the case, we do not in any way feel inhibited to invoke our jurisdiction under Article 142 of the Constitution of India for doing complete justice in the matter before us.

24. For the reasons stated above, we although agree with the view of the MCI and the High Court that the admissions of the appellants were irregular as they did not satisfy the requirement of securing not less than 50% marks in the CEE as prescribed in the MCI Regulations, we are inclined to take a considerate view in the special facts and circumstances mentioned in the earlier paragraphs and hence we direct that, as a special case, the appellants shall be allowed to continue and complete their MBBS course and also permit them to appear in the University examinations as if they had been regularly admitted to the course.

25. Since irregular admissions were made by the respondent -Colleges in violation of the MCI Regulations, though due to the mistake or omission in the Prospectus issued by the respondent colleges, they should be directed to surrender from the management quota, number of seats equal to the number of such irregular admissions. Such surrenders shall be made in a phased manner starting with the admissions of the year 2012. However, any of the respondent-Colleges shall not be required to surrender more than eight (8) seats in one academic year.

26. Learned counsel for the MCI strongly pleaded that as a deterrent against irregular admissions in future a penalty or fine should be imposed on the respondent-Colleges and for the said purpose he suggested that the respondent-Colleges may be directed to deposit with the Legal Services Authority the entire amount of fees collected by the colleges from the appellant–students. Having regard to the facts and circumstances of the case, we do not find sufficient justification for such a harsh treatment, as in our view, the irregularity in the admissions occurred due to an inadvertent and bona fide mistake or omission on the part of the Colleges while issuing the Prospectus. Since the mistake or omission occurred even before the applications were invited, it is not possible to attribute any malafides on the part of the respondent-Colleges

as it does not appear to be a deliberate act to violate the MCI Regulations and since the irregular admissions have not resulted in any pecuniary gain for the management. Even if the appellants were not admitted, the Colleges could have admitted equal number of other candidates from the management quota and collected from them the very same fees applicable to management quota students. There was also no attempt to favour the appellants, as the Colleges could not have anticipated that the appellants would apply and fail to secure 50% marks in the CEE. Moreover the respondent-Colleges inspite of bonafide lapse are adequately punished as we have directed them to surrender equal number of seats from the management quota in the coming years. As a result of such surrender of management quota seats, there will be considerable reduction in the income of the Colleges from the fees of the students, because, the fees to be paid by a student admitted in the management quota are admittedly much higher than the fees to be paid by the student admitted in the Government quota. Hence in the facts and circumstances of this case, we are not persuaded to accept the suggestion of the learned counsel for the MCI to impose a penalty on the Colleges.

27. The appeals are disposed of in the above terms. There will be no order as to costs.

B.B.B. Appeals disposed of.

JEEVAN CHANDRABHAN IDNANI & ANR.
v.
DIVISIONAL COMMISSIONER, KONKAN BHAVAN & ORS.
(Civil Appeal No. 1192 of 2012)

JANUARY 31, 2012

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

Bombay Provincial Municipal Corporation Act, 1949 – s.31-A(2), second proviso – Interpretation and purport of – Election to Municipal Corporation – Formation of post electoral aghadis or fronts – Held: The second proviso to sub-section (2) of s.31A enables the formation of a Aghadi or front within a period of one month from the date of notification of the election results – To permit recognition of variations in the relative strength of the political parties beyond the mentioned period of one month would be plainly in violation of the language of the second proviso to s.31A – Such an Aghadi or front can be formed by various possible combinations of councillors belonging to either two or more registered parties or recognised parties or independent councillors – The component parties or individual independent Councillors, as the case may be, in the case of a given front/aghadi do not lose their political identity and merge in to the aghadi/front or bring into existence a new political party – On formation of such an Aghadi or front, the same is required to be registered – Once such an Aghadi is registered by a legal fiction created under the proviso, such an Aghadi is treated as if it were a pre-poll Aghadi or front – Maharashtra Local Authority Members Disqualification Act, 1986 – ss.2(a), 3(2) and 5 – Maharashtra Local Authority Members Disqualification Rules, 1987.

Bombay Provincial Municipal Corporation Act, 1949 –

s.31A – Expressions 'political party', 'registered party', 'recognised party', 'groups' and 'front or aghadi' – Meaning of – Discussed – Maharashtra Local Authority Members Disqualification Act, 1986 – s.2(a) – Representation of the People Act, 1951 – Election Symbols (Reservation and Allotment) Order, 1968.

Administrative Law – Subordinate legislation – Held: Subordinate legislation made by the executive in exercise of the powers delegated by the legislature, at best, may reflect the understanding of the executive of the scope of the powers delegated – But there is no inherent guarantee such an understanding is consistent with the true meaning and purport of the parent enactment.

Election to the third respondent- Municipal Corporation (in the State of Maharashtra) took place and the Corporation was duly constituted with 76 elected Councillors. Apart from fourteen Members elected as Councillors to the Municipal Corporation on behalf of the Lok Bharti Party, two more Councillors, one independent and the other a lone Councillor, belonging to the Republican Party of India (G), joined hands with the Councillors of the Lok Bharti Party and formed a front/ aghadi immediately after the election availing the facility provided under the 2nd proviso to Section 31A(2) of the Bombay Provincial Municipal Corporation Act, 1949.

Respondent Nos. 6 to 13 were members of the said Aghadi. However, they decided to quit the Aghadi and form a 'Swatantar Aghadi' and addressed a letter to the first respondent requesting it to make suitable changes in the records maintained under the Maharashtra Local Authority Members Disqualification Act, 1986 and the rules made thereunder. The first respondent accepted the request by a written communication.

Challenging the said written communication, two

Councillors belonging to the Lok Bharti Party filed writ petition before the High Court. They contended that in the light of the language of the second proviso to Section 31A(2) of the said Municipal Corporation Act, formation of a front or *aghadi* after the completion of the election process to the municipal body is permissible only when that is done within one month from the date of the notification of the results of the election while the impugned written communication purported to recognise an *aghadi*/front beyond the above-mentioned period of one month which was clearly impermissible and hence illegal. The High Court held that the appointment of Councillors to the four categories of Committees specified under Section 31A(1) of the Act takes place "at least more than once" during the tenure of Corporation, and therefore the "relative strength of the recognised parties or registered parties or groups at the time of appointments" whenever made "would be relevant" and on that ground dismissed the writ petition.

In the instant appeal, the question which arose for consideration was whether the 1st Respondent was legally right in registering an Aghadi or front formed after the lapse of one month from the date of the notification of the election results. The interpretation and purport of the second proviso to Sub-section(2) of Section 31(A) of the Bombay Provincial Municipal Corporation Act, 1949 thus fell for the consideration of this Court.

Allowing the appeal, the Court

HELD:1.1. Section 20 of the Bombay Provincial Municipal Corporation Act, 1949 contemplates the constitution of a Standing Committee consisting of 16 Councillors to be appointed by the Corporation out of its own body. Section 24 authorises the Standing Committee to delegate any of its powers and duties to any Special Committee appointed under Section 30 of the

Act. Section 31 contemplates the appointment of ad-hoc Committees for inquiring into or reporting or for giving opinion with reference to such subjects relating to the purpose of this Act.Section 31(A) of the Act stipulates that in the case of (a) Standing, (b) Transport, (c) Special or (d) *ad hoc* Committees, the appointment of Councillors to such Committees shall be made by the Corporation in accordance with the provisions of Sub-section (2) thereof. Sub-section (2) stipulates that in making nomination of the Councillors to the above-mentioned Committees, the Corporation is required to take into account the relative strength of recognised or registered parties or groups in the Corporation and nominate members as nearly as in proportion to the strength of such parties or groups in the Corporation. The expressions (1) 'registered party', (2) 'recognised party', (3) groups and (4) 'front or *aghadi*' occurring in Section 31A of the Municipal Corporation Act are not defined under the said Act. However, the expression 'front' or '*aghadi*' is defined under Section 2(a) of the Maharashtra Local Authority Members Disqualification Act, 1986. The expressions "recognised party" and "registered party" in the context of political parties have a definite legal connotation in this country. [Paras 11, 12, 13, 14, 17, 18] [42-B-E; 44-F-G; 45-A-B]

1.2. Part IVA of the Representation of the People Act, 1951 provides for the registration of political parties. Section 29A prescribes the procedure for the registration of a political party. Such registration is not compulsory, but optional. However, registration enables a political party to claim certain benefits under law such as accepting of a contribution (Section 29B) from any person or company etc. Similarly under the Election Symbols (Allotment and Reservation) Order, 1968 certain symbols are reserved for a 'recognised political party' for the exclusive allotment to the candidates set up by such political party. The above mentioned order stipulates the

various conditions which are required to be satisfied before a political party is entitled for recognition under the said order. [Para 19] [45-B-D]

1.3. The expression "political party" itself is defined under the said order to mean a political party registered under Section 29A of the Representation of the People Act, 1951. In the absence of any clear definition to the contra in either of the local acts of Maharashtra, coupled with the established practice in this country that the various 'recognised political parties' under the symbols Order, 1968 set up candidates at the elections to the local bodies such as the third respondent and they are permitted to use the symbols which are reserved for them under the provisions of the Election Symbols (Reservation and Allotment) Order, 1968, the expressions 'political party', 'registered party' and 'recognised party' occurring in Section 31A of the Municipal Corporation Act, must necessarily be given the same meaning as assigned to them in the Representation of the People Act, 1951 and the Election Symbols (Reservation and Allotment) Order, 1968. [Para 20] [45-E-H; 46-A]

1.4. The expression "groups", occurring under Section 31A(2), once again, is not defined but in the context and scheme of the Section, the expression "group" must be understood only as meaning - Councillors not belonging to either a registered political party or a recognised political party, but persons set up at the Municipal election by an Aghadi as defined under the Disqualification Act. [Para 21] [46-B-C]

2.1. The second proviso to sub-section (2) of Section 31A enables the formation of a Aghadi or front within a period of one month from the date of notification of the election results. Such an Aghadi or front can be formed by various possible combinations of councillors belonging to either two or more registered parties or

recognised parties or independent councillors. The proviso categorically stipulates that such a formation of an 'Aghadi' or 'front' is possible notwithstanding anything contained in the Disqualification Act. Because an "Aghadi" or "front", as defined under the Disqualification Act, clearly, can only be the combination of a group of persons forming themselves into a party prior to the election for setting up candidates at an election to a local authority but not a combination of political parties or political parties and individuals. [Para 24] [48-G-H; 49-A-B]

2.2. The second proviso to Section 31A(2) of the Municipal Corporation Act which is a later expression of the will of the sovereign, in contrast to the stipulation as contained under Section 2(a) and 3(2) of the Disqualification Act, would enable the formation of post electoral aghadis or fronts. However, such a formation is only meant for a limited purpose of enabling such aghadis to secure better representation in the various categories of the Committees specified under Section 31A. The component parties or individual independent Councillors, as the case may be, in the case of a given front/aghadi do not lose their political identify and merge in to the aghadi/front or bring into existence a new political party. There is no merger such as the one contemplated under Section 5 of the Disqualification Act. It is further apparent from the language of the second proviso that on the formation of such an Aghadi or front, the same is required to be registered. The procedure for such registration is contained in the Maharashtra Local Authority Members Disqualification Rules, 1987. [Para 25] [49-C-F]

2.3. Once such an Aghadi is registered by a legal fiction created under the proviso, such an Aghadi is treated as if it were a pre-poll Aghadi or front. The proviso

further declares that once such registration is made, the provisions of the Disqualification Act apply to the Members of such post poll Aghadi. [Para 26] [49-F-G]

3. The High Court held that the interpretation of the Section 31A depends upon the tenor and scheme of the subordinate legislation. Such a principle of statutory construction is not normally resorted to save in the case of interpretation of an old enactment where the language is ambiguous. There is some difference of opinion on this principle but for the purpose of the present case it is not necessary to examine the proposition in detail as the language of Section 31A is too explicit to require any other external aid for the interpretation of the same. Subordinate legislation made by the executive in exercise of the powers delegated by the legislature, at best, may reflect the understanding of the executive of the scope of the powers delegated. But there is no inherent guarantee such an understanding is consistent with the true meaning and purport of the parent enactment. [Para 27] [50-H; 51-A-C]

4. Such variations of the relative strength of aghadis would have various legal consequences provided under the Disqualification Act. Depending upon the fact situation in a given case, the variation might result in the consequence of rendering some of the Councillors disqualified for continuing as Councillors. Section 31A of the Municipal Corporation Act only enables the formation of an aghadi or front within a month from the date of the notification of the results of the election to the Municipal Corporation. To permit recognition of variations in the relative strength of the political parties beyond the above mentioned period of one month would be plainly in violation of the language of the second proviso to Section 31A. [Para 28] [51-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1192 of 2012.

From the Judgment & Order dated 2.5.2011 of the High Court of Judicature at Bombay in Writ Petition No. 2237 of 2011.

Gaurav Agarwal for the Appellants.

Sudhanshu S. Choudhari, Shivaji M. Jadhav, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. The interpretation and purport of the second proviso to Sub-section(2) of Section 31(A) of the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as "Municipal Corporation Act") falls for the consideration of this Court.

3. The constitution of the "Municipal Corporations"[1] (in the State of Maharashtra), their powers, functions and various allied matters are regulated by the above-mentioned Act. Section 5(2)[2] of the Act declares, every "Corporation" shall consist of a

1. Sec.2(10)—"Corporation" means the Municipal Corporation constituted or deemed to have been constituted for a larger urban area known as a City.

Sec. 2(8)—"City" means the larger urban area specified in a notification issued in respect thereof under clause (2) of article 243-Q of the Constitution of India or under sub-section (2) of section 3 of the Act, forming a City.

2. Sec. 5(2) Each Corporation shall consist of,-

(a) such number of councilors, elected directly at ward elections, as is specified in the table below-

TABLE

xxx xxx xxx xxx

(b) such number of nominated councilors not exceedings five, having special knowledge or experience in Municipal Administration to be nominated by the Coporation in such manner as may be prescribed.

definite number of elected and a few nominated councillors. The number of elected Councillors with respect to any Corporation is determined on the basis of the population of that Municipal Corporation. The case on hand pertains to the Ulhasnagar Municipal Corporation, the third respondent herein, which has a total of 76 elected Councillors.

4. Election to the third respondent took place sometime in the month of February, 2007 and the Corporation was duly constituted with 76 elected Councillors. The break-up of the 76 Councillors is specified in the Judgment under appeal as follows:-

"(1) Lok Bharti Party 14

(2) Nationalist Congress Party 15

(3) Shiv Sena Party 16

(4) Bhartiya Janata Party 12

(5) Indian National Congress 6

(6) Republican Party of India (A) 5

(7) Maharashta Navnirman Sena 2

(8) Independents 5

(9) Republic Party of India (G) 1

5. Apart from the fourteen Members elected as Councillors to the Ulhasnagar Municipal Corporation on behalf of the Lok Bharti Party, two more Councillors, one independent and the other a lone Councillor, belonging to the Republican Party of India (G), joined hands with the Councillors of the Lok Bharti Party and formed a front/aghadi immediately after the election availing the facility provided under the 2nd proviso to Section 31A(2) of the Municipal Corporation Act.

6. Respondent Nos. 6 to 13 herein were admittedly members of the said Aghadi. However, they decided to quit the Aghadi and form a 'Swatantar Aghadi' and addressed a letter dated 23rd February, 2011 to the first respondent herein requesting the first respondent to make suitable changes in the records maintained under the Disqualification Act and the rules made thereunder.

7. The first respondent accepted the above-mentioned request. The same is evidenced by his communication dated 11th March, 2011 (hereinafter referred to as 'the impugned order').

8. Challenging the above-mentioned communication, two of the Councillors belonging to the Lok Bharti Party approached the Bombay High Court by way of a writ petition (civil) No. 2237 of 2011. By the judgment under appeal, the said writ petition was dismissed.

9. The substance of the objection to the legality of the impugned order is that in the light of the language of the second proviso to Section 31A(2), formation of a front or *aghadi* after the completion of the election process to the municipal body is permissible only when that is done within one month from the date of the notification of the results of the election. The impugned communication purports to recognise an *aghadi*/ front beyond the above-mentioned period of one month which is clearly impermissible and hence illegal.

10. The High Court rejected the above-mentioned submission. On an examination of the various provisions of the Act, the Court rightly held that the appointment to the four categories of Committees specified under Sections 31A(1) takes place "at least more than once" "during the tenure of the Corporation". Therefore the High Court opined "the relative strength of the recognised parties or registered parties or groups at the time of appointments" whenever made "would be relevant". Hence, found no reason to find fault with the

impugned order. The correctness of the said judgment is in issue before us.

11. To examine the correctness of the conclusion reached by the High Court, a brief survey of the relevant provisions of the Municipal Corporation Act is required. Section 20 of the Act contemplates the constitution of a Standing Committee consisting of 16 Councillors to be appointed by the Corporation out of its own body. It is further stipulated in Section 20(3) that half of the members of the Standing Committee shall retire every succeeding year.

12. Section 24 authorises the Standing Committee to delegate any of its powers and duties to any Special Committee appointed under Section 30 of the Act.

13. Section 31 contemplates the appointment of ad-hoc Committees for inquiring into or reporting or for giving opinion with reference to such subjects relating to the purpose of this Act.

14. Section 31(A) of the Act stipulates that in the case of (a) Standing, (b) Transport, (c) Special or (d) *ad hoc* Committees, the appointment of Councillors to such Committees shall be made by the Corporation in accordance with the provisions of Sub-section (2) thereof.

"31A. Appointment by nomination committees to be by proportional representation

(1) Notwithstanding anything contained in this Act or the rules or bye-laws made thereunder, in the case of the following Committees, except where it is provided by this Act, that the appointment of a Councillor to any Committee shall be by virtue of his holding any office, appointment of Councillors to these Committees, whether in regular or casual vacancies, shall be made by the Corporation by nominating Councillors in accordance with the provisions of sub-section (2):-

(a) Standing Committee;

(b) Transport Committee;

(c) Any special Committee appointed under section 30;

(d) Any ad hoc Committee appointed under section 31."

Sub-section (2) stipulates that in making nomination of the Councillors to the above-mentioned Committees, the Corporation is required to take into account the relative strength of recognised or registered parties or groups in the Corporation and nominate members as nearly as in proportion to the strength of such parties or groups in the Corporation.

> "31A(2). In nominating the Councillors on the Committee, the Corporation shall take into account the relative strength of the recognised parties or registered parties or groups and nominate members, as nearly as may be, in proportion to the strength of such parties or groups in the Corporation, after consulting the Leader of the House, the Leader of Opposition and the leader of each such party or group."

In making such nomination, the Corporation is required to consult the Leader of the House and the Leader of the Opposition etc.

15. However, the first proviso to sub-section (2) would recognise the authority of the Municipal Corporation to nominate any Councillor to any one of the above-mentioned Committees notwithstanding the fact that such a Councillor does not belong to any party or group.

> "Proviso (1) - Provided that, nothing contained in this sub-section be construed as preventing the Corporation from nominating on the Committee any member not belonging to any such party or group."

Second proviso – the exact meaning and scope of which is required to be examined in this appeal – reads as follows:

> "Proviso (2) - Provided further that, for the purpose of deciding the relative strength of the recognised parties or registered parties or groups under this Act, the recognised parties or registered parties or groups, or elected Councillors not belonging to any such party or group may, notwithstanding anything contained in the Maharashtra Local Authority Members' Disqualification Act, 1986, within a period of one month from the date of notification of elections results, from the *aghadi* or front and, on its registration, the provision of the said Act shall apply to the members of such *aghadi* or front, as if it is a registered pre-poll *aghadi* or front."

16. We may mention here that some of the political parties to which the councillors of the 3rd respondent corporation belong to, such as Bhartiya Janata Party, Indian National Congress, National Congress, Shiv Sena, etc., are indisputably registered political parties under Section 29A of the Representations of the People's Act and also recognised political parties in terms of the allotment of the symbols orders 1968 made by the Election Commission of India. Unfortunately there is no material on record to indicate whether Lok Bharti Party is either a registered or a recognised political party.

17. As already noticed under Section 31A of the Municipal Corporation Act, the Corporation is required to take into account the relative strength of the recognised parties or registered parties or groups. The expressions (1) 'registered party', (2) 'recognised party', (3) groups and (4) 'front or *aghadi*' occurring in Section 31A of the Municipal Corporation Act are not defined under the said Act. However, the expression 'front' or '*aghadi*' is defined under Section 2(a) of the Disqualification Act.

> "2.(a) "aghadi" or "front" means a group of persons who

have formed themselves into a party for the purpose of setting up candidates for election to a local authority."

18. The expressions "recognised party" and "registered party" in the context of political parties have a definite legal connotation in this country.

19. Part IVA of the Representation of the People Act, 1951 provides for the registration of political parties. Section 29A prescribes the procedure for the registration of a political party. Such registration is not compulsory, but optional. However, registration enables a political party to claim certain benefits under law such as accepting of a contribution (See Section 29B) from any person or company etc. Similarly under the Election Symbols (Allotment and Reservation) Order, 1968 certain symbols are reserved for a 'recognised political party' for the exclusive allotment to the candidates set up by such political party. The above mentioned order stipulates the various conditions which are required to be satisfied before a political party is entitled for recognition under the said order.

20. The expression "political party" itself is defined under the said order to mean a political party registered under Section 29A of the Representation of the People Act, 1951.

"Political party' means an association or body of individual citizens of India registered with the Commission as a political party under Section 29A of the Representation of the People Act, 1951."

In the absence of any clear definition to the contra in either of the local acts of Maharashtra referred to earlier, coupled with the established practice in this country that the various 'recognised political parties' under the symbols Order, 1968 set up candidates at the elections to the local bodies such as the third respondent and they are permitted to use the symbols which are reserved for them under the provisions of the Election Symbols (Reservation and Allotment) Order, 1968, the

expressions 'political party', 'registered party' and 'recognised party' occurring in Section 31A of the Municipal Corporation Act, must necessarily be given the same meaning as assigned to them in the Representation of the People Act, 1951 and the Election Symbols (Reservation and Allotment) Order, 1968.

21. The expression "groups", occurring under Section 31A(2), once again, is not defined but in the context and scheme of the Section, in our view, the expression "group" must be understood only as meaning - Councillors not belonging to either a registered political party or a recognised political party, but persons set up at the Municipal election by an Aghadi as defined under the Disqualification Act.

22. Having arrived at the meaning of various undefined expressions employed in Section 31A of the Municipal Corporation Act, the scheme and purpose of the 2nd proviso to Section 31A(2) is required to be examined. To understand the purport and scheme of the 2nd proviso to Section 31A(2) of the Municipal Corporation act, we must first examine relevance of the reference to the Maharashtra Local Authority Members Disqualification Act, 1986 made in the said proviso, and the purpose sought to be achieved by the legislature by excluding the application of the said Act through the devise of employing a *non obstante* clause. For a ready reference the relevant portion of the second proviso may again be extracted which reads as follows:-

"***** notwithstanding anything contained in the Maharashtra Local Authority Members' Disqualification Act, 1986,********"

The State of Maharashtra made an enactment called Maharashtra Local Authority Members Disqualification Act, 1986. The Act provides for the disqualification of Members of the Local Authorities i.e. Municipal Bodies and Panchayati Raj Institutions in certain circumstances. Section 3 of the said Act declares that an elected Councillor of a Municipal Corporation

shall be disqualified for being (i.e. continuing as) a Councillor in three contingencies, if such person – (i) voluntarily gives up the membership of the political party which had set him up as a candidate at the election to the Municipal Corporation, (ii) on voting or abstaining from voting in any meeting of the concerned municipal body, contrary to any directions issued by the political party to which such a person belongs. Section 3 of the Disqualification Act, in so far as it is relevant for the present purposes, reads as follows:-

" 3.(1) Subject to the provisions of [section 5] a councillor ……. belonging to any **political party** or aghadi or front shall be disqualified for being a councillor ……. :—

(a) if he has voluntarily given up his membership of such political party or aghadi or front; or

(b) if he votes or abstains from voting in any meeting of a Municipal Corporation, Municipal Council, …… contrary to any direction issued by the political party or aghadi, or front to which he belongs to by any person or authority authorised by any of them in this behalf, without obtaining, in either case, the prior permission of such political party or aghadi or front, person or authority and such voting or abstention has not been condoned by such political party or aghadi or front, person or authority within fifteen days from the date of such voting or abstention:

Provided that, such voting or abstention without prior permission from such party or aghadi or front, at election of any office, authority or committee under any relevant municipal law …… shall not be condoned under this clause;

Explanation.—For the purpose of this section—

(a) a person elected as a councillor, ……. shall be deemed to belong to the **political party** or **aghadi** or **front**, if any, by which he was set up as candidate for election as such councillor …….. ; "

[emphasis supplied]

(iii) under sub-section(2) that an elected councillor who had been elected as such otherwise than as a candidate set up by any political party or aghadi or front (i.e. an independent councillor) shall be disqualified if he joins any political party or aghadi after such election.

"(2) An elected councillor, ********** who has been elected as such otherwise than as a candidate set up by any political party or aghadi or front shall be disqualified for being a councillor, or as the case may be, a member if he joins any political party or aghadi or front after such election."

23. Section 5 of the Act carves out an exception to the Rule contained under Section 3(1) i.e. it stipulates contingencies in which an elected councillor does not incur the disqualification contemplated under Section 3(1) notwithstanding the fact that such person parted ways with the original political party to which he/she originally belonged to. The complete scheme of Section 5 may not be necessary for the purpose of this case but we must take note of the fact that Section 5 does not recognise any exception to the rule contained in Section3(2) with respect to the independent councillors.

24. The second proviso to sub-section (2) of Section 31A enables the formation of a Aghadi or front within a period of one month from the date of notification of the election results. Such an Aghadi or front can be formed by various possible combinations of councillors belonging to either two or more registered parties or recognised parties or independent councillors. The proviso categorically stipulates that such a

formation of an 'Aghadi' or 'front' is possible notwithstanding anything contained in the Disqualification Act. Because an "Aghadi" or "front", as defined under the Disqualification Act, clearly, can only be the combination of a group of persons forming themselves into a party prior to the election for setting up candidates at an election to a local authority but not a combination of political parties or political parties and individuals.

25. Therefore, second proviso to Section 31A (2) of the Municipal Corporation Act which is a later expression of the will of the sovereign, in contrast to the stipulation as contained under Section 2(a) and 3(2) of the Disqualification Act, would enable the formation of post electoral aghadis or fronts. However, such a formation is only meant for a limited purpose of enabling such aghadis to secure better representation in the various categories of the Committees specified under Section 31A. The component parties or individual independent Councillors, as the case may be, in the case of a given front/ aghadi do not lose their political identify and merge in to the aghadi/front or bring into existence a new political party. There is no merger such as the one contemplated under Section 5 of the Disqualification Act. It is further apparent from the language of the second proviso that on the formation of such an Aghadi or front, the same is required to be registered. The procedure for such registration is contained in the Maharashtra Local Authority Members Disqualification Rules, 1987.

26. Once such an Aghadi is registered by a legal fiction created under the proviso, such an Aghadi is treated as if it were a pre-poll Aghadi or front. The proviso further declares that once such registration is made, the provisions of the Disqualification Act apply to the Members of such post poll Aghadi. We do not propose to examine the legal consequences of such a declaration as it appears from the record that a complaint has already been lodged against the respondents 6 to 13 herein under the provisions of the Disqualification Act. The limited question before us is whether

the 1st respondent was legally right in registering an Aghadi or front formed after the lapse of one month from the date of the notification of the election results.

27. At paras 19 and 20 of the judgment under appeal, the High Court held:

> "19. Once it is held that the appointment to the various Committees contemplated under Section 31A of the B.P.M.C. Act takes place more than once, the relative strength of the recognized parties or registered parties or groups at the time of their appointment would be relevant. In other words, the relative strength of the parties that was at the time of registration with a period of one month from the date of notification of the election results, would be relevant only on the first occasion after the general elections are held.
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> 20. ..... If the interpretation suggested by the petitioners is accepted, in our opinion, Rule 3(4) of the Rules would be rendered otiose. We have already held that the provisions of the Act and Rules are required to be taken into account while interpreting the provisions of Section 31A of the B.P.M.C. Act. In view thereof, we are clearly of the opinion that the appointment of various Committees under Section 31A of the B.P.M.C. Act not being one time affair, the relative strength of the recognized parties or registered parties or groups, subject to any change, if any, will have to be taken into account at the time of appointment of councillors to these committees."

In substance, the High Court held that the interpretation of the Section 31A depends upon the tenor and scheme of the subordinate legislation. Such a principle of statutory construction is not normally resorted to save in the case of

interpretation of an old enactment where the language is ambiguous. We are conscious of the fact that there is some difference of opinion on this principle but for the purpose of the present case we do not think it necessary to examine the proposition in detail as in our opinion the language of Section 31A is too explicit to require any other external aid for the interpretation of the same. Subordinate legislation made by the executive in exercise of the powers delegated by the legislature, at best, may reflect the understanding of the executive of the scope of the powers delegated. But there is no inherent guarantee such an understanding is consistent with the true meaning and purport of the parent enactment.

28. Such variations of the relative strength of aghadis would have various legal consequences provided under the Disqualification Act. Depending upon the fact situation in a given case, the variation might result in the consequence of rendering some of the Councillors disqualified for continuing as Councillors. Section 31A of the Municipal Corporation Act only enables the formation of an aghadi or front within a month from the date of the notification of the results of the election to the Municipal Corporation. To permit recognition of variations in the relative strength of the political parties beyond the above mentioned period of one month would be plainly in violation of the language of the second proviso to Section 31A.

29. We are, therefore, of the opinion that the judgment under appeal, as well as the impugned order, cannot be sustained. We allow the appeal and set aside the impugned order.

B.B.B. Appeal allowed.

DR. SUBRAMANIAN SWAMY

v.

DR. MANMOHAN SINGH AND ANOTHER

(Civil Appeal No. 1193 of 2012)

JANUARY 31, 2012

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

Prevention of Corruption Act, 1988 – s. 19:

*Sanction for prosecution – Prosecution of public servant for commission of offence under the 1988 Act – Filing of complaint by private citizen – Permissibility of – Taking appropriate decision within the time specified in *Vineet Narain v. Union of India; guidelines issued by the Department of Personnel and Training and CVC – Requirement of – On facts, illegal grant of licence in 2G Mobile Service at the behest of Minister – Representation dated 29.11.2008 to the Prime Minister for according sanction for prosecution of the Minister for offences under the 1988 Act by appellant (private citizen) – Repeated reminders from 30.05.2009 to 13.03.2010 – Case of the appellant that he had placed sufficient evidence – Meanwhile on direction by CVC, CBI registered FIR – 16 months after the appellant's first representation, intimation to the appellant that grant of sanction for prosecution would arise only after perusal of the evidence collected by the investigating agency and other material provided to the Competent Authority – Writ petition by appellant seeking issue of a mandamus to Prime Minister to pass an order for grant of sanction for prosecution of the Minister – Dismissed by High Court holding that the matter was being investigated by the CBI, and the investigation was in progress – Subsequently, the Minister resigned, though he continued to be a Member of Parliament – On appeal, held: Appellant had right to file complaint for prosecution of the Minister as there is no bar either in the 1988 Act or Cr.P.C. – It cannot be said that grant*

*of sanction for prosecution of a public servant arises only at the stage of taking cognizance and any request made prior to that is premature – While considering grant or refusal of sanction, the Competent Authority is to see whether the material collected by the complainant or the investigating agency prima facie disclose commission of an offence by a public servant – It cannot undertake detailed enquiry – Further, the material placed on record does not show that the CBI had registered a case or started investigation at the instance of Prime Minister – High Court proceeded under a wholly erroneous assumption – Even though the appellant repeatedly wrote letters to Prime Minister highlighting the seriousness of the allegations made in his first representation and that he had already supplied the facts and documents on basis of which sanction could be granted for prosecution of the Minister, the concerned officers in the PMO kept the matter pending and then took the shelter of the fact that the CBI had registered the case and the investigation was pending – Officers in the PMO and the Ministry of Law and Justice, were duty bound to apprise Prime Minister about seriousness of allegations made by the appellant and the directions in *Vineet Narain's case that time limit of three months for grant of sanction for prosecution must be strictly adhered to with one month additional in specified situation, as also the guidelines framed by the CVC so as to enable him to take appropriate decision in the matter – Thus, the order of the High Court is set aside – However, since the Court of Special Judge, CBI has already taken cognizance of the offences allegedly committed by the Minister under the 1988 Act, no other direction issued – In future every Competent Authority to take appropriate action for grant of sanction for prosecution of a public servant strictly in accordance with the direction in *Vineet Narain v. Union of India and the guidelines framed by the CVC.*

Previous sanction for prosecution – Necessity of – Offence allegedly committed by Minister (Public servant)

*under the 1988 Act – Sanction for prosecution – Requirement of, even after he resigned from the Council of Ministers, though he continued to be a Member of Parliament – Held: Sanction for prosecution not necessary as clearly answered by the Constitution Bench in **R.S. Nayak v. A.R. Antulay's case.*

*Sanction for prosecution – Time limit for Competent Authority to grant sanction – Held: In terms with the directions laid down in *Vineet Narain v. Union of India, time limit of three months for grant of sanction for prosecution must be strictly adhered to – However, additional time of one month may be allowed where consultation is required with the Attorney General or any other law officer in AG's office.*

Sanction for prosecution – Person for whose prosecution sanction sought – Opportunity of hearing by Competent Authority – Held: Grant or refusal of sanction is not a quasi judicial function – Said person is not required to be heard by the Competent Authority before it takes a decision in the matter – Competent Authority is required to see whether the material collected by the complainant or the investigating agency prima facie disclose commission of an offence by a public servant – It cannot undertake a detailed inquiry - If material placed are sufficient for sanction, then Competent Authority is required to grant sanction, otherwise, it can refuse – In either case, said decision is to be communicated to him to avail appropriate legal remedy.

Words and Phrases – 'Cognizance' – Meaning of.

Licences in 2G mobile services were granted illegally at the behest of respondent No. 2 (Minister for Communication and Information Technology) causing loss of thousands of crores of rupees to the Government. Appellant made a representation dated 29.11.2008 to respondent No. 1 (Prime Minister) to accord sanction for prosecution of respondent No.2 for offences

under the Prevention of Corruption Act, 1988. The appellant did not receive any response from respondent No.1. He sent repeated letters from 30.5.2009 to 13.3.2010. Meanwhile on being directed by Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI) registered first information report against respondent No. 2. In one of the letter, the appellant claimed that it was not necessary to carry out a detailed inquiry, and that he had produced sufficient evidence for grant of sanction to initiate criminal prosecution against respondent No. 2. 16-1/2 months after the appellant's first letter, Secretary, Department of Personnel and Training, Ministry of Personnel sent a letter to the appellant that the CBI had registered a case on 21.10.2009 against unknown officers of the Department of Telecommunications (DoT), unknown private persons/ companies and others; that the issue of grant of sanction for prosecution would arise only after perusal of the evidence collected by the investigating agency and other material provided to the Competent Authority; and that it would be pre-mature to consider sanction for prosecution at that stage. The appellant then filed a writ petition and prayed for issue of a mandamus to respondent No.1 to pass an order for grant of sanction for prosecution of respondent No. 2 for offences under Sections 11 and 13(1)(d) of the 1988 Act. The Division Bench of the High Court dismissed the writ petition holding that when the matter is being investigated by the CBI, and the investigation is in progress, it would not be in fitness of things to issue a mandamus to respondent No. 1 to take a decision on sanctioning prosecution. Thus, the appellant filed the instant appeal.

After filing of SLP, respondent No. 2 resigned from the Council of Ministers on 14.11.2010, though he continued to be a member of Parliament.

The question which arose for consideration in the instant appeal were whether a complaint can be filed by a citizen for prosecuting a public servant for an offence under the Prevention of Corruption Act, 1988; and whether the authority competent to sanction prosecution of a public servant for offences under the 1988 Act is required to take an appropriate decision within the time specified in clause I(15) of the directions contained in paragraph 58 of the judgment of this Court in ****Vineet Narain v. Union of India* **(1998) 1 SCC 226 and the guidelines issued by the Central Government, Department of Personnel and Training and the (CVC).**

Allowing the appeal, the Court

HELD: Per Singhvi, J: (For himself and Ganguly, J)

1.1. The question whether sanction for prosecution of respondent No.2 for the offences allegedly committed by him under the Prevention of Corruption Act, 1988 is required even after he resigned from the Council of Ministers, though he continues to be a Member of Parliament, has already been answered by the Constitution Bench in *****R. S. Nayak v. A. R. Antulay's* **case that if a public servant has ceased to hold the office as public servant which he is alleged to have abused or misused for corrupt motives on the date of taking cognizance of an offence alleged to have been committed by him as a public servant and holds an entirely different public office which he is neither alleged to have misused or abused for corrupt motives, the sanction of authority competent to remove him from such latter office would be not necessary. [Para 15] [81-F-H; 82-A]**

***R. S. Nayak v. A. R. Antulay* **(1984) 2 SCC 183 – followed.**

Habibullsa Khan v. State of Orissa **(1995) 2 SCC 437:**

1995 (1) SCR 819; *State of H.P. v. M. P. Gupta* **(2004) 2 SCC 349; 2003 (6) Suppl. SCR 541;** *Parkash Singh Badal v. State of Punjab* **(2007) 1 SCC 1: 2006 (10) Suppl. SCR 197;** *Balakrishnan Ravi Menon v. Union of India* **(2007) 1 SCC 45 – referred to.**

1.2. There is no provision either in the 1988 Act or the Code of Criminal Procedure, 1973 which bars a citizen from filing a complaint for prosecution of a public servant who is alleged to have committed an offence. The appellant has the right to file a complaint for prosecution of respondent No.2 in respect of the offences allegedly committed by him under the 1988 Act. [Paras 18 and 19] [86-D-E; 92-F]

***A.R. Antulay v. Ramdas Sriniwas Nayak* (1984) 2 SCC 500: 1984 (2) SCR 914 – followed.**

H.N. Rishbud and Inder Singh v. State of Delhi **(1955) 1 SCR 1150;** *State of M.P. v. Mubarak Ali* **1959 Supp. (2) SCR 201;** *Union of India v. Mahesh Chandra* **AIR 1957 M.B. 43 – referred to.**

1.3. The submission that the question of granting sanction for prosecution of a public servant charged with an offence under the 1988 Act arises only at the stage of taking cognizance and not before that, is neither supported by the plain language of the Section nor the judicial precedents relied upon. Though, the term 'cognizance' has not been defined either in the 1988 Act or the Cr.P.C., the same has acquired a definite meaning and connotation from various judicial precedents. In legal parlance cognizance is "taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially". [Para 20] [92-G-H; 93-A-B]

R. R. Chari v. State of U.P. **(1951) SCR 312;**

Superintendent and Remembrancer of Legal Affairs v Abani Kumar Banerjee **AIR 1950 Cal. 437;** *State of West Bengal v. Mohd. Khalid* **(1995) 1 SCC 684 :1994 (6) Suppl. SCR 16;** *State through C.B.I. v. Raj Kumar* Jain **(1998) 6 SCC 551: 1998 (3) SCR 957;** *K. Kalimuthu v. State* **(2005) 4 SCC 512: 2005 (3) SCR 1;** *Centre for Public Interest Litigation v. Union of India* **(2005) 8 SCC 202: 2005 (4) Suppl. SCR 77;** *State of Karnataka v. Pastor P. Raju* **(2006) 6 SCC 728: 2006 (4) Suppl. SCR 269 – referred to.**

1.4. At the time of taking cognizance of the offence, the Court is required to consider the averments made in the complaint or the charge sheet filed under Section 173. It is not open for the Court to analyse the evidence produced at that stage and come to the conclusion that no *prima facie* case is made out for proceeding further in the matter. However, before issuing the process, it is open to the Court to record the evidence and on consideration of the averments made in the complaint and the evidence thus adduced, find out whether an offence has been made out. On finding that such an offence has been made out the Court may direct the issue of process to the respondent and take further steps in the matter. If it is a charge-sheet filed under Section 173 Cr.P.C., the facts stated by the prosecution in the charge-sheet, on the basis of the evidence collected during investigation, would disclose the offence for which cognizance would be taken by the Court. Thus, it is not the province of the Court at that stage to embark upon and sift the evidence to come to the conclusion whether or not an offence has been made out. [Para 26] [96-G-H; 97-A-C]

1.5. The grant or refusal of sanction is not a quasi judicial function and the person for whose prosecution the sanction is sought is not required to be heard by the Competent Authority before it takes a decision in the matter. What is required to be seen by the Competent Authority is whether the facts placed before it which, in

a given case, may include the material collected by the complainant or the investigating agency *prima facie* disclose commission of an offence by a public servant. If the Competent Authority is satisfied that the material placed before it is sufficient for prosecution of the public servant, then it is required to grant sanction. If the satisfaction of the Competent Authority is otherwise, then it can refuse sanction. In either case, the decision taken on the complaint made by a citizen is required to be communicated to him and if he feels aggrieved by such decision, then he can avail appropriate legal remedy. [Para 27] [97-C-F]

1.6. The CVC framed guidelines which were circulated vide office order No. 31/5/2005 dated 12.5.2005. The said guidelines are in conformity with the law laid down by this Court that while considering the issue regarding grant or refusal of sanction, the only thing which the Competent Authority is required to see is whether the material placed by the complainant or the investigating agency *prima facie* discloses commission of an offence. The Competent Authority cannot undertake a detailed inquiry to decide whether or not the allegations made against the public servant are true. [Para 31] [101-B-C]

*****Vineet Narain v. Union of India* (1998) 1 SCC 226 – relied on.**

Vineet Narain v. Union of India **1996 (1) SCALE (SP) 42;** *Vineet Narain v. Union of India* **(1996) 2 SCC 199: 1996 (1) SCR 1053;** *Vineet Narain v. Union of India* **(1997) 4 SCC 778;** *Vineet Narain v. Union of India* **(1997) 5 SCALE 254;;** *Jagjit Singh v. State of Punjab* **(1996) Crl. Law Journal 2962;** *State of Bihar v P. P. Sharma* **1991 Supp. 1 SCC 222;** *Superintendent of Police (CBI) v. Deepak Chowdhary* **(1995) 6 SC 225 – referred to.**

1.7. The High Court had proceeded under a wholly erroneous assumption that respondent No.1 had directed investigation by the CBI into the allegations of grave irregularities in the grant of licences. As a matter of fact, on receipt of representation dated 4.5.2009 that the grant of licences by respondent No.2 had resulted in huge loss to the Public Exchequer, the CVC got conducted an inquiry under Section 8(d) of the Central Vigilance Commission Act, 2003 and forwarded a copy of the report to the Director, CBI for making an investigation into the matter to establish the criminal conspiracy in the allocation of 2G spectrum under the UASL policy of the DoT and to bring to book all the wrongdoers. Thereupon, the CBI registered FIR dated 21.10.2009 against unknown officials of the DoT, unknown private persons/companies and others for offences under Section 120-B IPC read with Sections 13(2) and 13(1)(d) of the 1988 Act. For the next about one year, the matter remained dormant and the CBI took steps for vigorous investigation only when this Court intervened in the matter. The material placed on record does not show that the CBI had registered a case or started investigation at the instance of respondent No.1. [Para 32] [101-D-H; 102-A]

1.8. On his part, the appellant had submitted representation to respondent No. 1 almost one year prior to the registration of the first information report by the CBI and highlighted the grave irregularities committed in the grant of licences resulting in the loss of thousands of crores of rupees to the Public Exchequer. He continuously pursued the matter by sending letters to respondent No.1 at regular intervals. The affidavit filed by Director in the PMO shows that the matter was placed before respondent No.1 on 1.12.2008, who directed the concerned officer to examine and apprise him with the facts of the case. Surprisingly, instead of complying with the direction given by respondent No.1 the concerned

officer sent the appellant's representation to the DoT which was headed by none other than respondent No.2 against whom the appellant had made serious allegations of irregularities in the grant of licences. It was natural for respondent No.2 to have seized this opportunity, and he promptly sent letter dated 18.6.2009 to the appellant justifying the grant of licences. The concerned officer in the PMO then referred the matter to the Ministry of Law and Justice for advice. It is not possible to appreciate that even though the appellant repeatedly wrote letters to respondent No.1 highlighting the seriousness of the allegations made in his first representation and the fact that he had already supplied the facts and documents which could be made basis for grant of sanction to prosecute respondent No.2 and also pointed out that as per the judgments of this Court, detailed inquiry was not required to be made into the allegations, the concerned officers in the PMO kept the matter pending and then took the shelter of the fact that the CBI had registered the case and the investigation was pending. The officers in the PMO and the Ministry of Law and Justice, were duty bound to apprise respondent No.1 about seriousness of allegations made by the appellant and the judgments of this Court including the directions contained in paragraph 58(l) of the judgment in *****Vineet Narain's* **case that time limit of three months for grant of sanction for prosecution must be strictly adhered to, however, additional time of one month may be allowed where consultation is required with the Attorney General or any other law officer in AG's office, as also the guidelines framed by the CVC so as to enable him to take appropriate decision in the matter. By the very nature of the office held by him, respondent No. 1 is not expected to personally look into the minute details of each and every case placed before him and has to depend on his advisers and other officers. Unfortunately, those who were expected to give proper advice to respondent No. 1 and place full facts and legal**

position before him failed to do so. If respondent No.1 had been apprised of the true factual and legal position regarding the representation made by the appellant, he would have surely taken appropriate decision and would not have allowed the matter to linger for a period of more than one year. [Para 33] [102-B-H; 103-A-C]

1.9. The impugned order is set aside. It is declared that the appellant had the right to file a complaint for prosecuting respondent No.2. However, keeping in view the fact that the Court of Special Judge, CBI has already taken cognizance of the offences allegedly committed by respondent No.2 under the 1988 Act, it is not necessary to give any other direction in the matter. At the same time, it is observed that in future every Competent Authority shall take appropriate action on the representation made by a citizen for sanction of the prosecution of a public servant strictly in accordance with the direction contained in *****Vineet Narain v. Union of India* **and the guidelines framed by the CVC. [Para 34] [103-D-F]**

*****Vineet Narain v. Union of India*** **(1998) 1 SCC 226 – relied on.**

Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy **(1976) 3 SCC 252: 1976 (0) Suppl. SCR 524;** *Ram Kumar v. State of Haryana* **(1987) 1 SCC 476: 1987 (1) SCR 991;** *Krishna Pillai v. T.A. Rajendran* **1990 (Supp) SCC 121;** *State of H.P. v. M. P. Gupta* **(2004) 2 SCC 349: 2003 (6) Suppl. SCR 541– referred to.**

Per Ganguly, J: (Supplementing)

1.1. Today, corruption in the country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of Indian democracy and the Rule of Law. The magnitude of corruption in the public life is incompatible with the

concept of a socialist, secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in the preambular vision. Therefore, the duty of the Court is that any anti-corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it. [Paras 11] [107-D-F]

Sanjiv Kumar v. State of Haryana & Ors. **(2005) 5 SCC 517;** *State of A.P. v. V. Vasudeva Rao* **(2004) 9 SCC 319: 2003 (5) Suppl. SCR 500;** *Shobha Suresh Jumani v. Appellate Tribunal Forfeited Property & Anr.* **(2001) 5 SCC 755: 2001 (3) SCR 525;** *State of M.P. & Ors. v. Ram Singh* **(2000) 5 SCC 88: 2000 (1) SCR 579;** *J. Jayalalitha v. Union of India & Anr.* **(1999) 5 SCC 138: 1999 (3) SCR 653;** *Major S.K. Kale v. State of Maharashtra* **(1977) 2 SCC 394: 1977 (2) SCR 533 – referred to.**

1.2. The right of private citizen to file a complaint against a corrupt public servant must be equated with his right to access the Court in order to set the criminal law in motion against a corrupt public official. This right of access, a Constitutional right should not be burdened with unreasonable fetters. When a private citizen approaches a court of law against a corrupt public servant who is highly placed, what is at stake is not only a vindication of personal grievance of that citizen but also the question of bringing orderliness in society and maintaining equal balance in the rule of law. [Para 17] [109-B-C]

Sheonandan Paswan vs. State of Bihar and Ors. **(1987) 1 SCC 288: 1987 (1) SCR 702 – referred to.**

1.3. Section 19 of the Prevention of Corruption Act, 1988 bars a Court from taking cognizance of cases of corruption against a public servant under Sections 7, 10, 11, 13 and 15 of the Act, unless the Central or the State Government, as the case may be, has accorded sanction, virtually imposes fetters on private citizens and also on prosecutors from approaching Court against corrupt public servants. These protections are not available to other citizens. Public servants are treated as a special class of persons enjoying the said protection so that they can perform their duties without fear and favour and without threats of malicious prosecution. However, the said protection against malicious prosecution which was extended in public interest cannot become a shield to protect corrupt officials. These provisions being exceptions to the equality provision of Article 14 are analogous to provisions of protective discrimination and these protections must be construed very narrowly. These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good governance as opposed to escalation of corruption. Therefore, in every case where an application is made to an appropriate authority for grant of prosecution in connection with an offence under P.C. Act it is the bounden duty of such authority to apply its mind urgently to the situation and decide the issue without being influenced by any extraneous consideration. In doing so, the authority must make a conscious effort to ensure the rule of law and cause of justice is advanced. In considering the question of granting or refusing such sanction, the authority is answerable to law and law alone. Therefore, the requirement to take the decision with a reasonable dispatch is of the essence in such a situation. Delay in granting sanction proposal thwarts a very valid social purpose, namely, the purpose of a speedy trial with the

requirement to bring the culprit to book. Therefore, the right of the sanctioning authority, while either sanctioning or refusing to grant sanction, is coupled with a duty. The sanctioning authority must bear in mind that what is at stake is the public confidence in the maintenance of rule of law which is fundamental in the administration of justice. Delay in granting such sanction has spoilt many valid prosecution and is adversely viewed in public mind that in the name of considering a prayer for sanction, a protection is given to a corrupt public official as a quid pro quo for services rendered by the public official in the past or may be in the future and the sanctioning authority and the corrupt officials were or are partners in the same misdeeds. This may not be factual position in the instant case, but the general demoralizing effect of such a popular perception is profound and pernicious. By causing delay in considering the request for sanction, the sanctioning authority stultifies judicial scrutiny and determination of the allegations against corrupt official and thus, the legitimacy of the judicial institutions is eroded. It, thus, deprives a citizen of his legitimate and fundamental right to get justice by setting the criminal law in motion and thereby frustrates his right to access judicial remedy which is a constitutionally protected right. Under Section 19 of the P.C. Act, no time limit is mentioned. This has virtually armed the sanctioning authority with unbridled power which has often resulted in protecting the guilty and perpetuating criminality and injustice in society. [Para 18] [109-G-H; 110-A-H; 111A-D]

Mahendra Lal Das vs. State of Bihar and Ors. **(2002) 1 SCC 149: 2001 (4) Suppl. SCR 157;** *Santosh De vs. Archna Guha and Ors.* **(1994) Supp.3 SCC 735 – referred to.**

1.4. Article 14 must be construed as a guarantee against uncanalized and arbitrary power. Therefore, the absence of any time limit in granting sanction in Section 19 of the P.C. Act is not in consonance with the

requirement of the due process of law which has been read into the Constitution. [Para 20] [111-H; 112-A]

Maneka Gandhi vs. Union of India and Anr. **(1978) 1 SCC 248: 1978 (2) SCR 621 – referred to.**

1.5 Section 19 of the P.C. Act is constitutionally valid. The power under Section 19 of the P.C. Act must be reasonably exercised. The Parliament and the appropriate authority must consider restructuring Section 19 of the P.C. Act in such a manner as to make it consonant with reason, justice and fair play. [Para 21] [112-B]

Kalicharan Mahapatra vs. State of Orissa **(1998) 6 SCC 411: 1998 (3) SCR 961;** *Lalu Prasad vs. State of Bihar* **2007 (1) SCC 49: 2006 (10) Suppl. SCR 251;** *State of Uttar Pradesh vs. Paras Nath Singh* **(2009) 6 SCC 372: 2009 (8) SCR 85;** *Dilawar Singh vs. Parvinder Singh alias Iqbal Singh and Anr.* **(2005) 12 SCC 709: 2005 (5) Suppl. SCR 83 – referred to.**

R.v. Horseferry Road Magistrates'Court ex p. Bennett **(1994) 1 AC 42 – referred to.**

1.6. The Parliament should consider the Constitutional imperative of Article 14 enshrining the rule of law wherein 'due process of law' has been read into by introducing a time limit in Section 19 of the P.C. Act 1988 for its working in a reasonable manner. The Parliament may, consider the following guidelines:

(a) All proposals for sanction placed before any Sanctioning Authority, empowered to grant sanction for the prosecution of a public servant under Section 19 of the P.C. Act must be decided within a period of three months of the receipt of the proposal by the concerned authority.

(b) Where consultation is required with the Attorney General or the Solicitor General or the Advocate General of the State, as the case may be, and the same is not possible within the three months mentioned in clause (a) above, an extension of one month period may be allowed, but the request for consultation is to be sent in writing within the three months mentioned in (a) above. A copy of the said request would be sent to the prosecuting agency or the private complainant to intimate them about the extension of the time limit.

(c) At the end of the extended period of time limit, if no decision is taken, sanction would be deemed to have been granted to the proposal for prosecution, and the prosecuting agency or the private complainant would proceed to file the charge sheet/ complaint in the court to commence prosecution within 15 days of the expiry of the aforementioned time limit. [Para 22] [112-C-H; 113-A-B]

Case Law Reference:

Singhvi, J and Ganguly, J:

1951 SCR 312	**Referred to.**	**Para 9**
1976 (0) Suppl. SCR 524	**Referred to.**	**Para 9**
1987 (1) SCR 991	**Referred to.**	**Para 9**
1990 (Supp) SCC 121	**Referred to.**	**Para 9**
1994 (6) Suppl. SCR 16	**Referred to.**	**Para 9**
1998 (3) SCR 957	**Referred to.**	**Para 9**
2005 (3) SCR 1	**Referred to.**	**Para 9**
2005 (4) Suppl. SCR 77	**Referred to.**	**Para 9**

2006 (4) Suppl. SCR 269	**Referred to.**	**Para 9**
(1984) 2 SCC 183	**Referred to.**	**Para 15**
1995 (1) SCR 819	**Referred to.**	**Para 16**
2003 (6) Suppl. SCR 541	**Referred to.**	**Para 16**
2006 (10) Suppl. SCR 197	**Referred to.**	**Para 16**
(2007) 1 SCC 45	**Referred to.**	**Para 16**
1984 (2) SCR 914	**Referred to.**	**Para 18**
(1955) 1 SCR 1150	**Referred to.**	**Para 18**
1959 Supp. (2) SCR 201	**Referred to.**	**Para 18**
AIR 1957 M.B. 43	**Referred to.**	**Para 18**
(1951) SCR 312	**Referred to.**	**Para 20**
1996 (1) SCALE (SP) 42	**Referred to.**	**Para 28**
1996 (1) SCR 1053	**Referred to.**	**Para 28**
(1997) 4 SCC 778	**Referred to.**	**Para 28**
(1997) 5 SCALE 254	**Referred to.**	**Para 28**
(1998)1 SCC 226	**Relied on.**	**Para 31, 33, 34**
(1996) Crl. Law Journal 2962	**Referred to.**	**Para30**
1991 Supp. 1 SCC 222	**Referred to.**	**Para 30**
(1995) 6 SC 225	**Referred to.**	**Para 30**

Ganguly, J

1998 (3) SCR 961	**Referred to.**	**Para 3**
2006 (10) Suppl. SCR 251	**Referred to.**	**Para 4**

2009 (8) SCR 85	**Referred to.**	**Para 7**
2005 (5) Suppl. SCR 83	**Referred to.**	**Para 8**
(2005) 5 SCC 517	**Referred to.**	**Para 12**
2003 (5) Suppl. SCR 500	**Referred to.**	**Para 12**
2001 (3) SCR 525	**Referred to.**	**Para 12**
2000 (1) SCR 579	**Referred to.**	**Para 12**
1999 (3) SCR 653	**Referred to.**	**Para 12**
1977 (2) SCR 533	**Referred to.**	**Para 12**
(1994) 1 AC 42	**Referred to.**	**Para 14**
1987 (1) SCR 702	**Referred to.**	**Para 17**
2001 (4) Suppl. SCR 157	**Referred to.**	**Para 19**
(1994) Supp.3 SCC 735	**Referred to.**	**Para 19**
1978 (2) SCR 621	**Referred to.**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1193 of 2012.

From the Judgment & Order dated 18.08.2010 of the High Court of Delhi at New Delhi in W.P. (C) No. 2442 of 2010.

Dr. Subramanian Swamy Petitioner-In-Person.

Goolam E. Vahanvati, AG, Devadatt Kamat, Anoopam N. Prasad, Rohit Sharma for the Respondent.

The Judgment of the Court was delivered by

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

2. Whether a complaint can be filed by a citizen for prosecuting a public servant for an offence under the Prevention of Corruption Act, 1988 (for short, 'the 1988 Act') and whether

the authority competent to sanction prosecution of a public servant for offences under the 1988 Act is required to take an appropriate decision within the time specified in clause I(15) of the directions contained in paragraph 58 of the judgment of this Court in *Vineet Narain v. Union of India* (1998) 1 SCC 226 and the guidelines issued by the Central Government, Department of Personnel and Training and the Central Vigilance Commission (CVC) are the question which require consideration in this appeal.

3. For the last more than three years, the appellant has been vigorously pursuing, in public interest, the cases allegedly involving loss of thousands of crores of rupees to the Public Exchequer due to arbitrary and illegal grant of licences at the behest of Mr. A. Raja (respondent No. 2) who was appointed as Minister for Communication and Information Technology on 16.5.2007 by the President on the advice of Dr. Manmohan Singh (respondent No. 1). After collecting information about the grant of licences, the appellant made detailed representation dated 29.11.2008 to respondent No. 1 to accord sanction for prosecution of respondent No. 2 for offences under the 1988 Act. In his representation, the appellant pointed out that respondent No. 2 had allotted new licences in 2G mobile services on 'first come, first served' basis to novice telecom companies, viz., Swan Telecom and Unitech, which was in clear violation of Clause 8 of the Guidelines for United Access Services Licence issued by the Ministry of Communication and Information Technology vide letter No.10-21/2005-BS.I(Vol.II)/49 dated 14.12.2005 and, thereby, caused loss of over Rs. 50,000 crores to the Government. The appellant gave details of the violation of Clause 8 and pointed out that the two officers, viz., R.J.S. Kushwaha and D. Jha of the Department of Telecom, who had opposed the showing of undue favour to Swan Telecom, were transferred just before the grant of licences and Bharat Sanchar Nigam Limited (BSNL) which had never entered into a roaming agreement with any operator, was forced to enter into such an agreement with Swan Telecom. The

appellant further pointed out that immediately after acquiring 2G spectrum licences, Swan Telecom and Unitech sold their stakes to foreign companies, i.e., Etisalat, a telecom operator from UAE and Telenor of Norway respectively and, thereby, made huge profits at the expense of public revenue. He claimed that by 2G spectrum allocation under respondent No. 2, the Government received only one-sixth of what it would have received if it had opted for an auction. The appellant pointed out how respondent No. 2 ignored the recommendations of the Telecom Regulatory Authority of India (TRAI) and gave totally unwarranted benefits to the two companies and thereby caused loss to the Public Exchequer. Some of the portions of the appellant's representation are extracted below:

> "Clause 8 has been violated as follows: While Anil Dhirubhai Ambani Group (ADAG), the promoters of Reliance Communications (R Com), had more than 10 per cent stake in Swan Telecom, the figures were manipulated and showed as 9.99 per cent holding to beat the said Clause. The documents available disclose that on March 2, 2007, when Swan Telecom applied for United Access Services Licences, it was owned 100 per cent by Reliance Communications and its associates viz. Reliance Telecom, and by Tiger Trustees Limited, Swan Infonet Services Private Limited, and Swan Advisory Services Private Limited (see Annexure I). At one or the other point of time, employees of ADAG (Himanshu Agarwal, Ashish Karyekar, Paresh Rathod) or its associate companies have been acquiring the shares of Swan Telecom itself. But still the ADAG manipulated the holdings in Swan to reduce it to only 9.99 per cent. Ambani has now quietly sold his shares in Swan to Delphi Investments, a Mauritius based company owned by Ahmed O. Alfi, specializing in automobile spare parts. In turn, Swan has sold 45% of its shares to UAE's Emirates Telecom Corporation (Etisalat) for Rs.9000 crores! All this is highly suspicious and not normal business transactions. Swan company got 60% of

> the 22 Telecom licenced areas at a throw away price of Rs.1650 crores, when it was worth Rs.60,000 crores total.
>
> Room has operations in the same circles where the application for Swan Telecom was filed. Therefore, under Clause 8 of the Guidelines, Swan should not have been allotted spectrum by the Telecommunication Ministry. But the company did get it on Minister's direction, which is an undue favour from him (Raja). There was obviously a quid pro quo which only a CBI enquiry can reveal, after an FIR is registered. There is no need for a P/E, because the CVC has already done the preliminary enquiry.
>
> Quite surprisingly, the 2G spectrum licences were priced at 2001 levels to benefit these private players. That was when there were only 4 million cellphone subscribers; now it is 350 million. Hence 2001 price is not applicable today.
>
> Immediately after acquiring 2G spectrum licences both Swan and Unitech sold their stakes to foreign companies at a huge profits. While Swan Telecom sold its stakes to UAE telecom operator Etisalat, Unitech signed a deal with Telenor of Norway for selling its share at huge premiums.
>
> In the process of this 2G spectrum allocation, the government received only one-sixth of what it would have got had it gone through a fresh auction route. The total loss to the exchequer of giving away 2G GSM spectrum in this way – including to the CDMA operators – is over Rs.50,000 crores and is said to be one of the biggest financial scams of all times in the country.
>
> While approving the 2G licences, Minister Raja turned a blind eye to the fact that these two companies do not have any infrastructure to launch their services. Falsely claiming that the Telecom Regulatory Authority of India had approved the first-cum-first served rule, Raja went ahead with the 2G spectrum allocation to two debutants in the

Telecom sector. In fact earlier TRAI had discussed the spectrum allocation issue with existing services providers and suggested to the Telecom Ministry that spectrum allocation be made through a transparent tender and auction process. This is confirmed by what the TRAI Chairman N. Misra told the CII organized conference on November 28, 2008 (Annexure 2). But Raja did not bother to listen to the TRAI either and pursued the process on 'first come, first served' basis, benefiting those who had inside information, causing a loss of Rs.50,000 crores to the Government. His dubious move has been to ensure benefit to others at the cost of the national exchequer."

The request made in the representation, which was relied upon by the learned Attorney General for showing that the appellant had himself asked for an investigation, is also extracted below:

"According to an uncontradicted report in CNN-IBN news channel of November 26, 2008, you are said to be "very upset with A. Raja over the spectrum allocation issue". This confirms that an investigation is necessary, for which I may be given sanction so that the process of law can be initiated.

I, therefore, writ to demand the grant of sanction to prosecute Mr. A. Raja, Minister for Telecom of the Union of India for offences under the Prevention of Corruption Act. The charges in brief are annexed herewith (Annexure 3)."

4. Since the appellant did not receive any response from respondent No.1, he sent letters dated 30.5.2009, 23.10.2009, 31.10.2009, 8.3.2010 and 13.3.2010 and reiterated his request/ demand for grant of sanction to prosecute respondent No.2. In his letter dated 31.10.2009, the appellant referred to the fact that on being directed by the CVC, the Central Bureau of Investigation (CBI) had registered a first information report, and

claimed that *prima facie* case is established against respondent No. 2 for his prosecution under Sections 11 and 13(1)(d) of the 1988 Act. The appellant also claimed that according to various Supreme Court judgments it was not necessary to carry out a detailed inquiry, and he had produced sufficient evidence for grant of sanction to initiate criminal prosecution against respondent No. 2 for the misuse of authority and pecuniary gains from corrupt practices. In his subsequent letters, the appellant again asserted that the nation had suffered loss of nearly Rs.65,000 crores due to arbitrary, unreasonable and mala fide action of respondent No.2. In letter dated 13.3.2010, the appellant referred to the proceedings of the case in which this Court refused to interfere with the order of the Delhi High Court declaring that the decision of respondent No.2 to change the cut off date fixed for consideration of applications made for grant of licences was arbitrary and mala fide.

5. After 1 year and 4-1/2 months of the first letter written by him, Secretary, Department of Personnel and Training, Ministry of Personnel sent letter dated 19.3.2010 to the appellant mentioning therein that the CBI had registered a case on 21.10.2009 against unknown officers of the Department of Telecommunications (DoT), unknown private persons/ companies and others and that the issue of grant of sanction for prosecution would arise only after perusal of the evidence collected by the investigating agency and other material provided to the Competent Authority and that it would be premature to consider sanction for prosecution at that stage.

6. On receipt of the aforesaid communication, the appellant filed Civil Writ Petition No. 2442/2010 in the Delhi High Court and prayed for issue of a mandamus to respondent No.1 to pass an order for grant of sanction for prosecution of respondent No. 2. The Division Bench of the Delhi High Court referred to the submission of the learned Solicitor General that when respondent No. 1 has directed investigation by the CBI and the investigation is in progress, it is not permissible to take a decision on the application of the appellant either to grant or

refuse the sanction because that may affect the investigation, and dismissed the writ petition by recording the following observations:

> "The question that emanates for consideration is whether, at this stage, when the investigation by the CBI is in progress and this Court had earlier declined to monitor the same by order dated 25th May, 2010, which has been pressed into service by the learned Solicitor General of India, it would be appropriate to direct the respondent no. 1 to take a decision as regards the application submitted by the petitioner seeking sanction to prosecute.
>
> In our considered opinion, when the matter is being investigated by the CBI, and the investigation is in progress, it would not be in fitness of things to issue a mandamus to the first respondent to take a decision on the application of the petitioner."

7. The special leave petition filed by the appellant, out of which this appeal arises, was initially taken up for consideration along with SLP(C) No. 24873/2010 filed by the Center for Public Interest Litigation against order dated 25.5.2010 passed by the Division Bench of the High Court in Writ Petition (Civil) No. 3522/2010 to which reference had been made in the impugned order. During the course of hearing of the special leave petition filed by the appellant, the learned Solicitor General, who had appeared on behalf of respondent No. 1, made a statement that he has got the record and is prepared to place the same before the Court. However, keeping in view the fact that the record sought to be produced by the learned Solicitor General may not be readily available to the appellant, the Court passed order dated 18.11.2010 requiring the filing of an affidavit on behalf of respondent No. 1. Thereafter, Shri V. Vidyavati, Director in the PMO filed affidavit dated 20.11.2010, which reveals the following facts:

"(i) On 1.12.2008, the Prime Minister perused the letter

and noted "Please examine and let me know the facts of this case". This was marked to the Principal Secretary to the Prime Minister who in turn marked it to the Secretary. The Secretary marked it to me as Director in the PMO. I prepared a note dated 5.12.2008 factually summarizing the allegations and seeking approval to obtain the factual position from the sectoral side (in the PMO dealing with Telecommunications).

(ii) On 11.12.2008, a copy of appellant's letter dated 29.11.2008 was sent to the Secretary, Department of Telecommunication for submitting a factual report. The Department of Telecommunication sent reply dated 13.02.2009 incorporating his comments.

(iii) In the meanwhile, letters dated 10.11.2008 and 22.11.2008 were received from Shri Gurudas Gupta and Shri Suravaran Sudhakar Reddy respectively (copies of these letters have not been produced before the Court). The same were forwarded to the Department of Telecommunication on 25.03.2009 for sending an appropriate reply to the appellant.

(iv) On 01.06.2009, letter dated 30.05.2009 received from the appellant was placed before respondent No.1, who recorded the following endorsement "please examine and discuss".

(v) On 19.06.2009, the Director of the concerned Sector in the PMO recorded that the Minister of Telecommunications and Information Technology has sent D.O. letter dated 18.06.2009 to the appellant. When letter dated 23.10.2009 of the appellant was placed before respondent No.1, he recorded an endorsement on 27.10.2009 "please discuss".

(vi) In response to letter dated 31.10.2009 of the appellant, respondent No.1 made an endorsement "please examine".

(vii) On 18.11.2009, respondent No.1 stated that Ministry of Law and Justice should examine and advice. The advice of Ministry of Law and Justice was received on 8.2.2010. Para 7 thereof was as follows:

> "From the perusal of letter dated 23.10.2009 and 31.10.2009, it is noticed that Shri Swamy wants to rely upon the action and investigation of the CBI to collaborate and strengthen the said allegation leveled by him against Shri A. Raja, Minister for Communication and Information Technology. It is specifically mentioned in Para 2 of the letter dated 31.10.2009 of Shri Swamy that the FIR was registered by the CBI and "the substance of the allegation made by me in the above cited letters to you are already under investigation". If it is so, then it may be stated that decision to accord of sanction of prosecution may be determined only after the perusal of the evidence (oral or documentary) collected by the investigation agency, i.e., CBI and other materials to be provided to the competent authority."

(viii) On 05.03.2010, the deponent prepared a note that an appropriate reply be sent to the appellant in the light of the advice given by the Law Department and final reply was sent to the appellant after respondent No.1 had approved note dated 17.03.2010."

8. The appellant filed rejoinder affidavit on 22.11.2010 along with a copy of letter dated 18.6.2009 written to him by respondent No. 2 in the context of representation dated 29.11.2008 submitted by him to respondent No.1.

9. Although, respondent No.2 resigned from the Council of Ministers on 14.11.2010, the appellant submitted that the issues relating to his right to file a complaint for prosecution of respondent No.2 and grant of sanction within the time specified

in the judgment in Vineet Narain's case should be decided.

10. During the course of hearing, the learned Attorney General filed written submissions. After the hearing concluded, the learned Attorney General filed supplementary written submissions along with a compilation of 126 cases in which the sanction for prosecution is awaited for periods ranging from more than one year to few months

11. Final order in this case was deferred because it was felt that the directions given by this Court in Vineet Narain's case may require further elaboration in the light of the order passed in Civil Appeal No. 10660/2010 (arising out of SLP(C) No. 24873/2010) and the fact that decision on the question of grant of sanction under the 1988 Act and other statutes is pending for a sufficiently long time in 126 cases. However, as the investigation with regard to some of the facets of what has come to be termed as 2G case is yet to be completed, we have considered it appropriate to pass final order in the matter.

12. Appellant Dr. Subramanian Swamy argued that the embargo contained in Section 19(1) of the 1988 Act operates only against the taking of cognizance by the Court in respect of offences punishable under Sections 7, 10, 11, 13 and 15 committed by a public servant, but there is no bar to the filing of a private complaint for prosecution of the concerned public servant and grant of sanction by the Competent Authority, and that respondent No. 1 was duty bound to take appropriate decision on his representation within the time specified in clause I(15) of the directions contained in paragraph 58 of Vineet Narain's case, more so because he had placed sufficient evidence to show that respondent No.2 had committed offences under the 1988 Act.

13. The learned Attorney General argued that the question of grant of sanction for prosecution of a public servant charged with any of the offences enumerated in Section 19(1) arises only at the stage when the Court decides to take cognizance and

any request made prior to that is premature. He submitted that the embargo contained in Section 19(1) of the Act is applicable to the Court which is competent to take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant and there is no provision for grant of sanction at a stage before the competent Court applies its mind to the issue of taking cognizance. Learned Attorney General relied upon the judgment of the Calcutta High Court in *Superintendent and Remembrancer of Legal Affairs v. Abani Kumar Banerjee* AIR 1950 Cal. 437 as also the judgments of this Court in *R.R. Chari v. State of Uttar Pradesh* 1951 SCR 312, *Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy* (1976) 3 SCC 252, *Ram Kumar v. State of Haryana* (1987) 1 SCC 476, *Krishna Pillai v. T.A. Rajendran,* 1990 (Supp) SCC 121, *State of West Bengal v. Mohd. Khalid* (1995) 1 SCC 684, *State through C.B.I. v. Raj Kumar Jain* (1998) 6 SCC 551, *K. Kalimuthu v. State* (2005) 4 SCC 512, *Centre for Public Interest Litigation v. Union of India* (2005) 8 SCC 202 and *State of Karnataka v. Pastor P. Raju* (2006) 6 SCC 728 and argued that letter dated 29.11.2008 sent by the appellant for grant of sanction to prosecute respondent No.2 for the alleged offences under the 1988 Act was wholly misconceived and respondent No.1 did not commit any illegality or constitutional impropriety by not entertaining his prayer, more so because the appellant had himself asked for an investigation into the alleged illegal grant of licences at the behest of respondent No.2. Learned Attorney General further argued that the appellant does not have the *locus standi* to file a complaint for prosecuting respondent No.2 because the CBI is already investigating the allegations of irregularity committed in the grant of licences for 2G spectrum and the loss, if any, suffered by the Public Exchequer.

14. We have considered the respective submissions. Section 19 of the 1988 Act reads as under:

"19. Previous sanction necessary for prosecution. – (1) No

court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, –

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a

failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation. – For the purposes of this section,

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

15. The question whether sanction for prosecution of respondent No.2 for the offences allegedly committed by him under the 1988 Act is required even after he resigned from the Council of Ministers, though he continues to be a Member of Parliament, need not detain us because the same has already been answered by the Constitution Bench in *R. S. Nayak v. A. R. Antulay* (1984) 2 SCC 183 the relevant portions of which are extracted below:

"Now if the public servant holds two offices and he is accused of having abused one and from which he is removed but continues to hold the other which is neither alleged to have been used (*sic* misused) nor abused, is a sanction of the authority competent to remove him from the office which is neither alleged or shown to have been abused or misused necessary? The submission is that if the harassment of the public servant by a frivolous prosecution and criminal waste of his time in law courts keeping him away from discharging public duty, are the objects underlying Section 6, the same would be defeated if it is held that the sanction of the latter authority is not necessary. The submission does not commend to us. We fail to see how the competent authority entitled to remove the public servant from an office which is neither alleged to have been used (*sic* misused) or abused would be able to decide whether the prosecution is frivolous or tendentious. An illustration was posed to the learned counsel that a minister who is indisputably a public servant greased his palms by abusing his office as minister, and then ceased to hold the office before the court was called upon to take cognizance of the offence against him and therefore, sanction as contemplated by Section 6 would not be necessary; but if after committing the offence and before the date of taking of cognizance of the offence, he was elected as a Municipal President in which capacity he was a public servant under the relevant municipal law, and was holding that office on the date on which court proceeded to take cognizance of the offence committed by him as a minister, would a sanction be necessary and that too of that authority competent to remove him from the office of the Municipal President. The answer was in affirmative. But the very illustration would show that such cannot be the law. Such an interpretation of Section 6

would render it as a shield to an unscrupulous public servant. Someone interested in protecting may shift him from one office of public servant to another and thereby defeat the process of law. One can legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant, while abusing one office which he may have ceased to hold. Such an interpretation is contrary to all canons of construction and leads to an absurd end product which of necessity must be avoided. Legislation must at all costs be interpreted in such a way that it would not operate as a rogue's charter.

We would however, like to make it abundantly clear that if the two decisions purport to lay down that even if a public servant has ceased to hold that office as public servant which he is alleged to have abused or misused for corrupt motives, but on the date of taking cognizance of an offence alleged to have been committed by him as a public servant which he ceased to be and holds an entirely different public office which he is neither alleged to have misused or abused for corrupt motives, yet the sanction of authority competent to remove him from such latter office would be necessary before taking cognizance of the offence alleged to have been committed by the public servant while holding an office which he is alleged to have abused or misused and which he has ceased to hold, the decision in our opinion, do not lay down the correct law and cannot be accepted as making a correct interpretation of Section

6."

16. The same view has been taken in *Habibullsa Khan v. State of Orissa* (1995) 2 SCC 437 (para 12), *State of H.P. v. M. P. Gupta* (2004) 2 SCC 349 (paras 17 and 19), *Parkash Singh Badal v. State of Punjab* (2007) 1 SCC 1 and *Balakrishnan Ravi Menon v. Union of India* (2007) 1 SCC 45. In *Balakrishnan Ravi Menon's* case, it was argued that the observations made in para 25 of the judgment in Antulay's case are obiter. While negating this submission, the Court observed :

> "Hence, it is difficult to accept the contention raised by Mr. U.R. Lalit, the learned Senior Counsel for the petitioner that the aforesaid finding given by this Court in Antulay case is obiter.
>
> Further, under Section 19 of the PC Act, sanction is to be given by the Government or the authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed. The question of obtaining sanction would arise in a case where the offence has been committed by a public servant who is holding the office and by misusing or abusing the powers of the office, he has committed the offence. The word "office" repeatedly used in Section 19 would mean the "office" which the public servant misuses or abuses by corrupt motive for which he is to be prosecuted. Sub-sections (1) and (2) of Section 19 are as under:
>
> > "19. Previous sanction necessary for prosecution.—(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,—
> >
> > (a) in the case of a person who is employed in

connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed."

Clauses (a) and (b) of sub-section (1) specifically provide that in case of a person who is employed and is not removable from his office by the Central Government or the State Government, as the case may be, sanction to prosecute is required to be obtained either from the Central Government or the State Government. The emphasis is on the words "who is employed" in connection with the affairs of the Union or the State Government. If he is not employed then Section 19 nowhere provides for obtaining such sanction. Further, under sub-section (2), the question of obtaining sanction is relatable to the time of holding the office when the offence was alleged to have been committed. In case where the person is not holding the said office as he

might have retired, superannuated, be discharged or dismissed then the question of removing would not arise. Admittedly, when the alleged offence was committed, the petitioner was appointed by the Central Government. He demitted his office after completion of five years' tenure. Therefore, at the relevant time when the charge-sheet was filed, the petitioner was not holding the office of the Chairman of Goa Shipyard Ltd. Hence, there is no question of obtaining any previous sanction of the Central Government."

(emphasis supplied)

17. The same view was reiterated in Parkash Singh Badal's case and the argument that even though some of the accused persons had ceased to be Ministers, they continued to be the Members of the Legislative Assembly and one of them was a Member of Parliament and as such cognizance could not be taken against them without prior sanction, was rejected.

18. The next question which requires consideration is whether the appellant has the *locus standi* to file a complaint for prosecution of respondent No.2 for the offences allegedly committed by him under the 1988 Act. There is no provision either in the 1988 Act or the Code of Criminal Procedure, 1973 (CrPC) which bars a citizen from filing a complaint for prosecution of a public servant who is alleged to have committed an offence. Therefore, the argument of the learned Attorney General that the appellant cannot file a complaint for prosecuting respondent No.2 merits rejection. A similar argument was negatived by the Constitution Bench in *A.R. Antulay v. Ramdas Sriniwas Nayak* (1984) 2 SCC 500. The facts of that case show that on a private complaint filed by the respondent, the Special Judge took cognizance of the offences allegedly committed by the appellant. The latter objected to the jurisdiction of the Special Judge on two counts, including the one that the Court set up under Section 6 of the Criminal Law

Amendment Act, 1952 (for short, 'the 1952 Act') was not competent to take cognizance of any of the offences enumerated in Section 6(1)(a) and (b) upon a private complaint. His objections were rejected by the Special Judge. The revision filed by the appellant was heard by the Division Bench of the High Court which ruled that a Special Judge is competent and is entitled to take cognizance of offences under Section 6(1)(a) and (b) on a private complaint of the facts constituting the offence. The High Court was of the opinion that a prior investigation under Section 5A of the Prevention of Corruption Act, 1947 (for short, 'the 1947 Act') by a police officer of the designated rank is not *sine qua non* for taking cognizance of an offence under Section 8(1) of the 1952 Act. Before the Supreme Court, the argument against the *locus standi* of the respondent was reiterated and it was submitted that Section 5A of the 1947 Act is mandatory and an investigation by the designated officer is a condition precedent to the taking of cognizance by the Special Judge of an offence or offences committed by a public servant. While dealing with the issue relating to maintainability of a private complaint, the Constitution Bench observed:

> "It is a well recognised principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. The scheme of the Code of Criminal Procedure envisages two parallel and independent agencies for taking criminal offences to court. Even for the most serious offence of murder, it was not disputed that a private complaint can, not only be filed but can be entertained and proceeded with according to law. *Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statute creating an offence provides for the eligibility of the complainant, by necessary implication the general principle gets excluded by such statutory provision.* Numerous statutory provisions, can be referred to in

support of this legal position such as (i) Section 187-A of Sea Customs Act, 1878 (ii) Section 97 of Gold Control Act, 1968 (iii) Section 6 of Import and Export Control Act, 1947 (iv) Section 271 and Section 279 of the Income Tax Act, 1961 (v) Section 61 of the Foreign Exchange Regulation Act, 1973, (vi) Section 621 of the Companies Act, 1956 and (vii) Section 77 of the Electricity Supply Act. This list is only illustrative and not exhaustive. *While Section 190 of the Code of Criminal Procedure permits anyone to approach the Magistrate with a complaint, it does not prescribe any qualification the complainant is required to fulfil to be eligible to file a complaint.* But where an eligibility criterion for a complainant is contemplated specific provisions have been made such as to be found in Sections 195 to 199 of the CrPC. These specific provisions clearly indicate that in the absence of any such statutory provision, a locus standi of a complainant is a concept foreign to criminal jurisprudence. *In other words, the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicated by a statutory provision. This general principle of nearly universal application is founded on a policy that an offence i.e. an act or omission made punishable by any law for the time being in force is not merely an offence committed relation to the person who suffers harm but is also an offence against society. The society for its orderly and peaceful development is interested in the punishment of the offender. Therefore, prosecution for serious offences is undertaken in the name of the State representing the people which would exclude any element of private vendetta or vengeance. If such is the public policy underlying penal statutes, who brings an act or omission made punishable by law to the notice of the authority competent to deal with it, is immaterial and irrelevant unless the statute indicates to the contrary. Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted*

for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait-jacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception. To hold that such an exception exists that a private complaint for offences of corruption committed by public servant is not maintainable, the court would require an unambiguous statutory provision and a tangled web of argument for drawing a far fetched implication, cannot be a substitute for an express statutory provision."

(emphasis supplied)

The Constitution Bench then considered whether the Special Judge can take cognizance only on the basis of a police report and answered the same in negative in the following words:

"In the matter of initiation of proceeding before a Special Judge under Section 8(1), the Legislature while conferring power to take cognizance had three opportunities to unambiguously state its mind whether the cognizance can be taken on a private complaint or not. The first one was an opportunity to provide in Section 8(1) itself by merely stating that the Special Judge may take cognizance of an offence on a police report submitted to it by an investigating officer conducting investigation as contemplated by Section 5-A. While providing for investigation by designated police officers of superior rank, the Legislature did not fetter the power of Special Judge to take cognizance in a manner otherwise than on police report. The second opportunity was when by Section 8(3) a status of a deemed public prosecutor was conferred on a private complainant if he chooses to conduct the prosecution. The Legislature being aware of a provision like the one contained in Section 225 of the CrPC, could have as well provided that in every trial before a Special Judge the prosecution shall be conducted by a Public

Prosecutor, though that itself would not have been decisive of the matter. And the third opportunity was when the Legislature while prescribing the procedure prescribed for warrant cases to be followed by Special Judge did not exclude by a specific provision that the only procedure which the Special Judge can follow is the one prescribed for trial of warrant cases on a police report. *The disinclination of the Legislature to so provide points to the contrary and no canon of construction permits the court to go in search of a hidden or implied limitation on the power of the Special Judge to take cognizance unfettered by such requirement of its being done on a police report alone.* In our opinion, it is no answer to this fairly well-established legal position that for the last 32 years no case has come to the notice of the court in which cognizance was taken by a Special Judge on a private complaint for offences punishable under the 1947 Act."

(emphasis supplied)

The Court then referred to Section 5A of the 1947 Act, the provisions of the 1952 Act, the judgments in *H.N. Rishbud and Inder Singh v. State of Delhi* (1955) 1 SCR 1150, *State of M.P. v. Mubarak Ali* 1959 Supp. (2) SCR 201, *Union of India v. Mahesh Chandra* AIR 1957 M.B. 43 and held:

"Having carefully examined these judgments in the light of the submissions made, the only conclusion that unquestionably emerges is that Section 5-A is a safeguard against investigation of offences committed by public servants, by petty or lower rank police officer. It has nothing to do directly or indirectly with the mode and method of taking cognizance of offences by the Court of Special Judge. *It also follows as a necessary corollary that provision of Section 5-A is not a condition precedent to initiation of proceedings before the Special Judge who acquires power under Section 8(1) to take cognizance of offences enumerated in Section 6(1)(a) and (b), with*

this limitation alone that it shall not be upon commitment to him by the Magistrate.

Once the contention on behalf of the appellant that investigation under Section 5-A is a condition precedent to the initiation of proceedings before a Special Judge and therefore cognizance of an offence cannot be taken except upon a police report, does not commend to us and has no foundation in law, it is unnecessary to refer to the long line of decisions commencing from Taylor v. Taylor; Nazir Ahmad v. King-Emperor and ending with Chettiam Veettil Ammad v. Taluk Land Board, laying down hitherto uncontroverted legal principle that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

Once Section 5-A is out of the way in the matter of taking cognizance of offences committed by public servants by a Special Judge, the power of the Special Judge to take cognizance of such offences conferred by Section 8(1) with only one limitation, in any one of the known methods of taking cognizance of offences by courts of original jurisdiction remains undented. One such statutorily recognised well-known method of taking cognizance of offences by a court competent to take cognizance is upon receiving a complaint of facts which constitutes the offence. And Section 8(1) says that the Special Judge has the power to take cognizance of offences enumerated in Section 6(1)(a) and (b) and the only mode of taking cognizance excluded by the provision is upon commitment. It therefore, follows that the Special Judge can take cognizance of offences committed by public servants upon receiving a complaint of facts constituting such offences.

It was, however, submitted that even if it be held that the Special Judge is entitled to entertain a private complaint,

no further steps can be taken by him without directing an investigation under Section 5-A so that the safeguard of Section 5-A is not whittled down. This is the selfsame argument under a different apparel. Accepting such a submission would tantamount to saying that on receipt of the complaint the Special Judge must direct an investigation under Section 5-A, There is no warrant for such an approach. Astounding as it appeared to us, in all solemnity it was submitted that investigation of an offence by a superior police officer affords a more solid safeguard compared to a court. Myopic as this is, it would topsy turvy the fundamental belief that to a person accused of an offence there is no better safeguard than a court. And this is constitutionally epitomised in Article 22 that upon arrest by police, the arrested person must be produced before the nearest Magistrate within twenty-four hours of the arrest. Further, numerous provisions of the Code of Criminal Procedure such as Section 161, Section 164, and Section 25 of the Indian Evidence Act would show the Legislature's hesitation in placing confidence on police officers away from court's gaze. And the very fact that power is conferred on a Presidency Magistrate or Magistrate of the first class to permit police officers of lower rank to investigate these offences would speak for the mind of the Legislature that the court is a more reliable safeguard than even superior police officers."

(emphasis supplied)

19. In view of the aforesaid judgment of the Constitution Bench, it must be held that the appellant has the right to file a complaint for prosecution of respondent No.2 in respect of the offences allegedly committed by him under the 1988 Act.

20. The argument of the learned Attorney General that the question of granting sanction for prosecution of a public servant charged with an offence under the 1988 Act arises only at the stage of taking cognizance and not before that is neither

supported by the plain language of the section nor the judicial precedents relied upon by him. Though, the term 'cognizance' has not been defined either in the 1988 Act or the CrPC, the same has acquired a definite meaning and connotation from various judicial precedents. In legal parlance cognizance is "taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially". In *R. R. Chari v. State of U.P.* (1951) SCR 312, the three Judge Bench approved the following observations made by the Calcutta High Court in *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abni Kumar Banerjee* (supra):

> "What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter - proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

21. In Mohd. Khalid's case, the Court referred to Section 190 of the CrPC and observed :

> "In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence

> or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons."

22. In *Pastor P. Raju's* case, this Court referred to the provisions of Chapter XIV and Sections 190 and 196 (1-A) of the CrPC and observed :

> "There is no bar against registration of a criminal case or investigation by the police agency or submission of a report by the police on completion of investigation, as contemplated by Section 173 CrPC. If a criminal case is registered, investigation of the offence is done and the police submits a report as a result of such investigation before a Magistrate without the previous sanction of the Central Government or of the State Government or of the District Magistrate, there will be no violation of Section 196(1-A) CrPC and no illegality of any kind would be committed."

The Court then referred to some of the precedents including the judgment in Mohd. Khalid's case and observed :

> **"**It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

23. In Kalimuthu's case, the only question considered by this Court was whether in the absence of requisite sanction under Section 197 CrPC, the Special Judge for CBI cases, Chennai did not have the jurisdiction to take cognizance of the alleged offences. The High Court had taken the view that Section 197 was not applicable to the appellant's case. Affirming the view taken by the High Court, this Court observed :

> "The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage. Further, in cases where offences under the Act are concerned, the effect of Section 197, dealing with the question of prejudice has also to be noted."

24. In Raj Kumar Jain's case, this Court considered the question whether the CBI was required to obtain sanction from the prosecuting authority before approaching the Court for accepting the report under Section 173(2) of the CrPC. This question was considered in the backdrop of the fact that the CBI, which had investigated the case registered against the respondent under Section 5(2) read with Section 5(1)(e) of the 1947 Act found that the allegation made against the respondent could not be substantiated. The Special Judge declined to accept the report submitted under Section 173(2) CrPC by observing that the CBI was required to place materials collected during investigation before the sanctioning authority and it was for the concerned authority to grant or refuse sanction. The Special Judge opined that only after the decision of the sanctioning authority, the CBI could submit the report under Section 173(2). The High Court dismissed the petition filed by the CBI and confirmed the order of the Special Judge. This Court referred to Section 6(1) of the 1947 Act and observed:

> "From a plain reading of the above section it is evidently clear that a court cannot take cognizance of the offences mentioned therein without sanction of the appropriate authority. In enacting the above section, the legislature thought of providing a reasonable protection to public servants in the discharge of their official functions so that they may perform their duties and obligations undeterred by vexatious and unnecessary prosecutions. Viewed in that context, the CBI was under no obligation to place the materials collected during investigation before the sanctioning authority, when they found that no case was made out against the respondent. To put it differently, if the CBI had found on investigation that a prima facie case was made out against the respondent to place him on trial and accordingly prepared a charge-sheet (challan) against him, then only the question of obtaining sanction of the authority under Section 6(1) of the Act would have arisen for without that the Court would not be competent to take cognizance of the charge-sheet. It must, therefore, be said that both the Special Judge and the High Court were patently wrong in observing that the CBI was required to obtain sanction from the prosecuting authority before approaching the Court for accepting the report under Section 173(2) CrPC."

25. In our view, the decisions relied upon by the learned Attorney General do not have any bearing on the moot question whether respondent No.1, being the Competent Authority to sanction prosecution of respondent No.2, was required to take appropriate decision in the light of the direction contained in *Vineet Narain's* case.

26. Before proceeding further, we would like to add that at the time of taking cognizance of the offence, the Court is required to consider the averments made in the complaint or the charge sheet filed under Section 173. It is not open for the Court to analyse the evidence produced at that stage and come to the conclusion that no *prima facie* case is made out for

proceeding further in the matter. However, before issuing the process, it that it is open to the Court to record the evidence and on consideration of the averments made in the complaint and the evidence thus adduced, find out whether an offence has been made out. On finding that such an offence has been made out the Court may direct the issue of process to the respondent and take further steps in the matter. If it is a charge-sheet filed under Section 173 CrPC, the facts stated by the prosecution in the charge-sheet, on the basis of the evidence collected during investigation, would disclose the offence for which cognizance would be taken by the Court. Thus, it is not the province of the Court at that stage to embark upon and sift the evidence to come to the conclusion whether or not an offence has been made out.

27. We may also observe that grant or refusal of sanction is not a quasi judicial function and the person for whose prosecution the sanction is sought is not required to be heard by the Competent Authority before it takes a decision in the matter. What is required to be seen by the Competent Authority is whether the facts placed before it which, in a given case, may include the material collected by the complainant or the investigating agency *prima facie* disclose commission of an offence by a public servant. If the Competent Authority is satisfied that the material placed before it is sufficient for prosecution of the public servant, then it is required to grant sanction. If the satisfaction of the Competent Authority is otherwise, then it can refuse sanction. In either case, the decision taken on the complaint made by a citizen is required to be communicated to him and if he feels aggrieved by such decision, then he can avail appropriate legal remedy.

28. In Vineet Narain's case, the Court entertained the writ petitions filed in public interest for ensuring investigation into what came to be known as 'Hawala case'. The writ petition remained pending for almost four years. During that period, several interim orders were passed which are reported as *Vineet Narain v. Union of India* 1996 (1) SCALE (SP) 42,

Vineet Narain v. Union of India (1996) 2 SCC 199, *Vineet Narain v. Union of India* (1997) 4 SCC 778 and *Vineet Narain v. Union of India* (1997) 5 SCALE 254. The final order was passed in *Vineet Narain v. Union of India* (1998) 1 SCC 226. In (1996) 2 SCC 199, the Court referred to the allegations made in the writ petition that Government agencies like the CBI and the revenue authorities have failed to perform their duties and legal obligations inasmuch as they did not investigate into the matters arising out of seizure of the so-called "Jain Diaries" in certain raids conducted by the CBI. The Court took note of the allegation that the arrest of some terrorists led to the discovery of financial support to them by clandestine and illegal means and a nexus between several important politicians, bureaucrats and criminals, who were recipients of money from unlawful sources, and proceeded to observe:

> "The facts and circumstances of the present case do indicate that it is of utmost public importance that this matter is examined thoroughly by this Court to ensure that all government agencies, entrusted with the duty to discharge their functions and obligations in accordance with law, do so, bearing in mind constantly the concept of equality enshrined in the Constitution and the basic tenet of rule of law: "Be you ever so high, the law is above you." Investigation into every accusation made against each and every person on a reasonable basis, irrespective of the position and status of that person, must be conducted and completed expeditiously. This is imperative to retain public confidence in the impartial working of the government agencies."

29. After examining various facets of the matter in detail, the three Judge Bench in its final order reported in (1998) 1 SCC 226 observed :

> "These principles of public life are of general application in every democracy and one is expected to bear them in mind while scrutinising the conduct of every holder of a

public office. It is trite that the holders of public offices are entrusted with certain powers to be exercised in public interest alone and, therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to a breach of trust and must be severely dealt with instead of being pushed under the carpet. If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law vindicated. It is the duty of the judiciary to enforce the rule of law and, therefore, to guard against erosion of the rule of law.

The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. It also has adverse effect on foreign investment and funding from the International Monetary Fund and the World Bank who have warned that future aid to underdeveloped countries may be subject to the requisite steps being taken to eradicate corruption, which prevents international aid from reaching those for whom it is meant. Increasing corruption has led to investigative journalism which is of value to a free society. The need to highlight corruption in public life through the medium of public interest litigation invoking judicial review may be frequent in India but is not unknown in other countries: R. v. Secy. of State for Foreign and Commonwealth Affairs."

In paragraph 58 of the judgment, the Court gave several directions in relation to the CBI, the CVC and the Enforcement Directorate. In para 58 (I)(15), the Court gave the following direction:

"Time-limit of three months for grant of sanction for prosecution must be strictly adhered to. However, additional time of one month may be allowed where

consultation is required with the Attorney General (AG) or any other law officer in the AG's office."

30. The CVC, after taking note of the judgment of the Punjab and Haryana High Court in *Jagjit Singh v. State of Punjab* (1996) Crl. Law Journal 2962, *State of Bihar v. P. P. Sharma* 1991 Supp. 1 SCC 222, *Superintendent of Police (CBI) v. Deepak Chowdhary,* (1995) 6 SC 225, framed guidelines which were circulated vide office order No.31/5/05 dated 12.5.2005. The relevant clauses of the guidelines are extracted below:

"2(i) Grant of sanction is an administrative act. The purpose is to protect the public servant from harassment by frivolous or vexatious prosecution and not to shield the corrupt. The question of giving opportunity to the public servant at that stage does not arise. The sanctioning authority has only to see whether the facts would prima-facie constitutes the offence.

(ii) The competent authority cannot embark upon an inquiry to judge the truth of the allegations on the basis of representation which may be filed by the accused person before the Sanctioning Authority, by asking the I.O. to offer his comments or to further investigate the matter in the light of representation made by the accused person or by otherwise holding a parallel investigation/enquiry by calling for the record/report of his department.

(vii) However, if in any case, the Sanctioning Authority after consideration of the entire material placed before it, entertains any doubt on any point the competent authority may specify the doubt with sufficient particulars and may request the Authority who has sought sanction to clear the doubt. But that would be only to clear the doubt in order that the authority may apply its mind proper, and not for the purpose of considering the representations of the accused which may be filed while the matter is pending sanction.

(viii) If the Sanctioning Authority seeks the comments of the IO while the matter is pending before it for sanction, it will almost be impossible for the Sanctioning Authority to adhere to the time limit allowed by the Supreme Court in Vineet Narain's case."

31. The aforementioned guidelines are in conformity with the law laid down by this Court that while considering the issue regarding grant or refusal of sanction, the only thing which the Competent Authority is required to see is whether the material placed by the complainant or the investigating agency *prima facie* discloses commission of an offence. The Competent Authority cannot undertake a detailed inquiry to decide whether or not the allegations made against the public servant are true.

32. In the light of the above discussion, we shall now consider whether the High Court was justified in refusing to entertain the writ petition filed by the appellant. In this context, it is apposite to observe that the High Court had proceeded under a wholly erroneous assumption that respondent No.1 had directed investigation by the CBI into the allegations of grave irregularities in the grant of licences. As a matter of fact, on receipt of representation dated 4.5.2009 that the grant of licences by respondent No.2 had resulted in huge loss to the Public Exchequer, the CVC got conducted an inquiry under Section 8(d) of the Central Vigilance Commission Act, 2003 and forwarded a copy of the report to the Director, CBI for making an investigation into the matter to establish the criminal conspiracy in the allocation of 2G spectrum under the UASL policy of the DoT and to bring to book all the wrongdoers. Thereupon, the CBI registered FIR No.RC-DI-2009-A-0045 dated 21.10.2009 against unknown officials of the DoT, unknown private persons/companies and others for offences under Section 120-B IPC read with Sections 13(2) and 13(1)(d) of the 1988 Act. For the next about one year, the matter remained dormant and the CBI took steps for vigorous investigation only when this Court intervened in the matter. The

material placed on record does not show that the CBI had registered a case or started investigation at the instance of respondent No.1.

33. On his part, the appellant had submitted representation to respondent No. 1 almost one year prior to the registration of the first information report by the CBI and highlighted the grave irregularities committed in the grant of licences resulting in the loss of thousands of crores of rupees to the Public Exchequer. He continuously pursued the matter by sending letters to respondent No.1 at regular intervals. The affidavit filed by Shri V. Vidyawati, Director in the PMO shows that the matter was placed before respondent No.1 on 1.12.2008, who directed the concerned officer to examine and apprise him with the facts of the case. Surprisingly, instead of complying with the direction given by respondent No.1 the concerned officer sent the appellant's representation to the DoT which was headed by none other than respondent No.2 against whom the appellant had made serious allegations of irregularities in the grant of licences. It was natural for respondent No.2 to have seized this opportunity, and he promptly sent letter dated 18.6.2009 to the appellant justifying the grant of licences. The concerned officer in the PMO then referred the matter to the Ministry of Law and Justice for advice. It is not possible to appreciate that even though the appellant repeatedly wrote letters to respondent No.1 highlighting the seriousness of the allegations made in his first representation and the fact that he had already supplied the facts and documents which could be made basis for grant of sanction to prosecute respondent No.2 and also pointed out that as per the judgments of this Court, detailed inquiry was not required to be made into the allegations, the concerned officers in the PMO kept the matter pending and then took the shelter of the fact that the CBI had registered the case and the investigation was pending. In our view, the officers in the PMO and the Ministry of Law and Justice, were duty bound to apprise respondent No.1 about seriousness of allegations made by the appellant and the judgments of this Court including the directions contained in

paragraph 58(I) of the judgment in Vineet Narain's case as also the guidelines framed by the CVC so as to enable him to take appropriate decision in the matter. By the very nature of the office held by him, respondent No. 1 is not expected to personally look into the minute details of each and every case placed before him and has to depend on his advisers and other officers. Unfortunately, those who were expected to give proper advice to respondent No. 1 and place full facts and legal position before him failed to do so. We have no doubt that if respondent No.1 had been apprised of the true factual and legal position regarding the representation made by the appellant, he would have surely taken appropriate decision and would not have allowed the matter to linger for a period of more than one year.

34. In the result, the appeal is allowed. The impugned order is set aside. It is declared that the appellant had the right to file a complaint for prosecuting respondent No.2. However, keeping in view the fact that the Court of Special Judge, CBI has already taken cognizance of the offences allegedly committed by respondent No.2 under the 1988 Act, we do not consider it necessary to give any other direction in the matter. At the same time, we deem it proper to observe that in future every Competent Authority shall take appropriate action on the representation made by a citizen for sanction of the prosecution of a public servant strictly in accordance with the direction contained in *Vineet Narain v. Union of India* (1998) 1 SCC 226 and the guidelines framed by the CVC.

GANGULY, J. 1. After going through the judgment rendered by my learned brother G.S. Singhvi, J., I am in agreement with the various conclusions reached by His Lordship. However, I have added my own views on certain important facts of the questions raised in this case.

2. Brother Singhvi, J., has come to a finding that having regard to the very nature of the office held by respondent No.1, it may not be expected of respondent No.1 to personally look

into the minute details of each and every matter and the respondent No.1, having regard to the burden of his very onerous office, has to depend on the officers advising him. At the same time it may be noted that in the course of submission, the appellant, who argued in person, did not ever allege any malafide or lack of good faith against the respondent No.1. The delay which had taken place in the office of the respondent No.1 is unfortunate but it has not even been alleged by the appellant that there was any deliberate action on the part of the respondent No.1 in causing the delay. The position of respondent No.1 in our democratic polity seems to have been summed up in the words of Shakespeare "Uneasy lies the head that wears a crown" (Henry, The Fourth, Part 2 Act 3, scene 1).

3. I also agree with the conclusions of bother Singhvi, J., that the appellant has the locus to file the complaint for prosecution of the respondent No.2 in respect of the offences alleged to have been committed by him under the 1988 Act. Therefore, I agree with the finding of brother Singhvi, J., that the argument of the learned Attorney General to the contrary cannot be accepted. Apart from that the learned Attorney General in the course of his submission proceeded on the basis that the question of sanction has to be considered with reference to Section 19 of the Prevention of Corruption Act (hereinafter "the P.C. Act") or with reference to Section 197 of the Code of Criminal Procedure, 1973 (hereinafter "the Code"), and the scheme of both the sections being similar (Vide paragraph 3 of the supplementary written submission filed by the learned Attorney General). In fact, the entire submission of the learned Attorney General is structured on the aforesaid assumption. I fail to appreciate the aforesaid argument as the same is contrary to the scheme of Section 19 of the P.C. Act and also Section 197 of the Code. In *Kalicharan Mahapatra vs. State of Orissa* reported in (1998) 6 SCC 411, this Court compared Section 19 of P.C. Act with Section 197 of the Code. After considering several decisions on the point and also

considering Section 6 of the old P.C. Act, 1947 which is almost identical with Section 19 of the P.C. Act, 1988 and also noting Law Commission's Report, this Court in paragraph 13 of *Kalicharan* (supra) came to the following conclusions:

> "13. The sanction contemplated in Section 197 of the Code concerns a public servant who "is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty", whereas the offences contemplated in the PC Act are those which cannot be treated as acts either directly or even purportedly done in the discharge of his official duties. Parliament must have desired to maintain the distinction and hence the wording in the corresponding provision in the former PC Act was materially imported in the new PC Act, 1988 without any change in spite of the change made in Section 197 of the Code."

4. The above passage in *Kalicharan* (supra) has been quoted with approval subsequently by this Court in *Lalu Prasad vs. State of Bihar* reported in 2007 (1) SCC 49 at paragraph 9, page 54. In paragraph 10, (page 54 of the report) this Court held in *Lalu Prasad* (supra) that "Section 197 of the Code and Section 19 of the Act operate in conceptually different fields".

5. In view of such consistent view by this Court the basic submission of the learned Attorney General to the contrary is, with respect, untenable.

6. I also entirely agree with the conclusion of learned brother Singhvi, J., that the argument of the learned Attorney General that question for granting sanction for prosecution of a public servant charged with offences under the 1988 Act arises only at the stage of cognizance is also not acceptable.

7. In formulating this submission, the learned Attorney General substantially advanced two contentions. The first contention is that an order granting sanction is not required to

be filed along with a complaint in connection with a prosecution under Section 19 of the P.C. Act. The aforesaid submission is contrary to the settled law laid down by this Court in various judgments. Recently a unanimous three-judge Bench decision of this Court in the case of *State of Uttar Pradesh vs. Paras Nath Singh,* [(2009) 6 SCC 372], speaking through Justice Pasayat and construing the requirement of sanction, held that without sanction:

> "……The very cognizance is barred. That is, the complaint cannot be taken notice of. According to Black's Law Dictionary the word 'cognizance' means 'jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance, it means taking notice of. *A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed* during discharge of his official duty."
>
> (Para 6, page 375 of the report)

8. The other contention of the learned Attorney General is that in taking cognizance under the P.C. Act the Court is guided by the provisions under Section 190 of the Code and in support of that contention the learned Attorney General relied on several judgments. However, the aforesaid submissions were made without noticing the judgment of this Court in the case of *Dilawar Singh vs. Parvinder Singh alias Iqbal Singh and Another* (2005) 12 SCC 709. Dealing with Section 19 of P.C. Act and Section 190 of the Code, this Court held in paragraph 8 at page 713 of the report as follows:

> "……The Prevention of Corruption Act is a special statute and as the preamble shows, this Act has been enacted to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith. Here, the principle expressed in the maxim *generalia specialibus*

non derogant would apply which means that if a special provision has been made on a certain matter, that matter is excluded from the general provisions. (See *Godde Venkateswara Rao* v. *Govt. of A.P.*, *State of Bihar* v. *Dr. Yogendra Singh* and *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*.) Therefore, the provisions of Section 19 of the Act will have an overriding effect over the general provisions contained in Section 190……"

9. Therefore, concurring with brother Singhvi, J., I am unable to uphold the submission of the learned Attorney General.

10. As I am of the humble opinion that the questions raised and argued in this case are of considerable constitutional and legal importance, I wish to add my own reasoning on the same.

11. Today, corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of Indian democracy and the Rule of Law. The magnitude of corruption in our public life is incompatible with the concept of a socialist, secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in our preambular vision. Therefore, the duty of the Court is that any anti-corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it.

12. Time and again this Court has expressed its dismay and shock at the ever growing tentacles of corruption in our society but even then situations have not improved much. [See *Sanjiv Kumar v. State of Haryana & ors.,* (2005) 5 SCC 517;

State of A.P. v. V. Vasudeva Rao, (2004) 9 SCC 319; *Shobha Suresh Jumani v. Appellate Tribunal Forfeited Property & another,* (2001) 5 SCC 755; *State of M.P. & ors. v. Ram Singh,* (2000) 5 SCC 88; *J. Jayalalitha v. Union of India & another,* (1999) 5 SCC 138; *Major S.K. Kale v. State of Maharashtra,* (1977) 2 SCC 394.]

13. Learned Attorney General in the course of his submission fairly admitted before us that out of total 319 requests for sanction, in respect of 126 of such requests, sanction is awaited. Therefore, in more than 1/3rd cases of request for prosecution in corruption cases against public servants, sanctions have not been accorded. The aforesaid scenario raises very important constitutional issues as well as some questions relating to interpretation of such sanctioning provision and also the role that an independent judiciary has to play in maintaining rule of law and common man's faith in the justice delivering system.

14. Both rule of law and equality before law are cardinal questions in our Constitutional Laws as also in International law and in this context the role of the judiciary is very vital. In his famous treatise on Administrative Law, Professor Wade while elaborating the concept of rule of law referred to the opinion of Lord Griffith's which runs as follows:

> "the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."
>
> [See *R. v. Horseferry Road Magistrates' Court ex p. Bennett* {1994) 1 AC 42 at 62]

15. I am in respectful agreement with the aforesaid principle.

16. In this connection we might remind ourselves that courts while maintaining rule of law must structure its jurisprudence on

the famous formulation of Lord Coke where the learned Law Lord made a comparison between "the golden and straight metwand of law" as opposed to "the uncertain and crooked cord of discretion".

17. The right of private citizen to file a complaint against a corrupt public servant must be equated with his right to access the Court in order to set the criminal law in motion against a corrupt public official. This right of access, a Constitutional right should not be burdened with unreasonable fetters. When a private citizen approaches a court of law against a corrupt public servant who is highly placed, what is at stake is not only a vindication of personal grievance of that citizen but also the question of bringing orderliness in society and maintaining equal balance in the rule of law. It was pointed out by the Constitution Bench of this Court in *Sheonandan Paswan vs. State of Bihar and Others,* (1987) 1 SCC 288 at page 315:

> "……It is now settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of the society. It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book. It is for this reason that in *A.R. Antulay v. R.S. Nayak* this Court pointed out that (SCC p. 509, para 6) "punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait jacket formula of locus standi……"

18. Keeping those principles in mind, as we must, if we look at Section 19 of the P.C. Act which bars a Court from taking cognizance of cases of corruption against a public servant under Sections 7, 10, 11, 13 and 15 of the Act, unless the Central or

the State Government, as the case may be, has accorded sanction, virtually imposes fetters on private citizens and also on prosecutors from approaching Court against corrupt public servants. These protections are not available to other citizens. Public servants are treated as a special class of persons enjoying the said protection so that they can perform their duties without fear and favour and without threats of malicious prosecution. However, the said protection against malicious prosecution which was extended in public interest cannot become a shield to protect corrupt officials. These provisions being exceptions to the equality provision of Article 14 are analogous to provisions of protective discrimination and these protections must be construed very narrowly. These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good governance as opposed to escalation of corruption. Therefore, in every case where an application is made to an appropriate authority for grant of prosecution in connection with an offence under P.C. Act it is the bounden duty of such authority to apply its mind urgently to the situation and decide the issue without being influenced by any extraneous consideration. In doing so, the authority must make a conscious effort to ensure the rule of law and cause of justice is advanced. In considering the question of granting or refusing such sanction, the authority is answerable to law and law alone. Therefore, the requirement to take the decision with a reasonable dispatch is of the essence in such a situation. Delay in granting sanction proposal thwarts a very valid social purpose, namely, the purpose of a speedy trial with the requirement to bring the culprit to book. Therefore, in this case the right of the sanctioning authority, while either sanctioning or refusing to grant sanction, is coupled with a duty. The sanctioning authority must bear in mind that what is at stake is the public confidence in the maintenance of rule of law which is fundamental in the administration of justice. Delay in granting such sanction has spoilt many valid prosecution and is adversely viewed in public mind that in the name of considering a prayer for sanction, a protection is given

to a corrupt public official as a quid pro quo for services rendered by the public official in the past or may be in the future and the sanctioning authority and the corrupt officials were or are partners in the same misdeeds. I may hasten to add that this may not be factual position in this but the general demoralizing effect of such a popular perception is profound and pernicious. By causing delay in considering the request for sanction, the sanctioning authority stultifies judicial scrutiny and determination of the allegations against corrupt official and thus the legitimacy of the judicial institutions is eroded. It, thus, deprives a citizen of his legitimate and fundamental right to get justice by setting the criminal law in motion and thereby frustrates his right to access judicial remedy which is a constitutionally protected right. In this connection, if we look at Section 19 of the P.C. Act, we find that no time limit is mentioned therein. This has virtually armed the sanctioning authority with unbridled power which has often resulted in protecting the guilty and perpetuating criminality and injustice in society.

19. There are instances where as a result of delayed grant of sanction prosecutions under the P.C. Act against a public servant has been quashed. See *Mahendra Lal Das vs. State of Bihar and Others,* (2002) 1 SCC 149, wherein this Court quashed the prosecution as the sanctioning authority granted sanction after 13 years. Similarly, in the case of *Santosh De vs. Archna Guha and Others,* (1994) Supp.3 SCC 735, this Court quashed prosecution in a case where grant of sanction was unduly delayed. There are several such cases. The aforesaid instances show a blatant subversion of the rule of law. Thus, in many cases public servants whose sanction proposals are pending before authorities for long periods of time are being allowed to escape criminal prosecution.

20. Article 14 must be construed as a guarantee against uncanalized and arbitrary power. Therefore, the absence of any time limit in granting sanction in Section 19 of the P.C. Act is not in consonance with the requirement of the due process of

law which has been read into our Constitution by the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India and Another,* (1978) 1 SCC 248.

21. I may not be understood to have expressed any doubt about the constitutional validity of Section 19 of the P.C. Act, but in my judgment the power under Section 19 of the P.C. Act must be reasonably exercised. In my judgment the Parliament and the appropriate authority must consider restructuring Section 19 of the P.C. Act in such a manner as to make it consonant with reason, justice and fair play.

22. In my view, the Parliament should consider the Constitutional imperative of Article 14 enshrining the rule of law wherein 'due process of law' has been read into by introducing a time limit in Section 19 of the P.C. Act 1988 for its working in a reasonable manner. The Parliament may, in my opinion, consider the following guidelines:

(a) All proposals for sanction placed before any Sanctioning Authority, empowered to grant sanction for the prosecution of a public servant under section 19 of the P.C. Act must be decided within a period of three months of the receipt of the proposal by the concerned authority.

(b) Where consultation is required with the Attorney General or the Solicitor General or the Advocate General of the State, as the case may be, and the same is not possible within the three months mentioned in clause (a) above, an extension of one month period may be allowed, but the request for consultation is to be sent in writing within the three months mentioned in (a) above. A copy of the said request will be sent to the prosecuting agency or the private complainant to intimate them about the extension of the time limit.

(c) At the end of the extended period of time limit, if no decision is taken, sanction will be deemed to have been granted to the proposal for prosecution, and the prosecuting agency or the private complainant will proceed to file the chargesheet/ complaint in the court to commence prosecution within 15 days of the expiry of the aforementioned time limit.

23. With these additional reasons, as indicated, I agree with Brother Singhvi, J., and allow the appeal and the judgment of the High Court is set aside. No costs.

N.J. Appeal allowed.

JIK INDUSTRIES LIMITED & ORS.

v.

AMARLAL V. JUMANI AND ANOTHER

(Criminal Appeal No. 263 of 2012)

FEBRUARY 1, 2012

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

Code of Criminal Procedure, 1973:

s.320 – Compounding of offence – Whether sanction of a scheme u/s.391 of the Companies Act, 1956 amounts to compounding of an offence u/s.138 read with s.141 of the N.I. Act and whether such sanction has the effect of termination or dismissal of complaint proceedings under N.I. Act – Held: The effect of approval of a scheme of compromise and arrangement u/s.391 of the Companies Act is that it binds the dissenting minority, the company as also the liquidator if the company is under winding up – A scheme u/s.391 of the Companies Act does not have the effect of creating new debt – The scheme simply makes the original debt payable in a manner and to the extent provided for in the scheme – The offence under the N.I. Act which has already been committed prior to the scheme does not get automatically compounded only as a result of the said scheme – There are various features in the compounding of an offence and those features must be satisfied before it can be claimed by the offender that the offence has been compounded – Compounding of an offence cannot be achieved indirectly by sanctioning of a scheme by the Company Court – Negotiable Instruments Act, 1881 – s.138 r/ w s.141 – Companies Act, 1956 – s.391.

s.320 – Compounding of offence – Historical background – Discussed – Code of Criminal Procedure, 1861 – Code of Criminal Procedure, 1872 – Code of Criminal Procedure, 1898.

Negotiable Instruments Act, 1881:

s.141 – Mode and manner of compounding offences under N.I. Act – Held: Compounding of an offence is statutorily provided u/s.320, Cr.P.C. – The act of compounding involves an element of mutuality and it has to be bilateral and not unilateral –Thus, representation of the person compounding is essential u/s.320, Cr.P.C. – s.4(2), Cr.P.C. deals with offences under any other law which include offences under the N.I. Act – In view of s.4(2), Cr.P.C., the basic procedure of compounding an offence laid down in s.320, Cr.P.C. will apply to compounding of an offence under N.I. Act – Thus, in view of clear mandate of sub-section (2) of s.4, Cr.P.C., in the absence of special procedure relating to compounding under the N.I. Act, the procedure relating to compounding u/s.320 shall automatically apply.

s.147 – Effect of non-obstante clause contained in s.147 – Held: The non-obstante clause used in s.147 does not refer to any particular section of the Code of Criminal Procedure but refers to the entire Code – When non-obstante clause is used in the said fashion the extent of its impact has to be found out on the basis of consideration of the intent and purpose of insertion of such a clause – s.147 came by way of amendment – The amendment introduced was "to make offences under the Act compoundable" – The offence under the N.I. Act, which was previously non-compoundable, in view of s.320(9), Cr.P.C. became compoundable – That would not mean that the effect of s.147 is to obliterate all statutory provisions of s.320, Cr.P.C. relating to the mode and manner of compounding of an offence – s.147 will only override s.320(9), Cr.P.C. in so far as offence u/s.147 of N.I. Act is concerned.

INTERPRETATION OF STATUTES: Non-obstante clause – Significance of – Held: The insertion of a non-obstante clause is a well known legislative device and in olden times it had the effect of non obstante aliquo statuto in contrarium (notwithstanding any statute to the contrary) – Under the

Scheme of modern legislation, non-obstante clause has a contextual and limited application – The impact of a 'non-obstante clause' has to be limited to the extent it is intended by the Parliament and not beyond that.

JUDGMENT/ORDER: Interpretation of – Held: It is well settled that a judgment is always an authority for what it decides – It is equally well settled that a judgment cannot be read as a statute – It has to be read in the context of the facts discussed in it – Negotiable Instruments Act, 1881 – s.147.

COMPANIES ACT, 1956: s.391 – Sanction of scheme – Held: The proposed scheme cannot be violative of any provision of law, nor can it be contrary to public policy.

The question which arose for consideration in the instant appeals was whether the High Court was justified in holding that sanction of a scheme under Section 391 of the Companies Act, 1956 does not amount to compounding of an offence under Section 138 read with Section 141 of the N.I. Act and that the sanction do not have the effect of termination or dismissal of complaint proceedings under N.I. Act.

Dismissing the appeals, the Court

HELD: 1. Section 391 of the Companies Act gives very wide discretion to the Court to approve any set of arrangement between the company and its shareholders. The effect of approval of a scheme of compromise and arrangement under Section 391 of the Companies Act is that it binds the dissenting minority, the company as also the liquidator if the company is under winding up. A scheme under Section 391 of the Companies Act does not have the effect of creating new debt. The scheme simply makes the original debt payable in a manner and to the extent provided for in the scheme. In the instant appeal in most of the cases, the offence under the N.I. Act was committed prior to the scheme. Therefore, the offence

which has already been committed prior to the scheme does not get automatically compounded only as a result of the said scheme. [Paras 11, 13] [128-D-H; 129-A-C]

M/s. J.K. (Bombay) Private Ltd. vs. M/s. New Kaiser-I-Hind Spinning and Weaving Co., Ltd., and others **AIR 1970 SC 1041: 1970 SCR 866 – referred to.**

2. The proposed scheme cannot be violative of any provision of law, nor can it be contrary to public policy. A scheme under Section 391 of the Companies Act cannot have the effect of overriding the requirement of any law. The compounding of an offence is always controlled by statutory provision. There are various features in the compounding of an offence and those features must be satisfied before it can be claimed by the offender that the offence has been compounded. Thus, compounding of an offence cannot be achieved indirectly by the sanctioning of a scheme by the Company Court. [Paras 15, 18] [129-G; 130-G-H; 131-A-C]

3. It is no doubt true that Section 147 of the N.I. Act makes an offence under N.I. Act a compoundable one. But in order to make the offence compoundable the mode and manner of compounding such offences must be followed. The impugned judgment of the High Court correctly formulated the principle of compounding by holding that the act of compounding involves an element of mutuality and it has to be bilateral and not unilateral. Compounding of an offence is statutorily provided under Section 320 of the Code. It is clear from the list of offences which are specified in the Table attached to Section 320 of the Code that there are basically two categories of offences under the provisions of Indian Penal Code which have been made compoundable. There is a category of offence for the compounding of which leave of the Court is required and there is another category of offences where for compounding the leave of the Court is not required. But all cases of compounding can take place at the instance

of persons mentioned in the Third Column of the Table. The said Table shows that compounding can only be possible at the instance of the person who is either a complainant or who has been injured or is aggrieved. Sub-sections 4(a) and 4(b) of Section 320 also reiterate the same principle that in case of compounding, the person competent to compound, must be represented in a manner known to law. If the person compounding is a minor or an idiot or a lunatic, the person competent to contract on his behalf may, with the permission of the Court, compound the offence. Legislature has, therefore, provided that if the said category of person was suffering from some disability, a person to represent the said category of persons is only competent to compound the offence and in such cases the permission of the Court is statutory required. Section 320(4)(b) also reiterates the same principle by providing that when a person who is otherwise competent to compound an offence is dead, his legal representatives, as defined under the Code of Civil Procedure may, with the consent of the Court, compound such offence. Therefore, representation of the person compounding has been statutorily provided in all situations. [Paras 24, 38, 40-44] [133-C; 138-F-H; 139-A-F]

Balmer Lawrie Workers' Union, Bombay and another vs. Balmer Lawrie & Co. Ltd. and others **1984 (Supp.) SCC 663;** *Shivanand Gaurishankar Baswanti vs. Laxmi Vishnu Textile Mills and others* **(2008) 13 SCC 323: 2008 (10) SCR 782;** *Mandvi Cooperative Bank Limited vs. Nimesh B. Thakore* **(2010) 3 SCC 83: 2010 (1) SCR 219 – held inapplicable.**

Central Bureau of Investigation, SPE, SIU (X), New Delhi vs. Duncans Agro Industries Ltd., Calcutta **(1996) 5 SCC 591: 1996 (3) Suppl. SCR 360;** *Hira Lal Hari Lal Bhagwati vs. CBI, New Delhi* **(2003) 5 SCC 257: 2003 (3) SCR 1118;** *Nikhil Merchant vs. Central Bureau of Investigation and another* **(2008) 9 SCC 677: 08 (12) SCR 236 – Distinguished.**

4.1. The insertion of a non-obstante clause is a well known legislative device and in olden times it had the effect of non obstante aliquo statuto in contrarium (notwithstanding any statute to the contrary). Under the Stuart reign in England the Judges then sitting in Westminster Hall accepted that the statutes were overridden by the process but this device of judicial surrender did not last long. Under the Scheme of modern legislation, non-obstante clause has a contextual and limited application. The impact of a 'non-obstante clause' on the concerned act was considered by this Court in many cases and it was held that the same must be kept measured by the legislative policy and it has to be limited to the extent it is intended by the Parliament and not beyond that. [Paras 48-51] [140-D-G]

4.2. The non-obstante clause used in Section 147 of N.I. Act does not refer to any particular section of the Code of Criminal Procedure but refers to the entire Code. When non-obstante clause is used in the said fashion, the extent of its impact has to be found out on the basis of consideration of the intent and purpose of insertion of such a clause. Section 147 in N.I. Act came by way of amendment. From the Statement of Objects and Reasons of Negotiable Instrument (Amendment) Bill 2001, which ultimately became Act 55 of 2002, these amendments were introduced to deal with large number of cases which were pending under the N.I. Act in various Courts in the country. Considering the said pendency, a Working Group was constituted to review Section 138 of the N.I. Act and make recommendations about changes to deal with such pendency. Pursuant to the recommendations of the Working Group, the said Bill was introduced in Parliament and one of the amendments introduced was "to make offences under the Act compoundable". Pursuant thereto Section 147 was inserted after Section 142 of the old Act under Chapter II of Act 55 of 2002. It is clear from a perusal

of the said Statement of Objects and Reasons that offence under the N.I. Act, which was previously non-compoundable, in view of Section 320 sub-Section 9 of the Code became compoundable. That does not mean that the effect of Section 147 is to obliterate all statutory provisions of Section 320 of the Code relating to the mode and manner of compounding of an offence. Section 147 will only override Section 320 (9) of the Code in so far as offence under Section 147 of N.I. Act is concerned. [Paras 52, 55-58] [141-A-B-G-H; 142-A-D]

Damodar S. Prabhu vs. Sayed Babalal H. **(2010) 5 SCC 663: 2010 (5) SCR 678 – relied on.**

5. Section 4 of the Code, which is the governing statute in India for investigation, inquiry and trial of offences has two parts. Section 4 sub-section (1) deals with offences under the Indian Penal Code. Section 4 sub-section (2) deals with offences under any other law which would obviously include offences under the N.I. Act. In the instant case, no special procedure has been prescribed under the N.I. Act relating to compounding of an offence. In the absence of special procedure relating to compounding, the procedure relating to compounding under Section 320 shall automatically apply in view of clear mandate of sub-section (2) of Section 4 of the Code. In view of Section 4(2) of the Code, the basic procedure of compounding an offence laid down in Section 320 of the Code will apply to compounding of an offence under N.I. Act. [Paras 59-61, 64] [142-F-H 143-A-D, E]

6. The observations made in paragraph 24 of *Damodar*, that the scheme contemplated under Section 320 of the Code cannot be followed 'in the strict sense' does not and cannot mean that the fundamental provisions of compounding under Section 320 of the Code stand obliterated by a side wind, as it were. It is well settled that a judgment is always an authority for what it decides.

It is equally well settled that a judgment cannot be read as a statute. It has to be read in the context of the facts discussed in it. Following the said well settled principles, the basic mode and manner of effecting the compounding of an offence under Section 320 of the Code cannot be said to be not attracted in case of compounding of an offence under N.I. Act in view of Section 147 of the same. [paras 68-69] [144-D-G]

7. Compounding as codified in Section 320 of the Code has a historical background. In common law, compounding was considered a misdemeanour. Later on, compounding was permitted in certain categories of cases where the rights of the public in general are not affected but in all cases such compounding is permissible with the consent of the injured party. In our country also when the Criminal Procedure Code, 1861 was enacted it was silent about the compounding of offence. Subsequently, when the next Code of 1872 was introduced it mentioned about compounding in Section 188 by providing the mode of compounding. However, it did not contain any provision declaring what offences were compoundable. The decision as to what offences were compoundable was governed by reference to the exception to Section 214 of the Indian Penal Code. The subsequent Code of 1898 provided Section 345 indicating the offences which were compoundable but the said Section was only made applicable to compounding of offences defined and permissible under Indian Penal code. The present Code, which repealed the 1898 Code, contains Section 320 containing comprehensive provisions for compounding. A perusal of Section 320 makes it clear that the provisions contained in Section 320 and the various sub-sections is a Code by itself relating to compounding of offence. It provides for the various parameters and procedures and guidelines in the matter of compounding. If the contention of the appellant is accepted that as a result of incorporation

of Section 147 in the N.I. Act, the entire gamut of procedure of Section 320 of the Code are made inapplicable to compounding of an offence under the N.I. Act, then the compounding of offence under N.I. Act will be left totally unguided or uncontrolled. Such an interpretation apart from being an absurd or unreasonable one will also be contrary to the provisions of Section 4(2) of the Code. There is no other statutory procedure for compounding of offence under N.I. Act. Therefore, Section 147 of the N.I. Act must be reasonably construed to mean that as a result of the said Section the offences under N.I. Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be wished away nor can the same be substituted by virtue of Section 147 of N.I. Act. [paras 70, 72-74] [144-G-H; 145-E-G; 146-A-F]

Raghubar Dayal vs. The Bank of Upper India Ltd. **AIR 1919 P.C. 9;** *S.K. Gupta and another vs. K.P. Jain and another* **1979 (3) SCC 54: 1979 (2) SCR 1184;** *Miheer H. Mafatlal vs. Mafatlal Industries Ltd.* **AIR 1997 SC 506: 1996 (6) Suppl. SCR 1;** *Hindustan Lever and another vs. State of Maharashtra and another* **(2004) 9 SCC 438: 2003 (5) Suppl. SCR 685;** *Administrator of the Specified Undertaking of the Unit Trust of India and another vs. Garware Polyester Ltd.* **(2005) 10 SCC 682: 2005 (1) Suppl. SCR 192;** *Kaushalya Devi Massand vs. Roopkishore Khore* **(2011) 4 SCC 593: 2011 (3) SCR 879;** *ICICI Bank Ltd. vs. Sidco Leathers Ltd. and Ors.* **(2006) 10 SCC 452: 2006 (1) Suppl. SCR 528;** *Madhav Rao Scindia Bahadur, etc. vs. Union of India and Another* **(1971) 1 SCC 85: 1971 (3) SCR 9;** *Central Bank of India vs. State of Kerala and others* **(2009) 4 SCC 94: 2009 (3) SCR 735;** *Khatri and Ors. etc. Vs. State of Bihar and Ors.* **AIR 1981 SC 1068: 1981 (3) SCR 145;** *Vinay Devanna Nayak vs. Ryot Sewa Sahakari Bank Limited* **(2008) 2 SCC 305: 2007 (12) SCR 1134;** *R. Rajeshwari vs. H. N. Jagadish* **2008) 4 SCC 82: 2008 (3) SCR 1065– referred to.**

Kenny's 'Outlines of Criminal Law' (Nineteenth Edition, 1966); Russell on Crime (Twelfth Edition), Russell on Crime (Twelfth Edition) **– referred to.**

Case Law Reference:

AIR 1919 P.C. 9	**referred to**	**Para 8**
1970 SCR 866	**referred to**	**Para12,14**
1979 (2) SCR 1184	**referred to**	**Para 14**
1996 (6) Suppl. SCR 1	**referred to**	**Para 15,16,17**
2003 (5) Suppl. SCR 685	**referred to**	**Para 16**
2005 (1) Suppl. SCR 192	**referred to**	**Para 17**
1984 (Supp.) SCC 663	**referred to**	**Para 19**
2008 (10) SCR 782	**held inapplicable**	**Para 20**
2011 (3) SCR 879	**referred to**	**Para 22**
2010 (1) SCR 219	**held inapplicable**	**Para 23,24**
2010 (5) SCR 678	**relied on**	**Para 25,26, 27,47,58,68**
1996 (3) Suppl. SCR 360	**Distinguished**	**Para 28, 31,32**
2003 (3) SCR 1118	**referred to**	**Para 32,33**
2008 (12) SCR 236	**referred to**	**Para 34,35**
2006 (1) Suppl. SCR 528	**referred to**	**Para 51**
1971 (3) SCR 9	**referred to**	**Para 53, 54**
2009 (3) SCR 735	**referred to**	**Para 54**
1981 (3) SCR 145	**referred to**	**Para 63**
2007 (12) SCR 1134	**referred to**	**Para 65**
2008 (3) SCR 1065	**referred to**	**Para 67**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 263 of 2012.

From the Judgment & Order dated 14, 21, 22, 25 & 26.08.2008 of the High Court of Judicature of Mombay in Criminal Writ Petition No. 2781 of 2006.

WITH

Crl. A. Nos. 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275-294, 295-303 of 2012.

Mili Thakkar, Jatin Zaveri, Gaurav Aarwal, K.N. Rai for the Appellants.

K. Parameshwar, Anish Shah (for Shivaji M. Jadhav), Asha Gopalan Nair, C.N. Sree Kumar, Resmitha R. Chandran, Uday B. Dube, Nikhil Nayyar for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. This group of appeals were heard together as they involve common questions of law. There are some factual differences but the main argument by the appellant(s) in this matter was advanced by Mr. Chander Uday Singh, Senior Advocate on behalf of the Sharp Industries Limited in SLP (Crl.) No.6643-6651 of 2010 and the facts are taken mostly from the said case.

3. The learned counsel assailed the judgment of the High Court wherein by a detailed judgment High Court dismissed several criminal writ petitions which were filed challenging the processes which were issued by the learned Trial Judge on the complaint filed by the respondents in proceedings under Section 138 read with Section 141 of Negotiable Instruments Act, 1881 (hereinafter 'N.I. Act'). By way of a detailed judgment, the High Court after dismissing the writ petitions held that sanction of a scheme under Section 391 of the Companies Act, 1956 (hereinafter 'Companies Act') does not amount to compounding

of an offence under Section 138 read with Section 141 of the N.I. Act. The High Court also held that sanction of a scheme under Section 391 of the Companies Act will not have the effect of termination or dismissal of complaint proceedings under N.I. Act. However, the learned Judge made it clear that the judgment of the High Court will not prevent the petitioners from filing separate application invoking the provisions of Section 482 Criminal Procedure Code, if they are so advised. Assailing the said judgment the learned counsel submitted that an unsecured creditor who does not oppose the scheme of compromise or arrangement under Section 391 of the Companies Act must be taken to have supported the scheme in its entirety once such a scheme is sanctioned by the High Court, even a dissenting creditor cannot file a criminal complaint under Section 138 of the N.I. Act for enforcement of a pre-compromise debt. Nor can such a creditor oppose the compounding of criminal complaint which was filed under Section 138 of the N.I. Act in respect of pre-compromise debt.

4. The material facts of the case are that the appellant company on or about 12th May, 2005 came out with a scheme by which it was agreed that the appellant company should be revived and thereafter payments will be made to the creditors. Pursuant to such scheme the appellant company filed a petition under Section 391 of the Companies Act to the High Court. The whole scheme was placed before the High Court and according to the appellant(s), first order of the scheme came to be passed by the Hon'ble High Court by its order dated 5th May, 2005 in Company Petition No.92 of 2005. At the time the said company petition was pending, a meeting was convened by the appellant company on 1.6.05 and the same was attended by several creditors including representative of the first respondents and they opposed the scheme. Despite the said opposition, the appellant(s) succeeded in getting the scheme approved by statutory majority as required under the law. Thereafter, on 17.11.2005 another company petition with a fresh scheme (Company petition No. 460 of 2005) was filed. After the said

company petition was filed all proceedings which were initiated by different companies against the appellant(s) came to be stayed by the High Court. In view of the aforesaid scheme the appellant company filed application for compounding under Section 147 of the N.I. Act read with Section 320 of the Criminal Procedure Code (hereinafter, 'the Code') and Section 391 of the Companies Act. However, the respondents opposed the said prayer of the petitioner and by an order dated 19th January, 2007, the learned Chief Judicial Magistrate, Ahmednagar rejected the application filed by the appellant for termination of the proceedings inter alia on the ground that the learned Magistrate has no power to quash or terminate the proceedings.

5. Being aggrieved by the said order of the Magistrate, the appellants filed writ petitions before the High court.

6. Similar petitions were filed on 6.7.2009 by JIK Industries Limited and another. All those petitioners were dismissed by the High court on 18.3.2010 in view of an order dated 14.8.2008 passed by the High Court in connection with the petitions filed by other similarly placed companies (JIK Industries).

7. In the background of the aforesaid facts the contentions raised by the appellant company is that the scheme envisaged a compromise between the company and the secured creditors on the one hand and its unsecured creditors on the other hand. Such scheme was framed pursuant to the order of the Company Court dated 5th May, 2005 which directed meeting of the different classes of creditors for consideration of the scheme. Thereafter, meeting was convened of unsecured creditors and the scheme was approved on 1st June, 2005 by the requisite majority of the shareholders and unsecured creditors. Then the scheme was taken up for sanction by the Company Court. The Court considered the objections of some of the unsecured creditors and workmen but ultimately by its judgment dated 17th November, 2005 approved the scheme with a few minor modifications. It was also urged that some of the secured and unsecured creditors have taken advantage of the scheme and did not challenge the

scheme. However, the scheme was challenged by the appellant(s) in respect of certain observations made therein by the learned Company Judge and the said appeal is pending before the Bombay High court. The learned counsel for the appellant(s) argued that the effect of a scheme of compromise between the company and its creditors under Section 391 of the Companies Act is binding upon all class of creditors whether they are assenting or dissenting. The purpose of a scheme under Section 391 and 392 is restructure and alteration of the old debts which were payable prior to the scheme so as to make the debts payable in the manner and to the extent provided under the scheme.

8. In so far as the case of JIK Industries is concerned, it has been urged that the scheme in JIK is different that Sharp. The learned counsel for the appellant(s) urged that the once the scheme is sanctioned, it relates back to the date of the meeting and in support of the said contention reliance was placed on a judgment of the Privy Council in the case of *Raghubar Dayal vs. The Bank of Upper India Ltd.* reported in AIR 1919 P.C. 9. It was also urged that in a scheme under Section 491 a judgment is in rem. The learned counsel further submitted that admittedly the respondents objected to the scheme and is a dissenting creditor.

9. The learned counsel for the respondents (in Sharp Industries case) on the other hand submitted that in the petition which was filed before the Magistrate on behalf of the Sharp Industries the prayer was only for quashing of the criminal proceedings and there was no prayer for compounding of the offences. While the Magistrate refused to quash the said proceeding then while challenging the same in the High Court the prayer for compounding was made for the first time. The learned counsel for the respondents (in the case of JIK Industries) has drawn the attention of this Court to the order dated 3.10.2006 passed by the Metropolitan Magistrate, XII Court Bandra, Mumbai whereby the learned Magistrate passed an order on the application of the accused, the appellant, for compounding of offences under Section 138. By the said order the learned

Magistrate rejected the prayer for compounding made by the appellant(s) under Section 147 of the N.I. Act.

10. It was also pointed out by some of the respondents that after the High Court passed the impugned order whereby the prayer for compounding by the appellant(s) was rejected and the appellant(s) were given an opportunity to file a petition under Section 482 of the Criminal Procedure Code for quashing of the complaint, some of the appellant(s) availing of that liberty also filed application for quashing of the proceedings. They have also filed SLPs before this Court. This Court should, therefore, dismiss the SLPs.

11. Considering the aforesaid submissions of the rival parties, this Court finds that the effect of approval of a scheme of compromise and arrangement under Section 391 of the Companies Act is that it binds the dissenting minority, the company as also the liquidator if the company is under winding up. Therefore, Section 391 of the Companies Act gives very wide discretion to the Court to approve any set of arrangement between the company and its shareholders.

12. Learned counsel for the appellant(s) placed reliance on the decision of this Court in *M/s. J.K. (Bombay) Private Ltd. vs. M/s. New Kaiser-I-Hind Spinning and Weaving Co., Ltd., and others* reported in AIR 1970 SC 1041 in support of his contention that a scheme under Section 391 of the Companies Act is not a mere agreement but it has a statutory force. The learned counsel also urged, relying on the said judgment that the scheme is statutorily binding even on dissenting creditors and shareholders. The effect of the scheme is that so long as it was carried out by the company by regular payment in terms of the scheme, a creditor is bound by it and cannot maintain even a winding-up petition.

13. Even if the aforesaid position is accepted the same does not have much effect on any criminal proceedings initiated by the respondent creditors for non-payment of debts of the company arising out of dishonour of cheques. Factually the

allegation of the respondent is that even payment under the scheme has not been made. However, without going into those factual controversies, the legal position is that a scheme under Section 391 of the Companies Act does not have the effect of creating new debt. The scheme simply makes the original debt payable in a manner and to the extent provided for in the scheme. In the instant appeal in most of the cases the offence under the N.I. Act has been committed prior to the scheme. Therefore, the offence which has already been committed prior to the scheme does not get automatically compounded only as a result of the said scheme. Therefore, even by relying on the ratio of the aforesaid judgment, this Court cannot accept the appellant's contention that the scheme under Section 391 of the Companies Act will have the effect of automatically compounding the offence under the N.I. Act.

14. The learned counsel for the appellant(s) also relied on various other judgments to show the effect of the scheme under Section 391 of the Companies Act. Reliance was also placed on the decision of this Court in the case of *S.K. Gupta and another vs. K.P. Jain and another* reported in 1979 (3) SCC 54. In the case of *S.K. Gupta* (supra) also the ratio in the case of *M/s. J.K. (Bombay) Private Ltd.* (supra) was relied upon and it was held that a scheme under Section 391 of the Companies Act has a statutory force and is also binding on the dissenting creditor. Various other questions were discussed in the said judgment with which we are not concerned in this case.

15. The scheme under Section 391 of the Companies Act has been very elaborately dealt with by this Court in the case of *Miheer H. Mafatlal vs. Mafatlal Industries Ltd.* reported in AIR 1997 SC 506. From a perusal of the various principles laid down in *Mafatlal* (supra), it is clear that the proposed scheme cannot be violative of any provision of law, nor can it be contrary to public policy. (see paragraph 29 sub-paragraph 6 at page 602 of the report).

16. In *Hindustan Lever and another vs. State of*

Maharashtra and another reported in (2004) 9 SCC 438 it has been reiterated that a scheme under Section 391 of the Companies Act is binding on all shareholders including those who oppose it from being sanctioned. It has also been reiterated that the jurisdiction of the Company Court while sanctioning the scheme is supervisory. This Court in *Hindustan Lever* (supra) also accepted the principle laid down in sub-para 6 of para 29 in *Mafatlal* (supra) discussed above and held that a scheme under Section 391 of the Companies Act cannot be unfair or contrary to public policy, nor can it be unconscionable or *against the law* (see para 18 page 451 of the report)

17. In the case of *Administrator of the Specified Undertaking of the Unit Trust of India and another vs. Garware Polyester Ltd.* reported in (2005) 10 SCC 682, this Court held that a scheme under Section 391 of the Companies Act is a commercial document and the principles laid down in the case of *Mafatlal* (supra) have been relied upon and in para 32 at page 697 of the report it has been reiterated that the scheme must be fair, just and reasonable and should not contravene public policy or any statutory provision and in paragraph 33 at page 697 of the report, sub-paragraph 6 of para 29 of *Mafatlal* (supra) has been expressly quoted and approved.

18. Therefore, the main argument of the learned counsel for the appellant(s) that once a scheme under Section 391 of the Companies Act is sanctioned by the Court the same operates as compounding of offence under Section 138 read with Section 141 of the N.I. Act cannot be accepted. Rather the principle which has been reiterated by this Court repeatedly in the aforesaid judgments is that a scheme under Section 391 of the Companies Act cannot be contrary to any law. From this consistent view of this Court it clearly follows that a scheme under Section 391 of the Companies Act cannot have the effect of overriding the requirement of any law. The compounding of an offence is always controlled by statutory provision. There are various features in the compounding of an offence and those features must be satisfied before it can be claimed by the offender

that the offence has been compounded. Thus, compounding of an offence cannot be achieved indirectly by the sanctioning of a scheme by the Company Court.

19. The learned counsel also relied on a few other judgments in order to contend the scheme of compromise operates a statutory consent and the same will have the effect of restructuring legally enforceable debts or liabilities of the company. In support of the said contention reliance was placed on the judgment of this Court in the case of *Balmer Lawrie Workers' Union, Bombay and another vs. Balmer Lawrie & Co. Ltd. and others* reported in 1984 (Supp.) SCC 663. That decision related to a settlement reached in a proceeding under Industrial Disputes Act in which a representative union was a party. The Court held that such a settlement is binding on all the workmen of the undertaking. This Court fails to understand the application of this ratio to the facts of the present case.

20. Reliance was also placed by the learned counsel for the appellant(s) on the decision of this Court in the case of *Shivanand Gaurishankar Baswanti vs. Laxmi Vishnu Textile Mills and others* reported in (2008) 13 SCC 323. In that case also the question of an agreement under Section 18 of Industrial Disputes Act came up for consideration by this Court. The wide sweep of an agreement under Section 18 of the Industrial Disputes Act for the purpose of maintaining industrial peace is not in issue in this case. Therefore, the decision in *Shivanand* (supra) does not have any relevance to the question with which we are concerned in the facts and circumstances of the case.

21. The learned counsel for the appellant(s) then advanced his argument on the provisions of N.I. Act and the nature of the offence under the N.I. Act. Reliance was placed on explanation to Section 138 of the N.I. Act in order to show that for the purposes of an offence under Section 138 of the N.I. Act, debt or other liability must mean a legally enforceable debt or liability. The learned counsel urged that even if a cheque is issued by the appellant company and which has been subsequently

dishonoured, the same is a cheque relating to the debt of the company in respect of which there is a sanctioned scheme. Therefore, the same is not a legally enforceable debt in as much as after the sanctioning of the scheme the debt of the company can only be enforced against the company by a creditor in accordance with the said scheme and not otherwise. Reliance was also placed on Section 139 of the N.I. Act in order to contend that the statutory presumption must be construed in favour of the appellant company in as much as the cheque which has been received by the respondent is not for the discharge of any debt of the company which is legally enforceable. The learned counsel relied on several judgments of this Court on the question of the nature of the offence under Section 138 of the N.I. Act.

22. Reliance was placed on the decision of this Court in the case of *Kaushalya Devi Massand vs. Roopkishore Khore* reported in (2011) 4 SCC 593. The learned counsel relied on the observation made in para 11, at page 595 of the report and contended that the gravity of a complaint under the N.I. Act cannot be equated with an offence under the provisions of Indian Penal Code and further urged that this Court held that a criminal offence under Section 138 of the N.I. Act is almost in the nature of a civil wrong which has been given criminal overtones.

23. Reliance was also placed on the judgment of this Court in the case of *Mandvi Cooperative Bank Limited vs. Nimesh B. Thakore* reported in (2010) 3 SCC 83. This Court in *Mandvi* (supra) discussed the scope of N.I. Act including the first amendment to the Act inserted under Chapter XVII in the Act. This Court looked into the Statement of Objects and Reasons introducing the amendment and noted the rationale for introduction of Section 147 of N.I. Act. Section 147 of N.I. Act made the offences under the said Act compoundable. The Court noted that from the Statement and Objects and Reasons it is clear that the Parliament became aware of the fact that the courts are not able to dispose of, in a time bound manner, large number of cases coming under the said Act in view of the procedure in the

Act. In order to deal with such situation, several amendments were introduced and one of them is making offences under the said Act compoundable. Section 147 of the N.I. Act is as follows:

> "**147. Offences to be compoundable. –** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

24. This Court fails to understand the applicability of the principle laid down in *Mandvi* (supra) to the facts of the present case. It is no doubt true that Section 147 of the N.I. Act makes an offence under N.I. Act a compoundable one. But in order to make the offence compoundable the mode and manner of compounding such offences must be followed. No contrary view has been expressed by this Court in *Mandvi* (supra).

25. On the nature of the offence under N.I. Act learned counsel for the appellant(s) also placed reliance on a decision of this Court in the case of *Damodar S. Prabhu vs. Sayed Babalal H.* reported in (2010) 5 SCC 663. In paragraph 4, this Court held that the dishonour of a cheque can be best described as a regulatory offence which has been created to serve the public interest in ensuring the reliability of these instruments and the Court has further held that the impact of the offence is confined to private parties involvement in commercial transactions. The Court also noted the situation that large number of cases involving dishonour of cheques are choking the criminal justice system and putting an unprecedented strain on the judicial functioning. In paragraph 7 of the judgment this Court noted the submissions of the learned Attorney General to the extent that the Court should frame certain guidelines so as to motivate the litigants from seeking compounding of the offence at an early stage of litigation and not at an unduly late stage. It was argued that if compounding is early the pendency of arrears can be tackled.

26. In paragraph 12 of *Damodar* (supra) this Court dealt with the provision of Section 147 of the N.I. Act and held that the same

is an enabling provision for compounding of the offence and is an exception to the general rule incorporated in sub-section 9 of Section 320 of the Code. This Court harmonised the provision of Section 320 of the Code along with Section 147 of N.I. Act by saying that an offence which is not otherwise compoundable in view of the provisions of Section 320 sub-section 9 of the Code has become compoundable in view of Section 147 of N.I. Act and to that extent Section 147 of N.I. Act will override Section 320 sub-section 9 of the Code since Section 147 of N.I. Act carries a non-obstante clause. This Court on the basis of the submissions of the learned Attorney General framed certain guidelines for compounding of offence under Section 138 of the N.I. Act. Those guidelines are as follows:

> **"THE GUIDELINES**
>
> (*i*) In the circumstances, it is proposed as follows:
>
> (*a*) That directions can be given that the writ of summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.
>
> (*b*) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the court deems fit.
>
> (*c*) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(*d*) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount."

27. The Court held in paragraph 26 of *Damodar* (supra) that those guidelines have been issued by this Court under Article 142 of the Constitution in order to fill-up legislative vacuum which exists in Section 147 of the N.I. Act. The Court held that Section 147 of the N.I. Act does not carry any guidance on how to proceed with the compounding of the offence under the N.I. Act and the Court felt that Section 320 of the Code cannot be strictly followed in the compounding of offence under Section 147 of the N.I. Act. Those guidelines were given to fill up a legislative vacuum.

28. Reliance was also placed by the learned counsel for the appellant(s) on the judgment of this Court in *Central Bureau of Investigation, SPE, SIU (X), New Delh vs. Duncans Agro Industries Ltd., Calcutta* reported in (1996) 5 SCC 591. The decision of this Court in *Duncans Agro* (supra) was on the question of quashing the complaint under Section 482 of Criminal Procedure Code. In the facts of that case the learned Judges held that the Bank filed suits for recovery of the dues on account of grant of credit facility and the suits have been compromised on receiving the payments from the company concerned. The learned Court held if an offence of cheating is prima facie constituted, such offence is a compoundable offence and compromise decrees passed in the suits instituted by the Banks, for all intents and purposes amount to compounding of the offence of cheating. In that case the Court came to the conclusion since the claims of the Banks have been satisfied and the suits instituted by the Banks have been compromised on receiving payments, the Court felt that the complaint should not be perused any further and, therefore, the Court felt "*in the special facts of the case*" the decision of the High Court in quashing the complaint does not require any interference under Article 136 of the Constitution.

29. Quashing of a case is different from compounding. In quashing the Court applies it but in compounding it is primarily

based on consent of injured party. Therefore, the two cannot be equated.

30. It is clear from the discussion made hereinabove that the said case was not one relating to compounding of offence. Apart from that the Court found that the dues of the Banks have been satisfied by receiving the money and the suits filed by the Bank in the Civil Court have been compromised. The FIRs were filed in 1987-1988 and the investigation had not been completed till 1991. On those facts the Court, rendering the judgment in July, 1996, felt that having regard to the lapse of time and also having regard to the fact that there is a compromise decree satisfying the Banks' dues, there is no purpose in allowing the criminal prosecution to proceed. On those consideration, this Court, in the 'special facts of the case', did not interfere with the order of the High Court dated 23.12.1992 whereby the criminal prosecution was quashed.

31. It is, therefore, clear that no legal proposition has been laid down on the compounding of offence in *Duncans Agro* (supra). This Court proceeded on the peculiar facts of the case discussed above. Therefore, the said decision cannot be an authority to contend that by mere sanctioning of a scheme, the offences committed by the appellant company, prior to the scheme, stand automatically compounded.

32. Reliance was also placed on the decision of this Court in the case of *Hira Lal Hari Lal Bhagwati vs. CBI, New Delhi* reported in (2003) 5 SCC 257. In that case reliance was placed on the decision of this Court in *Duncans Agro* (supra). In *Hira Lal* (supra) this Court was discussing the voluntary scheme namely, *Kar Vivad Samadhan* scheme 1998 introduced by the Government of India. The Court found that the aforesaid scheme being a voluntary scheme has provided that if the dispute and demand is settled by the authority and pending proceedings were withdrawn by an importer the balance demand against the importer shall be dropped and the importer shall be immune from any penal proceedings under any law. The Court also came to

the conclusion that under the Customs Act, 1962 the appellant(s) have been discharged and the scheme granted them immunity from prosecution. On those facts the Court held that the immunity which has been granted under the provisions of Customs Act will also extend to such offences that may, prima facie, be made out on identical allegation, namely, evasion of customs duty and violation of any notification under the said Act. The Court also found, on a reading of the chargesheet and the FIR that there was no allegation against the appellant(s) of any intentional deception or of fraudulent or dishonest intention. On those facts the Court held that once a civil case has been compromised and the alleged offence has been compounded, the continuance of the criminal proceedings thereafter would be an abuse of the judicial process.

33. We fail to appreciate how the ratio in the case of *Hira Lal* (supra) rendered on completely different facts has any application to the facts of the present case.

34. Reliance was also placed on the judgment of this Court in the case of *Nikhil Merchant vs. Central Bureau of Investigation and another* reported in (2008) 9 SCC 677. In paragraphs 30 and 31 of the judgment this Court held that dispute between company and the Bank have been set at rest on the basis of compromise arrived at between them. The Court noted that Bank does not have any claim against the company. The Court poses the question whether the power of quashing criminal proceeding which is there with the Court should be exercised. (See para 30 at page 684 of the judgment)

35. The Court answered the same in *Nikhil Merchant* (supra) by saying in para 31 that technicality should not be allowed to stand in the way of quashing of the criminal proceedings since in the view of the Court the continuance of the same after the compromise could be a futile exercise. Therefore, the said decision in *Nikhil Merchant* (supra) was rendered in the peculiar facts of the case and it was done in exercise of quashing power by the Court. It was not a case of

automatic compounding of an offence on the sanctioning of a scheme under Section 391 of the Companies Act.

36. Mr. K. Parameshwar, learned counsel appearing for the respondent in special leave petition Nos.4445-4454/2009 argued that the impugned judgment of the High Court is based on correct principles inasmuch as the effect of a Scheme under Section 391 of the Companies Act can only be made applicable to a civil proceeding and it cannot affect criminal liability. Learned counsel further submitted that under the criminal law there is nothing known as deemed compounding. It was further urged that under the very concept of compounding, it cannot take place without the explicit consent of the complainant or the person aggrieved. It was also urged that in the instant case the offence has been completed prior to the scheme under Section 391 of the Companies Act was sanctioned by the Court.

37. Learned counsel distinguished between a Scheme under Section 391 and an act of compounding by urging that a Scheme under section 391 can at most be a Scheme to forego a part of a debt or to restructure the payment schedule of a debt but the act of compounding an offence must proceed on the basis of the consent of the person compounding and his consent cannot be assumed under any situation.

38. Learned counsel further submitted that the impugned judgment of the High Court correctly formulated the principle of compounding by holding that the act of compounding involves an element of mutuality and it has to be bilateral and not unilateral.

39. This Court finds lot of substance in the aforesaid submission.

40. Compounding of an offence is statutorily provided under Section 320 of the Code. If we look at the list of offences which are specified in the Table attached to Section 320 of the Code, it would be clear that there are basically two categories of offences under the provisions of Indian Penal Code which have been made compoundable.

41. There is a category of offence for the compounding of which leave of the Court is required and there is another category of offences where for compounding the leave of the Court is not required. But all cases of compounding can take place at the instance of persons mentioned in the Third Column of the Table. If the said Table is perused, it will be clear that compounding can only be possible at the instance of the person who is either a complainant or who has been injured or is aggrieved.

42. Sub-sections 4(a) and 4(b) of Section 320 also reiterate the same principle that in case of compounding, the person competent to compound, must be represented in a manner known to law. If the person compounding is a minor or an idiot or a lunatic, the person competent to contract on his behalf may, with the permission of the Court, compound the offence. Legislature has, therefore, provided that if the aforesaid category of person was suffering from some disability, a person to represent the aforesaid category of persons is only competent to compound the offence and in such cases the permission of the Court is statutory required.

43. Section 320 (4) (b) also reiterates the same principle by providing that when a person who is otherwise competent to compound an offence is dead, his legal representatives, as defined under the Code of Civil Procedure may, with the consent of the Court, compound such offence.

44. Therefore, representation of the person compounding has been statutorily provided in all situations.

45. Sub-section (9) of Section 320 which is relevant in this connection is set out below:

> "No offence shall be compounded except as provided by this section."

46. Section 147 of the Negotiable Instrument Act reads as follows0:

> "**147. Offences to be compoundable.** –
>
> Notwithstanding anything contained in the code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

47. Relying on the aforesaid non-obstante clause in Section 147 of the N.I. Act, learned counsel for the appellant argued that a three-Judge Bench decision of this Court in *Damodar* (supra), held that in view of non-obstante clause in Section 147 of N.I. Act, which is a special statute, the requirement of consent of the person compounding in Section 320 of the Code is not required in the case of compounding of an offence under N.I. Act. This Court is unable to accept the aforesaid contention for various reasons which are discussed below.

48. The insertion of a non-obstante clause is a well known legislative device and in olden times it had the effect of non obstante aliquo statuto in contrarium (notwithstanding any statute to the contrary).

49. Under the Stuart reign in England the Judges then sitting in Westminster Hall accepted that the statutes were overridden by the process but this device of judicial surrender did not last long. On the device of non-obstante clause, William Blackstone in his Commentaries on the Laws of England (Oxford: The Claredon Press, 1st Edn. 1765-1769) observed that the devise was "…effectually demolished by the Bill of Rights at the revolution, and abdicated Westminster Hall when James II abdicated the Kingdom" (See Bennion on Statutory Interpretation, 5th Edition, Section 48).

50. Under the Scheme of modern legislation, non-obstante clause has a contextual and limited application.

51. The impact of a 'non-obstante clause' on the concerned act was considered by this Court in many cases and it was held that the same must be kept measured by the legislative policy and it has to be limited to the extent it is intended by the Parliament and not beyond that. [See *ICICI Bank Ltd. vs. Sidco*

Leathers Ltd. and Ors. – (2006) 10 SCC 452 para 37 at page 466]

52. In the instant case the non-obstante clause used in Section 147 of N.I. Act does not refer to any particular section of the Code of Criminal Procedure but refers to the entire Code. When non-obstante clause is used in the aforesaid fashion the extent of its impact has to be found out on the basis of consideration of the intent and purpose of insertion of such a clause.

53. Reference in this connection may be made to the Constitution Bench decision of this Court in the case of *Madhav Rao Scindia Bahadur, etc. vs. Union of India and Another* reported in (1971) 1 SCC 85, Chief Justice Hidayatullah delivering the majority opinion, while construing the provision of Article 363, which also uses non-obstante clause without reference to any Article in the Constitution, held that when non-obstante clause is used in such a blanket fashion the Court has to determine the scope of its use very strictly (see paragraph 68-69 at page 138-139 of the report).

54. This has been followed by a three-Judge Bench of this Court in *Central Bank of India vs. State of Kerala and others* reported in (2009) 4 SCC 94, following the principles as laid down in *Madhav Rao* (supra) this Court in *Central Bank* (supra) held as follows:-

> "…When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. 'A search has, therefore, to be made with a view to determining which provision answers the description and which does not'."
>
> (Para 105, page 132 of the report)

55. Section 147 in N.I. Act came by way of amendment. From the Statement of Objects and Reasons of Negotiable Instrument (Amendment) Bill 2001, which ultimately became Act

55 of 2002, these amendments were introduced to deal with large number of cases which were pending under the N.I. Act in various Courts in the country. Considering the said pendency, a Working Group was constituted to review Section 138 of the N.I. Act and make recommendations about changes to deal with such pendency.

56. Pursuant to the recommendations of the Working Group, the aforesaid Bill was introduced in Parliament and one of the amendments introduced was "to make offences under the Act compoundable".

57. Pursuant thereto Section 147 was inserted after Section 142 of the old Act under Chapter II of Act 55 of 2002.

58. It is clear from a perusal of the aforesaid Statement of Objects and Reasons that offence under the N.I. Act, which was previously non-compoundable in view of Section 320 sub-Section 9 of the Code has now become compoundable. That does not mean that the effect of Section 147 is to obliterate all statutory provisions of Section 320 of the Code relating to the mode and manner of compounding of an offence. Section 147 will only override Section 320 (9) of the Code in so far as offence under Section 147 of N.I. Act is concerned. This is also the ratio in *Damodar* (supra), see para 12. Therefore, the submission of the learned counsel for the appellant to the contrary cannot be accepted.

59. In this connection, we may refer to the provisions of Section 4 of the Code. Section 4 of the Code, which is the governing statute in India for investigation, inquiry and trial of offences has two parts.

60. Section 4 sub-section (1) deals with offences under the Indian Penal Code. Section 4 sub-section (2) deals with offences under any other law which would obviously include offences under the N.I. Act. (See 2007 Crl. Law Journal 3958)

61. In the instant case no special procedure has been prescribed under the N.I. Act relating to compounding of an

offence. In the absence of special procedure relating to compounding, the procedure relating to compounding under Section 320 shall automatically apply in view of clear mandate of sub-section (2) of Section 4 of the Code.

62. Sub-section (2) of Section 4 of the code is set out below:-

> "4(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

63. Interpreting the said Section, this Court in the case of *Khatri and Ors. etc. Vs. State of Bihar and Ors.* – AIR 1981 SC 1068 held that the provisions of the Code are applicable where an offence under the Indian Penal Code or under any other law is being investigated, inquired into, tried or otherwise dealt with (See para 3 page 1070).

64. In view of Section 4(2) of the Code, the basic procedure of compounding an offence laid down in Section 320 of the Code will apply to compounding of an offence under N.I. Act.

65. In *Vinay Devanna Nayak vs. Ryot Sewa Sahakari Bank Limited reported in* (2008) 2 SCC 305, this Court also considered the object behind the insertion of Section 138 of the N. I. Act by Banking Financial Institutions and Negotiable Instruments (Amendment) Act 1988. This Court held:-

> "…The incorporation of the provision is designed to safeguard the faith of the creditor in the drawer of the cheque, which is essential to the economic life of a developing country like India. The provision has been introduced with a view to curb cases of issuing cheques indiscriminately by making stringent provisions and safeguarding interest of creditors."

(para 16, page 309 of the report)

66. The Court also looked into the scope of Section 147 of the N.I. Act, and held after considering the two sections, that there is no reason to refuse compromise between the parties. But the Court did not hold that in view of Section 147, the procedure relating to compounding under Section 320 of the Code has to be given a go bye.

67. Subsequently in the case of *R. Rajeshwari vs. H. N. Jagadish* reported in (2008) 4 SCC 82, another Bench of this Court also construed the provisions of Section 147 of the N.I. Act, as well as those of Section 320 of the Code. Here also it was not held that all the requirements of Section 320 of the Code for compounding were to be given a go bye.

68. Both these aforesaid decisions were referred to and approved in *Damodar (supra)*. The decision in *Damodar* (supra) was rendered by referring to Article 142 of the Constitution insofar as guidelines were framed in relation to compounding for reducing pendency of 138 cases. In doing so the Court held that attempts should be made for compounding the offence early. Therefore, the observations made in paragraph 24 of *Damodar (supra)*, that the scheme contemplated under Section 320 of the Code cannot be followed 'in the strict sense' does not and cannot mean that the fundamental provisions of compounding under Section 320 of the Code stand obliterated by a side wind, as it were.

69. It is well settled that a judgment is always an authority for what it decides. It is equally well settled that a judgment cannot be read as a statute. It has to be read in the context of the facts discussed in it. Following the aforesaid well settled principles, we hold that the basic mode and manner of effecting the compounding of an offence under Section 320 of the Code cannot be said to be not attracted in case of compounding of an offence under N.I. Act in view of Section 147 of the same.

70. Compounding as codified in Section 320 of the Code

has a historical background. In common law compounding was considered a misdemeanour. In Kenny's 'Outlines of Criminal Law' (Nineteenth Edition, 1966) the concept of compounding has been traced as follows:-

> "It is a misdemeanour at common law to 'compound' a felony (and perhaps also to compound a misdemeanour); i.e. to bargain, for value, to abstain from prosecuting the offender who has committed a crime. You commit this offence if you promise a thief not to prosecute him if only he will return the goods he stole from you; but you may lawfully take them back if you make no such promise. You may show mercy, but must not sell mercy. This offence of compounding is committed by the bare act of agreement; even though the compounder afterwards breaks his agreement and prosecutes the criminal. And inasmuch as the law permits not merely the person injured by a crime, but also all other members of the community, to prosecute, it is criminal for anyone to make such a composition; even though he suffered no injury and indeed has no concern with the crime."

71. Russell on Crime (Twelfth Edition) also describes:-

> "Agreements not to prosecute or to stifle a prosecution for a criminal offence are in certain cases criminal".
>
> (Chapter 22 – Compounding Offences, page 339)

72. Later on compounding was permitted in certain categories of cases where the rights of the public in general are not affected but in all cases such compounding is permissible with the consent of the injured party.

73. In our country also when the Criminal Procedure Code, 1861 was enacted it was silent about the compounding of offence. Subsequently, when the next Code of 1872 was introduced it mentioned about compounding in Section 188 by providing the mode of compounding. However, it did not contain any provision declaring what offences were compoundable. The decision as to what offences were compoundable was governed

by reference to the exception to Section 214 of the Indian Penal Code. The subsequent Code of 1898 provided Section 345 indicating the offences which were compoundable but the said Section was only made applicable to compounding of offences defined and permissible under Indian Penal code. The present Code, which repealed the 1898 Code, contains Section 320 containing comprehensive provisions for compounding. A perusal of Section 320 makes it clear that the provisions contained in Section 320 and the various sub-sections is a Code by itself relating to compounding of offence. It provides for the various parameters and procedures and guidelines in the matter of compounding. If this Court upholds the contention of the appellant that as a result of incorporation of Section 147 in the N.I. Act, the entire gamut of procedure of Section 320 of the Code are made inapplicable to compounding of an offence under the N.I. Act, in that case the compounding of offence under N.I. Act will be left totally unguided or uncontrolled. Such an interpretation apart from being an absurd or unreasonable one will also be contrary to the provisions of Section 4(2) of the Code, which has been discussed above. There is no other statutory procedure for compounding of offence under N.I. Act. Therefore, Section 147 of the N.I. Act must be reasonably construed to mean that as a result of the said Section the offences under N.I. Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be wished away nor can the same be substituted by virtue of Section 147 of N.I. Act.

74. For the reasons aforesaid, this Court is unable to accept the contentions of the learned counsel for the appellant(s) that as a result of sanction of a scheme under Section 391 of the Companies Act there is an automatic compounding of offences under Section 138 of the N.I. Act even without the consent of the complainant.

75. The appeals are dismissed. The judgment of the High Court is affirmed.

D.G. Appeals dismissed.

CENTRE FOR PUBLIC INTEREST LITIGATION AND OTHERS
v.
UNION OF INDIA AND OTHERS
(Writ Petition (Civil) No. 423 of 2010)

FEBRUARY 2, 2012

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

Telecommunications:

2G Spectrum – Allocation of – Under-pricing of spectrum based on theory of level playing field – Whether the recommendations made by the Telecom Regulatory Authority of India (TRAI) on 28.8.2007 for grant of Unified Access Service Licence (UAS Licence) with 2G spectrum in 800, 900 and 1800 MHz at the price fixed in 2001 were contrary to the decision taken by the Council of Ministers on 31.10.2003 and whether the exercise undertaken by the Department of Telecommunications (DoT) from September 2007 to March 2008 under the leadership of the then Minister of C&IT for grant of UAS Licences to the private respondents in terms of the recommendations made by TRAI was vitiated due to arbitrariness and malafides and was contrary to public interest – Held: While making recommendations on 28.8.2007, TRAI itself had recognised that spectrum was a scarce commodity – It, however, completely ignored that spectrum was to be utilised efficiently, economically, rationally and optimally – The decision of the Council of Ministers in 2003 that the DoT and the Ministry of Finance should discuss and finalise the spectrum pricing formula was ignored by TRAI – The entire approach adopted by TRAI was lopsided and contrary to the decision taken by the Council of Ministers and its recommendations became a handle for the then Minister of C&IT and the officers of the DoT who virtually gifted away the important national asset at throw away prices by willfully

ignoring the concerns regarding fairness and transparency in spectrum allocation raised from various quarters including the Prime Minister, Ministry of Finance and also some of its own officers – This is also clear from the fact that soon after obtaining the licences, some of the beneficiaries off-loaded their stakes to others, in the name of transfer of equity or infusion of fresh capital by foreign companies, and thereby made huge profits – There was no merit in the reasoning of TRAI that the consideration of maintaining a level playing field prevented a realistic reassessment of the entry fee – The material produced clearly showed that the then Minister of C&IT wanted to favour some companies at the cost of Public Exchequer and took various steps to achieve same – In view of illegality of entire process, licences and spectrum allocation quashed – Costs of Rs 5 crores each imposed on parties getting the most undue benefit – Directions issued for regrant of licences and allocation spectrum in 2G band in 22 service areas by auction, as was done for allocation of spectrum in 3G band – Central Government to consider recommendations of TRAI and take appropriate decision within next one month and fresh licences to be granted by public auction – However, licences/spectrum granted previously through FCFS method i.e. between 2001 and 24.9.2007 not disturbed because said earlier cases were not questioned before this Court.

History of the growth of telecommunications in the country and the reforms introduced 1984 onwards – Discussed.

New Economic Policy of India as announced on 24.7.1991; National Telecom Policy 1994 and National Telecom Policy 1999 – Objectives of – Discussed.

Constitution of India, 1950:

Articles 38, 39, 48, 48A and 51A(g) – Natural resources – Concept of – Held: Even though there is no universally accepted definition of natural resources, they are generally

understood as elements having intrinsic utility to mankind – They may be renewable or non-renewable – They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural form – A natural resource's value rests in the amount of the material available and the demand for it – The latter is determined by its usefulness to production – Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value – In India, the Courts have given an expansive interpretation to the concept of natural resources and have from time to time issued directions, by relying upon the provisions contained in Articles 38, 39, 48, 48A and 51A(g), for protection and proper allocation/distribution of natural resources and have repeatedly insisted on compliance of the constitutional principles in the process of distribution, transfer and alienation to private persons.

Article 14 – Doctrine of equality – Distribution of national resources – Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution – Held: The State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good – Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources – By virtue of Article 39(b), the ownership and control of the material resources of the community should be so distributed so as to best sub-serve the common good – A duly publicised auction conducted fairly and impartially is perhaps the best

method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values.

Article 14 – Policy decision – Whether the policy of first-come-first-served followed by the DoT for grant of licences is ultra vires the provisions of Article 14 of the Constitution – Held: There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident – In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first-served policy has inherently dangerous implications – Wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition.

ADMINISTRATIVE LAW: Judicial review – Scope of – Held: The power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters – There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies – The Court should also not interfere with the fiscal policies of the State – However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters – When

matters like these are brought before the judicial constituent of the State by public spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest and ensure that the institutional integrity is not compromised by those in whom the people have reposed trust and who have taken oath to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill will and who, as any other citizen, enjoy fundamental rights and, at the same time, are bound to perform the duties enumerated in Article 51A.

On 28.8.2007, TRAI made recommendations regarding the principles of fair competition, no restriction on the number of access service providers in any service area, scarce availability of spectrum, need for spectrum management, measures to increase spectrum efficiency, allocation of spectrum and compliance of roll out obligations by the service providers. It also recommended that in future all spectrum excluding the spectrum in 800, 900 and 1800 MHz bands in 2G services should be auctioned.

On 17.10.2007, the Minister of C&IT approved the recommendations made by TRAI. However, no action was taken in terms of paragraph 2.40 of the recommendations wherein it was emphasised that the existing spectrum allocation criteria, pricing methodology and the management system suffered from a number of deficiencies and the whole issue needed to be addressed keeping in view issues linked with spectrum efficiency and its management. The DoT also did not get in touch with the Ministry of Finance to discuss and finalise the spectrum pricing formula which had to include incentive for efficient use of spectrum as well as disincentive for sub-optimal usage in terms of the Cabinet decision of 2003 which required the Department of Telecom and Ministry of Finance to discuss and agree on

spectrum pricing. . In the meanwhile, on 24.9.2007, the DoT prepared a note mentioning therein that as on that date, 167 applications were received from 12 companies for 22 service areas and opined that it was difficult to handle such a large number of applications at any point of time.

The Minister of C&IT fixed 1.10.2007 as the cut-off date for receipt of applications for new UAS Licence. Accordingly, press note dated 24.9.2007 was issued by the DoT stating that no new application for UAS Licence would be accepted after 1.10.2007. Few companies had made applications for UAS Licence in 2004 and some had made similar applications in 2006. However, the same were not disposed of by the DoT and they were included in the figure of 167. Between 24.9.2007 and 1.10.2007, over 300 applications were received for grant of UAS Licences. Member (Technology), Telecom Commission and Ex-officio Secretary to Government of India sent a letter dated 26.10.2007 to Secretary, Department of Legal Affairs, Ministry of Law and Justice seeking the opinion of the Attorney General of India/Solicitor General of India on the issue of the mechanism to deal with what he termed as an unprecedented situation created due to receipt of large number of applications for grant of UAS Licence.

The Law Secretary placed the papers before the Law Minister on 1.11.2007 who recorded in the note that the said issue required discussion. When the note was placed before the Minister of C&IT, he on his own recorded that the LoI may be issued to the applicants received upto 25.9.2007. Simultaneously, he sent letter dated 2.11.2007 to the Prime Minister and criticised the suggestion made by the Law Minister by describing it as totally out of context. He also mentioned that the DoT has decided to continue with the existing policy of first-come-

first-served for processing of applications received up to 25.9.2007 and the procedure for processing the remaining applications would be decided at a later date, if any spectrum is left available after processing the applications received up to 25.9.2007.

The Minister of C&IT did not bother to consider the suggestion made by the Prime Minister that a fair and transparent method should be adopted for grant of fresh licences. The Minister of C&IT sent a reply to the Prime Minister wherein he brushed aside the suggestion made by the Prime Minister by saying that it was unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants as it would not give them a level playing field. On 22.11.2007, the Finance Secretary dispatched letter to the DoT expressing his doubt as to how the rate of Rs.1600 crores determined in 2001, could be applied without any indexation for a licence to be given in 2007. He also emphasized that in view of the financial implications, the Ministry of Finance should have been consulted before the matter was finalised at the level of the DoT.

The DoT replied to the Finance Secretary that as per the Cabinet decision dated 31.10.2003, the DoT had been authorised to finalise the details of implementation of the recommendations of TRAI and in its recommendations dated 28.8.2007, TRAI had not suggested any change in the entry fee/licence fee. In the context of letter dated 22.11.2007 sent by the Finance Secretary, Member (Finance), DoT submitted note dated 30.11.2007 suggesting that the issue of revision of rates should be examined in depth before any final decision is taken in the matter. When the note was placed before the Minister, he observed that the matter of entry fee was deliberated in the department several times in light of various guidelines and the TRAI recommendations and

accordingly decision was taken not to revise the entry fee. The Minister C&IT sent letter dated 26.12.2007 to the Prime Minister changing the first come first serve policy. The letter stated that an applicant who fulfilled the conditions of LOI first would be granted licence first, although several applicants would be issued LOI simultaneously. After 12 days, the DoT prepared a note incorporating therein the changed first-come-first-served policy to which reference was made by the Minister of C&IT in letter dated 26.12.2007 sent to the Prime Minister. On the same day the Minister of C&IT approved the change. The meeting of the full Telecom Commission, which was scheduled to be held on 9.1.2008 to consider two important issues i.e., performance of telecom sector and pricing of spectrum was postponed to 15.1.2008. On 10.1.2008 i.e., after three days of postponement of the meeting of the Telecom Commission, a press release was issued by the DoT wherein it was stated that DOT has been implementing a policy of First-cum-First Served for grant of UAS licences under which initially an application which is received first will be processed first and thereafter if found eligible will be granted LOI and then who so ever complied with the conditions of LOI first will be granted UAS licence. On the same day, another press release was issued asking all the applicants to assemble at the departmental headquarters within 45 minutes to collect the response(s) of the DoT. They were also asked to submit compliance of the terms of LoIs within the prescribed period.

All the applicants including those who were not even eligible for UAS Licence collected their LoIs on 10.1.2008. The acceptance of 120 applications and compliance with the terms and conditions of the LoIs for 78 applications was also received on the same day. Soon after obtaining the LoIs, 3 of the successful applicants offloaded their stakes for thousands of crores in the name of infusing

equity. One of the applicant who had applied for grant of licence pursuant to press note dated 24.9.2007, but was ousted from the zone of consideration because of the cut-off date fixed by the Minister of C&IT, filed writ petition in the High Court with the prayer that the first press release dated 10.1.2008 may be quashed. The High Court declared that the cut-off date, i.e., 25.9.2007 was totally arbitrary and directed the respondents in the writ petition to consider the offer made by the writ petitioner to pay Rs.17.752 crores towards additional revenue share over and above the applicable spectrum revenue share. The decision of the High Court was upheld by the Supreme Court.

The questions which arose for consideration in these writ petitions were whether the Government has the right to alienate, transfer or distribute natural resources/ national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution; whether the recommendations made by the Telecom Regulatory Authority of India (TRAI) on 28.8.2007 for grant of Unified Access Service Licence (UAS Licence) with 2G spectrum in 800, 900 and 1800 MHz at the price fixed in 2001, which were approved by the Department of Telecommunications (DoT), were contrary to the decision taken by the Council of Ministers on 31.10.2003; whether the exercise undertaken by the DoT from September 2007 to March 2008 for grant of UAS Licences to the private respondents in terms of the recommendations made by TRAI is vitiated due to arbitrariness and malafides and is contrary to public interest; whether the policy of first-come-first-served followed by the DoT for grant of licences is *ultra vires* the provisions of Article 14 of the Constitution and whether the said policy was arbitrarily changed by the Minister of Communications and Information Technology (the Minister of C&IT'), without

consulting TRAI, with a view to favour some of the applicants; and whether the licences granted to ineligible applicants and those who failed to fulfil the terms and conditions of the licence are liable to be quashed.

Allowing the writ petitions, the Court

HELD: 1. The history of the growth of telecommunications in the country and the reforms introduced 1984 onwards. [Para 2] [179-E-F]

1.1. In 1839, the first telegraph link was experimented between Calcutta and Diamond Harbour covering 21 miles. In 1851, the telegraph line was opened for traffic, mostly for the official work of the East India Company. In course of time, telegraphy service was made available for public traffic. The Indian Telegraph Act was enacted in 1885. It gave the exclusive privilege of establishing, maintaining and working of "telegraphs" to the Central Government. It also empowered the Government to grant licences on such conditions and in consideration of such payments as it thought fit, to any person to establish, maintain or work a telegraph in any part of India. After independence, Government of India took complete control of the telecom sector and brought it under the Post & Telegraph Department. One major step taken for improving telecommunication services in the country was the establishment of a modern telecommunication manufacturing facility at Bangalore under the Public Sector, in the name of "Indian Telephone Industries Ltd." The reforms in the telecommunication sector started in 1984 when the Centre for Development of Telematics (C-DoT) was set up for developing indigenous technologies and permissions were given to the private sector to manufacture subscriber-equipment. In 1986, Mahanagar Telephone Nigam Ltd., (MTNL) and Videsh Sanchar Nigam Ltd., (VSNL) were set up. The New Economic

Policy of India was announced on 24.7.1991. It was aimed at meeting India's competitiveness in the global market; rapid growth of exports, attracting foreign direct investment; and stimulating domestic investments. With a view to achieve standards comparable to international facilities, the sub-sector of Value Added Services was opened up to private investment in July 1992 for the following services: (a) Electronic Mail; (b) Voice Mail; (c) Data Services; (d) Audio Text Services; (e) Video Text Services; (f) Video Conferencing; (g) Radio Paging; and (h) Cellular Mobile Telephone.In respect of services (a) to (f), the companies registered in India were permitted to operate under a licence on non-exclusive basis. For services covered by (g) and (h), keeping in view the constraints on the number of companies that could be allowed to operate, a policy of selection through a system of tendering was followed for grant of licences. [paras 2–5] [178-G-H 179-A-G]

1.2. <u>National Telecom Policy 1994</u>

National Telecom Policy 1994 (NTP 1994) was announced on 13.5.1994. This was the first major step towards deregulation, liberalization and private sector participation. The objectives of the policy were: (i) affording telecommunication for all and ensuring the availability of telephone on demand; (ii) providing certain basic telecom services at affordable and reasonable prices to all people and covering all villages; (iii) giving world standard telecom services; addressing consumer complaints, dispute resolution and public interface to receive special attention and providing widest permissible range of services to meet the customers' demand and at the same time at a reasonable price; (iv) creating a major manufacturing base and major export of telecom equipment having regard to country's size and development; and (v) protecting the defence and security

interest of the country. In furtherance of NTP 1994, licences were granted to eight Cellular Mobile Telephone Service (CMTS) operators, two in each of the four metropolitan cities of Delhi, Mumbai (Bombay), Kolkata (Calcutta) and Chennai (Madras). In the second phase, in December 1995, after following a competitive bidding process, 14 CMTS licences were awarded in 18 state circles, 6 Basic Telephone Services (BTS) licences were awarded in 6 state circles and paging licences were awarded in 27 cities and 18 state circles. However, this did not yield the intended results apparently because revenue realised by the cellular and basic operators was less than the projections and the operators were unable to arrange finances for their projects. [Paras 6-7] [179-H; 180-A-G]

1.3. <u>New Telecom Policy 1999</u> On the directions of the Prime Minister, a high level Group on Telecommunications (GoT) was constituted on 20.11.1998 to review the existing telecom policy and suggest further reforms. On the basis of the report of the GoT, a draft New Telecom Policy 1999 (NTP 1999) was formulated. After its approval by the Cabinet, NTP 1999 was announced to be effective from 1.4.1999. NTP 1999 had the following objectives: (i) to make available affordable and effective communications for the citizens, considering access to telecommunications as utmost important for achievement of the country's social and economic goals; (ii) to provide universal service to all uncovered areas including the rural areas and also provide high level services capable of meeting the needs of the country's economy by striking a balance between the two; (iii) to encourage development of telecommunication in remote, hilly and tribal areas of the country; (iv) to create a modern and efficient telecommunications infrastructure taking into account the convergence of IT, media, telecom and consumer electronics which will in turn propel India to

become an IT superpower; (v) to convert PCOs wherever justified into Public Teleinfo centres having multimedia capability such as Integrated Services Digital Network (ISDN) services, remote database access, government and community information systems, etc.; (vi) to transform, in a time bound manner, the telecommunications sector in both urban and rural areas into a greater competitive environment providing equal opportunities and level playing field for all players; (vii) to strengthen research and development efforts in the country and provide an impetus to build world class manufacturing capabilities; (viii) to achieve efficiency and transparency in spectrum management; (ix) to protect defence and security interests of the country; and (x) to enable Indian Telecom Companies to become truly global players. NTP 1999 categorized 8 services in the telecom sector, namely; (i) Cellular Mobile Service Providers (CMSPs), Fixed Service Providers (FSPs) and Cable Service Providers, collectively referred as 'Access Providers'; (ii) Radio Paging Service Providers; (iii) Public Mobile Radio Trunking Service Providers; (iv) National Long Distance Operators; (v) International Long Distance Operators; (vi) Other Service Providers, (vii) Global Mobile Personal Communication by Satellite (GMPCS) Service Providers; (viii) V-SAT based Service Providers. NTP 1999 dealt with, and provided the framework for, all these categories of telecom service providers. The policy on spectrum management as enumerated in NTP 1999 was as under: (i) Proliferation of new technologies and the growing demand for telecommunication services has led to manifold increase in demand for spectrum and consequently it is essential that the spectrum is utilized efficiently, economically, rationally and optimally. (ii) There is a need for a transparent process of allocation of frequency spectrum for use by a service provider and making it available to various users under specific conditions. (iii) With the proliferation of new technologies

it is essential to revise the National Frequency Allocation Plan (NFAP) in its entirety so that it becomes the basis for development, manufacturing and spectrum utilization activities in the country amongst all users. NFAP was under review and the revised NFAP was to be made public by the end of 1999 detailing information regarding allocation of frequency bands for various services, without including security information. (iv) NFAP would be reviewed no later than every two years and would be in line with radio regulations of the International Telecommunication Union (ITU). (v)Adequate spectrum is to be made available to meet the growing need of telecommunication services. Efforts would be made for relocating frequency bands assigned earlier to defence and others. Compensation for relocation may be provided out of spectrum fee and revenue share. (vi) There is a need to review the spectrum allocation in a planned manner so that required frequency bands are available to the service providers. (vii) There is a need to have a transparent process of allocation of frequency spectrum which is effective and efficient and the same would be further examined in the light of ITU guidelines. In this regard the following course of action shall be adopted viz.: spectrum usage fee shall be charged; an Inter-Ministerial Group to be called Wireless Planning Coordination Committee, as a part of the Ministry of Communications for periodical review of spectrum availability and broad allocation policy, should be set up; and massive computerization in WPC Wing would be started in the next three months so as to achieve the objective of making all operations completely computerized by the end of the year 2000. [Paras 8-10] [180-H; 181-A-H; 182-A-H; 183-A-H; 184-A-B]

<u>Establishment of the Telecommunication Commission and the Telecom Regulatory Authority of India.</u>

2. On 11.4.1989, the Council of Ministers passed a

resolution and decided to establish the Telecom Commission. The Rules of Business for the Telecom Commission were also framed in 1989. In terms of para 2 of the Rules of Business read with item 1 of Annexure 'A' appended thereto, all important matters of policy relating to Telecommunications are required to be brought before the Telecom Commission. In 1997, Parliament enacted the Telecom Regulatory Authority of India Act, 1997 to provide for the establishment of TRAI. By Act No.2 of 2000, the 1997 Act was amended and provision was made for establishment of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). [Paras 11–12] [184-C-D; 187-B-D]

3.1. Question No.1: Even though there is no universally accepted definition of natural resources, they are generally understood as elements having intrinsic utility to mankind. They may be renewable or non renewable. They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value. The State is empowered to distribute natural resources. However, as they constitute public property/ national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In

Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best sub-serve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection. Of course, environment laws enacted by Parliament and State legislatures deal with specific natural resources, i.e., Forest, Air, Water, Costal Zones, etc. The ownership regime relating to natural resources can also be ascertained from international conventions and customary international law, common law and national constitutions. In international law, it rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) over (their) natural resources as asserted in the 17th Session of the United Nations General Assembly and then affirmed as a customary international norm by the International Court of Justice in the case of *Democratic Republic of Congo v. Uganda*. Common Law recognizes States as having the authority to protect natural resources insofar as the resources are within the interests of the general public. The State is deemed to have a proprietary interest in natural resources and must act as guardian and trustee in relation to the same. Constitutions across the world focus on establishing natural resources as owned by and for the benefit of the country. In most instances where constitutions specifically address ownership of natural resources, the Sovereign State, or, as it is more commonly expressed, 'the people', is designated as the owner of the natural resource. Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilisation. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a

particular State, right of use has been granted to States as per international norms. [Paras 63–65] [241-F-H; 242-A-H; 243-A-C]

3.2. In India, the Courts have given an expansive interpretation to the concept of natural resources and have from time to time issued directions, by relying upon the provisions contained in Articles 38, 39, 48, 48A and 51A(g), for protection and proper allocation/distribution of natural resources and have repeatedly insisted on compliance of the constitutional principles in the process of distribution, transfer and alienation to private persons. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: *first*, it regulates the rights and obligations of the State *vis-à-vis* its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and *second*, it regulates the rights and obligations of the State *vis-à-vis* private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties. [Paras 66, 69] [243-D-E; 246-D-F]

Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal **(1995) 2 SCC 161: 1995 (1) SCR 1036;** *Reliance Natural Resources Limited v. Reliance Industries Limited* **(2010) 7 SCC 1: 2010 (5) SCR 704; Re Special Reference No. 1 of 2001 (2004) 4 SCC 489: 2004 (3) SCR 534;** *M.C. Mehta v. Kamal Nath* **(1997) 1 SCC 388: 1996 (10) Suppl. SCR 12;** *Akhil Bharatiya Upbhokta Congress v. State of M.P.* **(2011) 5 SCC 29: 2011**

(5) SCR 77; *Ugar Sugar Works Ltd. v. Delhi Administration* **(2001) 3 SCC 635: 2001 (2) SCR 630;** *State of U.P. v. Choudhary Rambeer Singh* **(2008) 5 SCC 550: 2008 (4) SCR 610;** *State of Orissa v. Gopinath Dash* **(2005) 13 SCC 495: 2005 (5) Suppl. SCR 699;** *Meerut Development Authority v. Association of Management Studies* **(2009) 6 SCC 171: 2009 (6) SCR 663;** *Ramanna Dayaram Shetty v. International Airport Authority of India* **(1979) 3 SCC 489: 1979 (3) SCR 1014;** *S.G. Jaisinghani v. Union of India* **AIR 1967 SC 1427: 1967 SCR 703;** *Kasturilal Lakshmi Reddy v. State of J & K* **(1980) 4 SCC 1: 1980 (3) SCR 1338;** *Common Cause v. Union of India* **(1996) 6 SCC 530: 1996 (6) Suppl. SCR 719;** *Shrilekha Vidyarthy v. State of U.P.* **(1991) 1 SCC 212: 1990 (1) Suppl. SCR 625;** *LIC v. Consumer Education and Research Centre* **(1995) 5 SCC 482: 1995 (1) Suppl. SCR 349;** *New India Public School v. HUDA* **(1996) 5 SCC 510: 1996 (3) Suppl. SCR 597;** *Sachidanand Pandey v. State of West Bengal* **(1987) 2 SCC 295: 1987 (2) SCR 223 – relied on.**

Illinois Central Railroad Co. v. People of the State of Illinois **146 U.S. 387 (1892)** *M.C. Mehta v. Kamal Nath* **(1997) 1 SCC 388: 1996 (10) Suppl. SCR 12;** *Jamshed Hormusji Wadia v. Board of Trustee, Port of Mumbai* **(2002) 3 SCC 214:;** *Intellectuals Forum, Tirupathi v. State of A.P.* **(2006) 3 SCC 549: 2006 (2) SCR 419;** *Fomento Resorts and Hotels Limited v. Minguel Martins* **(2009) 3 SCC 571: 2009 (3) SCR 1; *P.I.L. v. Union of India* (2011) 4 SCC 1: 2011 (4) SCR 445 – referred to.**

4. Question No.2:

Although, while making recommendations on 28.8.2007, TRAI itself had recognised that spectrum was a scarce commodity, it made recommendation for allocation of 2G spectrum on the basis of 2001 price by invoking the theory of level playing field. Paragraph 2.40 of the recommendations dated 28.8.2007 shows that as

per TRAI's own assessment the existing system of spectrum allocation criteria, pricing methodology and the management system suffered from number of deficiencies and there was an urgent need to address the issues linked with spectrum efficiency and its management and yet it decided to recommend the allocation of spectrum at the price determined in 2001. All this was done in the name of growth, affordability, penetration of wireless services in semi urban and rural areas, etc. Unfortunately, while doing so, TRAI completely overlooked that one of the main objectives of NTP 1999 was that spectrum should be utilised efficiently, economically, rationally and optimally and there should be a transparent process of allocation of frequency spectrum as also the fact that in terms of the decision taken by the Council of Ministers in 2003 to approve the recommendations of the Group of Ministers, the Department of Telecommunications (DoT) and Ministry of Finance were required to discuss and finalise the spectrum pricing formula. The entire approach adopted by TRAI was lopsided and contrary to the decision taken by the Council of Ministers and its recommendations became a handle for the then Minister of C&IT and the officers of the DoT who virtually gifted away the important national asset at throw away prices by willfully ignoring the concerns raised from various quarters including the Prime Minister, Ministry of Finance and also some of its own officers. This becomes clear from the fact that soon after obtaining the licences, some of the beneficiaries off-loaded their stakes to others, in the name of transfer of equity or infusion of fresh capital by foreign companies, and thereby made huge profits. If the method of auction had been adopted for grant of licence which could be the only rational transparent method for distribution of national wealth, the nation would have been enriched by many thousand crores. While it cannot be denied that TRAI is an expert body assigned with important

functions under the 1997 Act, it cannot make recommendations overlooking the basic constitutional postulates and established principles and thereby deny people from participating in the distribution of national wealth and benefit a handful of persons. Therefore, even though the scope of judicial review in such matters is extremely limited, keeping in view the facts which have been brought to the notice of the Court that the mechanism evolved by TRAI for allocation of spectrum and the methodology adopted by the then Minister of C&IT and the officers of DoT for grant of UAS Licences may have caused huge loss to the nation, the recommendations made by TRAI were flawed in many respects and implementation thereof by the DoT resulted in gross violation of the objective of NPT 1999 and the decision taken by the Council of Ministers on 31.10.2003. Even though in its recommendations dated 28.8.2007, TRAI had not specifically recommended that entry fee be fixed at 2001 rates, but paragraph 2.73 and other related paragraphs of its recommendations state that it has decided not to recommend the standard option for pricing of spectrum in 2G bands keeping in view the level playing field for the new entrants. It is impossible to approve the decision taken by the DoT to act upon those recommendations. In today's dynamism and unprecedented growth of telecom sector, the entry fee determined in 2001 ought to have been treated by the TRAI as wholly unrealistic for grant of licence along with start up spectrum. The recommendations made by TRAI in this regard were contrary to the decision of the Council of Ministers that the DoT shall discuss the issue of spectrum pricing with the Ministry of Finance along with the issue of incentive for efficient use of spectrum as well as disincentive for sub-optimal usages. Being an expert body, it was incumbent upon the TRAI to make suitable recommendations even for the 2G bands especially in light of the deficiencies of the present system which it

had itself pointed out. There is no merit in the reasoning of TRAI that the consideration of maintaining a level playing field prevented a realistic reassessment of the entry fee. [Paras 73-75] [248-G-H; 249-A-H; 250-A-H; 251-A]

Question Nos.3 and 4:

5. There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the Government files or the files of the agency/instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim. Wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest. A duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden

and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process. The exercise undertaken by the officers of the DoT between September, 2007 and March 2008, under the leadership of the then Minister of C&IT was wholly arbitrary, capricious and contrary to public interest apart from being violative of the doctrine of equality. The material produced before the Court showed that the then Minister of C&IT wanted to favour some companies at the cost of the Public Exchequer and for this purpose, he took the following steps: (i) Soon after his appointment as Minister of C&IT, he directed that all the applications received for grant of UAS Licence should be kept pending till the receipt of TRAI recommendations. (ii) The recommendations made by TRAI on 28.8.2007 were not placed before the full Telecom Commission which, among others, would have included the Finance Secretary. The notice of the meeting of the Telecom Commission was not given to any of the non permanent members despite the fact that the recommendations made by TRAI for allocation of spectrum in 2G bands had serious financial implications. This is established from the pleadings and the records produced before this Court which show that after issue of licences, 3 applicants transferred their equities for a total sum of Rs.24,493 crores in favour of foreign companies. Therefore, it was absolutely necessary for the DoT to take the opinion of the Finance Ministry as per the requirement of the Government of India (Transaction of Business) Rules, 1961. (iii) The officers of the DoT who attended the

meeting of the Telecom Commission held on 10.10.2007 hardly had any choice but to approve the recommendations made by TRAI. If they had not done so, they would have incurred the wrath of the Minister of C&IT. (iv) In view of the approval by the Council of Ministers of the recommendations made by the Group of Ministers in 2003, the DoT had to discuss the issue of spectrum pricing with the Ministry of Finance. Therefore, the DoT was under an obligation to involve the Ministry of Finance before any decision could be taken in the context of paragraphs 2.78 and 2.79 of TRAI's recommendations. However, as the Minister of C&IT was very much conscious of the fact that the Secretary, Finance, had objected to the allocation of 2G spectrum at the rates fixed in 2001, he did not consult the Finance Minister or the officers of the Finance Ministry. (v) The Minister of C&IT brushed aside the suggestion made by the Minister of Law and Justice for placing the matter before the Empowered Group of Ministers. Not only this, within few hours of the receipt of the suggestion made by the Prime Minister in his letter dated 2.11.2007 that keeping in view the inadequacy of spectrum, transparency and fairness should be maintained in the matter of allocation thereof, the Minister of C&IT rejected the same by saying that it will be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants because it will not give them level playing field. (vi) The Minister C&IT introduced cut off date as 25.9.2007 for consideration of the applications received for grant of licence despite the fact that only one day prior to this, press release was issued by the DoT fixing 1.10.2007 as the last date for receipt of the applications. This arbitrary action of the Minister of C&IT though appears to be innocuous, actually benefitted some of the real estate companies who did not have any experience in dealing with telecom services and who had made applications only on 24.9.2007, i.e., one day before the cut off date

fixed by the Minister of C&IT on his own. (vii) The cut off date, i.e. 25.9.2007 decided by the Minister of C&IT on 2.11.2007 was not made public till 10.1.2008 and the first-come-first-served policy, which was being followed since 2003 was changed by him on 7.1.2008 and was incorporated in press release dated 10.1.2008. This enabled some of the applicants, who had access either to the Minister or the officers of the DoT to get the demand drafts, bank guarantee, etc. prepared in advance for compliance of conditions of the LoIs, which was the basis for determination of seniority for grant of licences and allocation of spectrum. (viii) The meeting of the full Telecom Commission, which was scheduled to be held on 9.1.2008 to consider issues relating to grant of licences and pricing of spectrum was deliberately postponed on 7.1.2008 so that the Secretary, Finance and Secretaries of three other important Departments may not be able to raise objections against the procedure devised by the DoT for grant of licence and allocation of spectrum by applying the principle of level playing field. (ix) The manner in which the exercise for grant of LoIs to the applicants was conducted on 10.1.2008 leaves no room for doubt that every thing was stage managed to favour those who were able to know in advance the change in the implementation of the first-come-first served policy. As a result of this, some of the companies which had submitted applications in 2004 or 2006 were pushed down in the priority and those who had applied between August and September 2007 succeeded in getting higher seniority entitling them to allocation of spectrum on priority basis. The argument that if the Court finds that the exercise undertaken for grant of UAS Licences has resulted in violation of the institutional integrity, then all the licences granted 2001 onwards should be cancelled does not deserve acceptance because those who have got licence between 2001 and 24.9.2007 are not parties to these petitions and legality of the licences granted to

them has not been questioned before this Court. [Paras 76-78] [251-B-H; 252-A-H; 253-A-H; 254-A-H; 255-A-B]

6. The power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. The Court should also not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters. When matters like these are brought before the judicial constituent of the State by public spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest and ensure that the institutional integrity is not compromised by those in whom the people have reposed trust and who have taken an oath to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill will and who, as any other citizen, enjoy fundamental rights and, at the same time, are bound to perform the duties enumerated in Article 51A. [Para 79] [255-C-G]

7. It is imperative to observe that but for the vigilance of some enlightened citizens who held important constitutional and other positions and discharged their duties in larger public interest and Non Governmental Organisations who have been constantly fighting for

clean governance and accountability of the constitutional institutions, unsuspecting citizens and the Nation would never have known how the scarce natural resource spared by the Army has been grabbed by those who enjoy money power and who have been able to manipulate the system. [para 80] [256-B-C]

K. Manjusree v. State of Andhra Pradesh **(2008) 3 SCC 512: 2008 (2) SCR 1025;** *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corpn.* **(2000) 5 SCC 287: 2000 (3) SCR 1159;** *Home Communication Ltd. and Anr. v. Union of India and Ors.* **52 (1993) DLT 168;** *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai* **(2004) 3 SCC 214: 2004 (1) SCR 483:** *Chaitanya Kumar v. State of Karnataka* **(1986) 2 SCC 594: 1986 (2) SCR 409;** *Shivsagar Tiwari v. Union of India* **(1996) 6 SCC 558: 1996 (7) Suppl. SCR 478;** *Common Cause, A Registered Society (Petrol pumps matter) v. Union of India* **(1996) 6 SCC 530: 1996 (6) Suppl. SCR 719;** *Nagar Nigam v. Al Faheem Meat Exports (P) Ltd.* **(2006) 13 SCC 382: 2006 (10) Suppl. SCR 354;** *Delhi Science Forum v. Union of India* **(1996) 2 SCC 405: 1996 (2) SCR 767;** *BALCO Employees' Union (Regd.) v. Union of India* **(2002) 2 SCC 333: 2001 (5) Suppl. SCR 511;** *Villianur Iyarkkai Padukappu Maiyam v. Union of India* **(2009) 7 SCC 561: 2009 (9) SCR 225;** *Ministry of Labour and Rehabilitation v. Tiffin's Barytes Asbestos & Paints Ltd.* **(1985) 3 SCC 594: 1985 (2) Suppl. SCR 302;** *United India Fire and General Insurance Co. Ltd. v. K.S. Vishwanathan* **(1985) 3 SCC 686;** *State of T.N. v. M.N. Sundararajan* **(1980) 4 SCC 592: 1981 (1) SCR 471;** *Sunil Pannalal Banthia v. City & Industrial Development Corporation of Maharashtra Ltd.* **(2007) 10 SCC 674: 2007 (3) SCR 798;** *Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group* **(2006) 3 SCC 434: 2006 (2) SCR 920;** *Prem Chand Somchand Shah v. Union of India* **(1991) 2 SCC 48: 1991 (1) SCR 232;** *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.* **(1983) 1 SCC 147: 1983 (1) SCR 1000 – referred to.**

8.In the result, the writ petitions are allowed in the following terms:

(i) The licences granted to the private respondents on or after 10.1.2008 pursuant to two press releases issued on 10.1.2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.

(ii) The above direction shall become operative after four months.

(iii) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band.

(iv) The Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licences be granted by auction.

(v) Respondent Nos.2, 3 and 9 who have been benefited at the cost of Public Exchequer by a wholly arbitrary and unconstitutional action taken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band and who off-loaded their stakes for many thousand crores in the name of fresh infusion of equity or transfer of equity shall pay cost of Rs.5 crores each. Respondent Nos. 4, 6, 7 and 10 shall pay cost of Rs.50 lakhs each because they too had been benefited by the wholly arbitrary and unconstitutional exercise undertaken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band. No cost is imposed on the respondents who had submitted their applications in 2004 and

2006 and whose applications were kept pending till 2007.

(vi) Within four months, 50% of the cost shall be deposited with the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants. The remaining 50% cost shall be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence. However, it is made clear that the observations made in this judgment shall not, in any manner, affect the pending investigation by the CBI, Directorate of Enforcement and others agencies or cause prejudice to those who are facing prosecution in the cases registered by the CBI or who may face prosecution on the basis of chargesheet(s) which may be filed by the CBI in future and the Special Judge, CBI shall decide the matter uninfluenced by this judgment. This judgment shall not prejudice any person in the action which may be taken by other investigating agencies under Income Tax Act, 1961, Prevention of Money Laundering Act, 2002 and other similar statutes. [Para 81] [256-D-H; 257-A-F]

Case Law Reference:

2008 (2) SCR 1025	**referred to**	**Para 60**
2000 (3) SCR 1159	**referred to**	**Para 60**
(1993) DLT 168	**referred to**	**Para 60**
2004 (1) SCR 483	**referred to**	**Para 60**
1986 (2) SCR 409	**referred to**	**Para 60**
1996 (7) Suppl. SCR 478	**referred to**	**Para 60**
1996 (6) Suppl. SCR 719	**referred to**	**Para 60**
2006 (10) Suppl. SCR 354	**referred to**	**Para 60**

1996 (2) SCR 767	**referred to**	**Para 60**
2001 (5) Suppl. SCR 511	**referred to**	**Para 60**
2009 (9) SCR 225	**referred to**	**Para 60**
1985 (2) Suppl. SCR 302	**referred to**	**Para 60**
(1985) 3 SCC 686	**referred to**	**Para 60**
1981 (1) SCR 471	**referred to**	**Para 60**
2007 (3) SCR 798	**referred to**	**Para 60**
2006 (2) SCR 920	**referred to**	**Para 60**
1991 (1) SCR 232	**referred to**	**Para 60**
1983 (1) SCR 1000	**referred to**	**Para 60**
146 U.S. 387 (1892)	**referred to**	**Para 66**
1996 (10) Suppl. SCR 12	**referred to**	**Para 66**
(2002) 3 SCC 214	**referred to**	**Para 66**
2006 (2) SCR 419	**referred to**	**Para 66**
2009 (3) SCR 1	**referred to**	**Para 66**
1995 (1) SCR 1036	**relied on**	**Para 67**
2010 (5) SCR 704	**relied on**	**Para 68**
2004 (3) SCR 534	**relied on**	**Para 68**
1996 (10) Suppl. SCR 12	**relied on**	**Para 68**
2011 (5) SCR 77	**relied on**	**Para 70**
2001 (2) SCR 630	**relied on**	**Para 70**
2008 (4) SCR 610	**relied on**	**Para 70**
2005 (5) Suppl. SCR 699	**relied on**	**Para 70**
2009 (6) SCR 663	**relied on**	**Para 70**
1979 (3) SCR 1014	**relied on**	**Para 70**

1967 SCR 703	**referred to**	**Para 70**
1980 (3) SCR 1338	**relied on**	**Para 70**
1996 (6) Suppl. SCR 719	**relied on**	**Para 70**
1990 (1) Suppl. SCR 625	**relied on**	**Para 70**
1995 (1) Suppl. SCR 349	**relied on**	**Para 70**
1996 (3) Suppl. SCR 597	**relied on**	**Para 70**
1987 (2) SCR 223	**relied on**	**Para 71**
2011 (4) SCR 445	**referred to**	**Para 79**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 423 of 2010.

Under Article 32 of the Constitution of India.

WITH

W.P. (C) No. 10 of 2011.

Prashant Bhushan, Pranav Sachdeva, Dr. Subramanian Swamy (Petitioner-in-Person) in W.P. No. 10 of 2011 for the Petitioners.

G.E. Vahanvati, AG, Indira Jaising ASG, Rakesh Dwivedi, C.S. Vaidyanathan, Ramji Srinivasan, Dr. Abhishek Manu Singhvi, Meet Malhotra, C.A. Sundaram, Vikas Singh, Arijit Prasad, T.A. Khan, Sonam Anand, Nishant Patil, Saket Singh, Abhishek Chaudhary, Varun Chaudhary, Preetika Dwivedi, Manjul Bajpai, Ankur Saigal, Mansoor Ali Shoket, Pukhnambam Ramesh Kumar, Nitin Kala, Vibha Dhawan, Manu Nair, Adit S. Pujari, Gopal Jain, Manik Karanjawala, Ruby Singh Ahuja (for Karanjawala & Co.), Ritu Bhalla, Sahil Sharma, Omar Ahmad, Ananya Ghosh, Jai Mohan (for Suresh A. Shroff & Co.), Dayan Krishnan, Gautam Narayan for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. The important questions which arise for consideration in these petitions, one of which has been filed by Centre for Public Interest Litigation, a registered Society formed by Shri V.M. Tarkunde (former Judge of the Bombay High Court) for taking up causes of public interest and conducting public interest litigation in an organised manner, Lok Satta, a registered Society dedicated to political governance, reforms and fight against corruption, Telecom Watchdog and Common Cause, both Non-Governmental Organisations registered as Societies for taking up issues of public importance and national interest, Sarva Shri J.M. Lingdoh, T.S. Krishnamurthi and N. Gopalasamy, all former Chief Election Commissioners, P. Shanker, former Central Vigilance Commissioner, Julio F. Ribero, former member of the Indian Police Service, who served as Director General of Police, Gujarat, Punjab and C.R.P.F. and Commissioner of Police, Mumbai, P.G. Thakurta, an eminent Senior Journalist and visiting faculty member of various institutions including IIMs, IIT, FTII, IIFT, Delhi University, Jawaharlal Nehru University and Jamia Milia Islamia University and Admiral R.H. Tahiliyani, former Chief of Naval Staff, former Governor and former Chairman of Transparency International India and the other has been filed by Dr. Subramanian Swami, a political and social activist, are:

(i) Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution?

(ii) Whether the recommendations made by the Telecom Regulatory Authority of India (TRAI) on 28.8.2007 for grant of Unified Access Service Licence (for short 'UAS Licence') with 2G spectrum in 800, 900 and 1800 MHz at the price fixed in 2001, which were approved by the Department of Telecommunications (DoT), were contrary

to the decision taken by the Council of Ministers on 31.10.2003?

(iii) Whether the exercise undertaken by the DoT from September 2007 to March 2008 for grant of UAS Licences to the private respondents in terms of the recommendations made by TRAI is vitiated due to arbitrariness and malafides and is contrary to public interest?

(iv) Whether the policy of first-come-first-served followed by the DoT for grant of licences is *ultra vires* the provisions of Article 14 of the Constitution and whether the said policy was arbitrarily changed by the Minister of Communications and Information Technology (hereinafter referred to as 'the Minister of C&IT'), without consulting TRAI, with a view to favour some of the applicants?

(v) Whether the licences granted to ineligible applicants and those who failed to fulfil the terms and conditions of the licence are liable to be quashed?

2. For detailed examination of the issues raised by the petitioners, it will be useful to briefly notice the history of the growth of telecommunications in the country and the reforms introduced 1984 onwards.

3. In 1839, the first telegraph link was experimented between Calcutta and Diamond Harbour covering 21 miles. In 1851, the telegraph line was opened for traffic, mostly for the official work of the East India Company. In course of time, telegraphy service was made available for public traffic. The Indian Telegraph Act was enacted in 1885. It gave the exclusive privilege of establishing, maintaining and working of "telegraphs" to the Central Government. It also empowered the Government to grant licences on such conditions and in consideration of such payments as it thought fit, to any person to establish, maintain or work a telegraph in any part of India.

4. After independence, Government of India took complete control of the telecom sector and brought it under the Post & Telegraph Department. One major step taken for improving telecommunication services in the country was the establishment of a modern telecommunication manufacturing facility at Bangalore under the Public Sector, in the name of "Indian Telephone Industries Ltd." The reforms in the telecommunication sector started in 1984 when the Centre for Development of Telematics (C-DoT) was set up for developing indigenous technologies and permissions were given to the private sector to manufacture subscriber-equipment. In 1986, Mahanagar Telephone Nigam Ltd., (MTNL) and Videsh Sanchar Nigam Ltd., (VSNL) were set up.

5. The New Economic Policy of India was announced on 24.7.1991. It was aimed at meeting India's competitiveness in the global market; rapid growth of exports, attracting foreign direct investment; and stimulating domestic investments. With a view to achieve standards comparable to international facilities, the sub-sector of Value Added Services was opened up to private investment in July 1992 for the following services: (a) Electronic Mail; (b) Voice Mail; (c) Data Services; (d) Audio Text Services; (e) Video Text Services; (f) Video Conferencing; (g) Radio Paging; and (h) Cellular Mobile Telephone. In respect of services (a) to (f), the companies registered in India were permitted to operate under a licence on non-exclusive basis. For services covered by (g) and (h) mentioned above, keeping in view the constraints on the number of companies that could be allowed to operate, a policy of selection through a system of tendering was followed for grant of licences.

National Telecom Policy 1994

6. National Telecom Policy 1994 (NTP 1994) was announced on 13.5.1994. This was the first major step towards deregulation, liberalization and private sector participation. The objectives of the policy were:

(i) affording telecommunication for all and ensuring the availability of telephone on demand;

(ii) providing certain basic telecom services at affordable and reasonable prices to all people and covering all villages;

(iii) giving world standard telecom services; addressing consumer complaints, dispute resolution and public interface to receive special attention and providing widest permissible range of services to meet the customers' demand and at the same time at a reasonable price;

(iv) creating a major manufacturing base and major export of telecom equipment having regard to country's size and development; and

(v) protecting the defence and security interest of the country.

7. In furtherance of NTP 1994, licences were granted to eight Cellular Mobile Telephone Service (CMTS) operators, two in each of the four metropolitan cities of Delhi, Mumbai (Bombay), Kolkata (Calcutta) and Chennai (Madras). In the second phase, in December 1995, after following a competitive bidding process, 14 CMTS licences were awarded in 18 state circles, 6 Basic Telephone Services (BTS) licences were awarded in 6 state circles and paging licences were awarded in 27 cities and 18 state circles. However, this did not yield the intended results apparently because revenue realised by the cellular and basic operators was less than the projections and the operators were unable to arrange finances for their projects.

New Telecom Policy 1999

8. On the directions of the Prime Minister, a high level Group on Telecommunications (GoT) was constituted on 20.11.1998 to review the existing telecom policy and suggest

further reforms. On the basis of the report of the GoT, a draft New Telecom Policy 1999 (NTP 1999) was formulated. After its approval by the Cabinet, NTP 1999 was announced to be effective from 1.4.1999. NTP 1999 had the following objectives:

(i) to make available affordable and effective communications for the citizens, considering access to telecommunications as utmost important for achievement of the country's social and economic goals;

(ii) to provide universal service to all uncovered areas including the rural areas and also provide high level services capable of meeting the needs of the country's economy by striking a balance between the two;

(iii) to encourage development of telecommunication in remote, hilly and tribal areas of the country;

(iv) to create a modern and efficient telecommunications infrastructure taking into account the convergence of IT, media, telecom and consumer electronics which will in turn propel India to become an IT superpower;.

(v) to convert PCOs wherever justified into Public Teleinfo centres having multimedia capability such as Integrated Services Digital Network (ISDN) services, remote database access, government and community information systems, etc.;

(vi) to transform, in a time bound manner, the telecommunications sector in both urban and rural areas into a greater competitive environment providing equal opportunities and level playing field for all players;

(vii) to strengthen research and development efforts in

the country and provide an impetus to build world class manufacturing capabilities;

(viii) to achieve efficiency and transparency in spectrum management;

(ix) to protect defence and security interests of the country; and

(x) to enable Indian Telecom Companies to become truly global players.

9. NTP 1999 categorized 8 services in the telecom sector, namely; (i) Cellular Mobile Service Providers (CMSPs), Fixed Service Providers (FSPs) and Cable Service Providers, collectively referred as 'Access Providers'; (ii) Radio Paging Service Providers; (iii) Public Mobile Radio Trunking Service Providers; (iv) National Long Distance Operators; (v) International Long Distance Operators; (vi) Other Service Providers, (vii) Global Mobile Personal Communication by Satellite (GMPCS) Service Providers; (viii) V-SAT based Service Providers. NTP 1999 dealt with, and provided the framework for, all these categories of telecom service providers.

10. The policy on spectrum management as enumerated in NTP 1999 was as under:

(i) Proliferation of new technologies and the growing demand for telecommunication services has led to manifold increase in demand for spectrum and consequently *it is essential that the spectrum is utilized efficiently, economically, rationally and optimally.*

(ii) There is a need for a transparent process of allocation of frequency spectrum for use by a service provider and making it available to various users under specific conditions.

(iii) With the proliferation of new technologies it is essential to revise the National Frequency Allocation Plan (NFAP) in its entirety so that it becomes the basis for development, manufacturing and spectrum utilization activities in the country amongst all users. NFAP was under review and the revised NFAP was to be made public by the end of 1999 detailing information regarding allocation of frequency bands for various services, without including security information.

(iv) NFAP would be reviewed no later than every two years and would be in line with radio regulations of the International Telecommunication Union (ITU).

(v) Adequate spectrum is to be made available to meet the growing need of telecommunication services. Efforts would be made for relocating frequency bands assigned earlier to defence and others. Compensation for relocation may be provided out of spectrum fee and revenue share.

(vi) There is a need to review the spectrum allocation in a planned manner so that required frequency bands are available to the service providers.

(vii) There is a need to have a transparent process of allocation of frequency spectrum which is effective and efficient and the same would be further examined in the light of ITU guidelines. In this regard the following course of action shall be adopted viz.:

a) spectrum usage fee shall be charged;

b) an Inter-Ministerial Group to be called Wireless Planning Coordination Committee, as a part of the Ministry of Communications for periodical review of spectrum availability and broad allocation policy,

should be set up; and

c) massive computerization in WPC Wing would be started in the next three months so as to achieve the objective of making all operations completely computerized by the end of the year 2000.

(emphasis supplied)

Establishment of the Telecommunication Commission (for short, 'the Telecom Commission') and the Telecom Regulatory Authority of India.

11. On 11.4.1989, the Council of Ministers passed a resolution and decided to establish the Telecom Commission. The relevant portions of that resolution are extracted below:

"CABINET SECRETARIAT

New Delhi the 11th April, 1989

RESOLUTION

CONSTITUTION OF TELECOM COMMISSION

No. 15/1/2/87-Cab. 1. Telecommunication service is an essential infrastructure for national development. It has impact on social and economic activities. Besides, business, industry and administration depends heavily on information and telecom for productivity, efficiency and their day-to-day operations. Its development, therefore, is vital for nation building.

In order to promote rapid development in all aspects of telecommunications including technology, production and services, the Government of India consider it necessary to set up an organisation, which will have responsibility in the entire field of telecommunications.

After careful consideration, the Government of India

have decided to establish a Telecommunication Commission with full executive and financial powers modelled on the lines of the Atomic Energy Commission.

2. Constitution of the Commission

(a) The Commission will consist of full time and part time Members;

(b) The Secretary to the Government of India in the Department of Telecommunications shall be the ex-officio Chairman of the Commission;

(c) The full time Members of the Commission shall be ex-officio Secretary to the Government of India in the Department of Telecommunications. One of these Members shall be Member for Finance; and

(d) The Secretary and the full time Members of the Commission shall be drawn from the best persons available, including from within the Department of Telecommunications.

3. Functions

The Telecom Commission shall be responsible :

(a) For formulating the policy of the Department of Telecommunications for approval of the Government;

(b) For preparing the budget for the Department of Telecommunications for each financial year and getting it approved by the Government; and

(c) Implementation of the Government's policy in all matters concerning telecommunication**.**

4. Within the limits of the budget provision, approval by the Parliament, the Commission shall have the powers of the

Government of India, both administrative and financial, for carrying out the work of the Department of Telecommunications.

5. Chairman

(a) The Chairman, in his capacity as Secretary to the Government of India in the Department of Telecommunications, shall be responsible under the Minister of Communications for arriving at decisions on technical questions and advising Government on policy and allied matters of telecommunication. All recommendations of the Commission on policy and allied matters shall be put to the Minister of Communications through the Chairman.

(b) In case of any difference of opinion in the meetings of the Commission, the decision of the Chairman shall be final, but in financial matters, Member (Finance) of the Commission will have access to Finance Minister.

(c) The Chairman may authorise any Member of the Commission to exercise on his behalf, subject to such general or special orders as he may issue from time to time, such of his powers and responsibilities as he may decide.

6. Member Finance

The Member of Finance shall exercise powers of the Government of India in financial matters concerning the Department of Telecommunications except in so far as such powers have been, or may in future be conferred on or delegated to the Department.

7. The Commission shall have power to frame its own rules and procedures. The Commission shall meet

at such time and places as fixed by the Chairman.

8. The Telecom Commission shall take over all legal and statutory authority vested with the Telecom Board."

12. The Rules of Business for the Telecom Commission were also framed in 1989. In terms of para 2 of the Rules of Business read with item 1 of Annexure 'A' appended thereto, all important matters of policy relating to Telecommunications are required to be brought before the Telecom Commission.

13. In 1997, Parliament enacted the Telecom Regulatory Authority of India Act, 1997 (for short, 'the 1997 Act') to provide for the establishment of TRAI. By Act No.2 of 2000, the 1997 Act was amended and provision was made for establishment of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). Sections 11 and 13, which have bearing on the decision of these petitions read as under:

"11. Functions of Authority. - (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-

(a) to make recommendations, either *suo motu* or on a request from the licensor, on the following matters, namely:-

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of licence to a service provider;

(iii) revocation of licence for non- compliance of terms and conditions of licence;

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely:-

(i) ensure compliance of terms and conditions of licence;

(ii) (ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of

telecommunication between different service providers;

(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central

Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this subsection and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall, refer the recommendation back to the Authority for its reconsideration, and the Authority may within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision.

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons

therefor.

(3) While discharging its functions :under sub-section (1) or sub-section (2) the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

13. Power of Authority to issue directions. - The Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary:

Provided that no direction under sub-section (4) of section 12 or under this section shall be issued except on the matters specified in clause (b) of sub-section (1) of section 11."

14. After its establishment, TRAI made various recommendations either *suo motu* or on the request of the licensor, i.e., the Central Government or the Telegraph Authority. On a reference made by the Ministry of Communications and Information Technology on four issues including the issues of appropriate level of entry fee, basis of selection of new operators and entry of 4th cellular operator, TRAI made its recommendations, which were communicated to Secretary, DoT vide D.O. No. 250-14/2000-Fin (DF) (Vol. II) dated 23.6.2000. Paragraphs 4.1 to 4.3, 4.5 to 4.6 and 4.11 to 4.15 of that letter are extracted below:

"4. For the purposes of clarity each issue on which TRAI's recommendation has been sought has been stated separately and recommendations have been given therefor.

4.1(A) Appropriate level of entry fee, basis for selection of

new operators and entry of fourth operator

The issues under this head can be broken under three main subheads. These are :

(i) Level of entry fee;

(ii) Basis for selection of new operation;

(iii) Entry of the fourth operator.

We take these issues sequentially.

4.2(1) Level of Entry Fee:-

New operators are to be licensed in the following vacant circles/slots:

(a) Jammu & Kashmir - Andamans & Nicobar Islands;

(b) Assam and West Bengal;

(c) DOT/MTNL as the third operator.

(d) Fourth operator in circles where migration has been permitted.

4.3 DOT/MTNL wherever they come in as the third operator as also the fourth operator to be introduced will be required to pay as licence fee the same percentage share of their revenue as recommended by TRAI for the existing CMSPs who are being allowed to migrate to revenue sharing arrangement in accordance with NTP 99. The fourth operator will also pay an entry fee which will be fixed through a process of bidding.

4.5 (ii) Selection of new operators:

The TRAI recommends that all new operators barring DOT/ MTNL be selected through a competitive process. This is recommended to be a multi stage bidding process

preceded by a pre-qualification round.

4.6 Pre-qualification

Prospective operators would be required to meet pre-determined criteria in order to qualify to bid for the licence. Pre-qualifications will mainly be on the following grounds :-

- Financial strength and experience as Telecom Service Provider

- Minimum roll out obligation

- Technical Plan

- Business Plan

- Payment terms and other commercial conditions

It is recommended that prospective bidders who meet the predetermined threshold as set out in the pre-qualification criteria be short-listed for bidding for entry fee in the next stage. No weightages need be attached to the pre-qualification criteria. The criteria for pre-qualification could be developed on the following lines:-

4.11 The Structure of the Bidding Process

Selection from amongst all those who pass the pre-qualification round will be by a process of bidding. The bids will be carefully structured so as to guard against the possible misuses of the process such as preemptive over-bidding or cartelisation. For this purpose, a bid structure involving "Multi Stage Informed Ascending Bids" is recommended. It is also recommended that such bids be invited for the entry fee for selection of operations and issuing licenses to them. Although, as recommended earlier in the case of NLDO, TRAI is primarily of the opinion that because of its greater relevance, direct impact on

operations and being equitable, revenue sharing is a better basis on which to invite bids for licenses, in the case of CMSPs this choice is not available except in two vacant circles/slots. The 34 incumbent operators have already been given licenses through a process of bidding and it would not be correct to subject them to yet another process of bidding, this time concerning revenue sharing. They have already been asked to pay as license fee, albeit on a provisional basis a fixed amount of the revenue share viz. 15%. It is, therefore, recommended that a fixed percentage of revenue share be paid by all operators as the license fee and this percentage be the same for all the operators barring the exceptions specifically mentioned in the paragraph 5.9 below.

4.12. While, the detailed bid structure can be prepared at the time bids are being called and assistance/advise of experts may be taken in doing so, based on the experience of such successful bids elsewhere, the basic outlines of the proposed structure can be given. Bids can be invited for more than one licence at a time. The total number of rounds in which the bids will be finalised will be pre-determined and all bidders should be eligible to bid for all licenses on offer in each of the rounds. The licensor, may, however, if it so desires, stipulate beforehand the total number of licences that can be finally allotted to a single bidder. The TRAI's recommendation in this regard is that the number of licences that can go to a single bidder need not be restricted. This will favour the serious and techno-financially strong bidders and will help keep the bids at operationally feasible optimal levels.

4.13. *After each stage of bidding, bids received will be made public and all bidders (those lower than the highest bidder as well as the highest bidder) will be permitted to raise their bids in the subsequent rounds of bidding. The process will be deemed complete only on the completion*

of the pre-determined number of bid rounds at the end of which the highest bidder for each licence will have the claim to the license in question. Licences will become effective on payment of the amount of the winning bid for the entry fee within a period specified in the tender document.

4.14. The same process of bidding will also enable selection of operators where two slots in the same circle are vacant viz. J & K and Andaman and Nicobar where no operators exist. In these circles, two bidders may be selected and it is recommended in this regard that while the second highest bidder in these circles may be considered for the second slot available, he need not be asked to match the bid of the highest bidder. It may be provided though that if the difference between the first and the second highest bids is substantial, say more than 25 %, fresh bids for the second slot will be invited. Such an arrangement while being equitable will act as a good incentive for attracting bids for these circles which have not proved to be attractive in the past.

(III). Entry of the Fourth Operator:

4.15 DOT/MTNL, the incumbent in basic services, are to enter the field of cellular mobile services as the third operator in terms of NTP 99 with the existing availability of spectrum. TRAI, however, has no information about the availability of spectrum either for the third or the fourth operator. The financial analysis conducted by the TRAI for the purpose of studying the revenue share which the operators can part with as licence fee assumes entry of the third operator in the sixth year of licence i.e. in the current year and of another i.e. the fourth operator two years later in accordance with NTP 99. The analysis reveals that even if the business in each of these metropolitan areas and circles is required to produce a reasonable IRR say 16-18 % and a decent return on the

capital say around 20%, it would still enable the operators to share upto about 25% of the Gross (adjusted) revenue as the licence fee. In the circumstances, it would be reasonable to assume that on purely economic grounds, in most circles there is even at present, a fair case for the entry of the fourth operator. In this context, however, more than the market, the determining factor has to be the availability of a spectrum and its optimal utilisation. Moreover, it is also a matter for careful consideration that even when additional spectrum is released, whether it should be utilised to augment the number of service providers or for improving the quality and coverage of the already available services. In the GSM 900 band the maximum frequency spectrum made available to the operators in a large number of countries is a pair of 12.5 MHz. Against this in India the circle operators have been given a pair of less than 5 MHz and the metro operators of less than 7 MHz. It is learnt that in a number of metros and circles, no further expansion of services is possible unless additional spectrum is made available to the existing operators. Paucity of frequency spectrum is also adversely affecting the quality of service in a number of service areas. In the circumstances a fair balance between the two objectives of increasing competition on the one hand and improving the quality, coverage and price-efficiency of the service on the other will have to be struck so that the larger objective of providing quality services at affordable prices is not jeopardised. A sub-optimal cost structure and quality of service may finally turn out to be detrimental to the growth of tele-density notwithstanding a higher number of service providers. Similar views were expressed also by the BICP in their report on Cellular Mobile Services (para 20 page-V) of the report). *Accordingly, TRAI is of the opinion that a view can be taken in this matter only after getting a full report from the DOT on the quantum of spectrum being made available for the CMSPs, existing as well as the proposed*

new entrants and its location i.e. whether it is going to be in the 900 MHz or in 1800 MHz bands."

(underlining is ours)

15. On 5.1.2001, the Government of India issued guidelines for issue of licence for CMTS. These guidelines envisaged a detailed bidding process for selection of the new service providers.

16. On 27.10.2003, TRAI made recommendations under Section 11(1)(a)(i), (ii), (iv) and (vii) of the 1997 Act on Unified Licensing. TRAI referred to international practices, NTP 1994 and NTP 1999 and growth of telephone density - national objective and priority. Para 7.2 of those recommendations read as under:

"7.2 The Guidelines would be notified by the licensor based on TRAI recommendations to include nominal entry fee, USO, etc. The charges for spectrum shall be determined separately. The operator shall be required to approach the licensor mainly for spectrum allocation. Since, spectrum is a scarce resource, it needs to be regulated separately. Spectrum should be distributed using such a mechanism that it is allocated optimally to the most efficient user."

17. Paragraphs 7.15 to 7.19 of the 2003 recommendations contained various alternatives for deciding the benchmark for the entry fee for Unified Access Licensing Regime. In paragraph 7.30, TRAI laid emphasis on efficient utilization of spectrum by all service providers and indicated that it would make further recommendations on efficient utilization of spectrum, spectrum pricing, availability and spectrum allocation procedure shortly, and the DoT may like to issue spectrum related guidelines based on its recommendations.

18. In the meanwhile, a Group of Ministers was constituted on 10.9.2003 with the approval of the Prime Minister to consider the following matters:

(i) To recommend how to ensure release of adequate spectrum needed for the growth of the telecom sector;

(ii) To recommend measures for ensuring adequate resources for the realization of the NTP targets of rural telephony;

(iii) To resolve issues relating to the enactment of the Convergence Bill;

(iv) To chart the course to a Universal Licence;

(v) To review adequacy of steps and enforcing limited mobility within the SDCA for WLL(M) services of basic operators, and recommend the future course of action;

(vi) To appraise FDI limits in the telecom sector and give recommendations thereon;

(vii) To identify issues relating to mergers and acquisitions in the telecom sector and recommend the way forward; and

(viii) To consider issues relating to imposition of trade tax on telecom services by the State Governments.

19. After considering the entire matter, the Group of Ministers made detailed recommendations on 30.10.2003, the relevant portions of which are extracted below:

"2.1 1st Term of Reference: to recommend how to ensure release of adequate spectrum needed for the growth of the telecom sector.

2.1.1. The GOM was informed that the availability of adequate spectrum in appropriate frequency bands, i.e. 1800 MHz in a timely manner is crucial, for the growth of

mobile telephone services. The growth of mobile services and resultant spectrum needs are mainly in metro, major and main cities having population above 1 million. However, the frequency bands of 1800 MHz are extensively used by Defence services, thus severely limiting their availability for the mobile telecom operators.

2.1.2. In the above context, GoM recommended the following:

(1) Adequate spectrum be made available for the unimpeded growth of telecom services, modalities for which will be jointly worked out by Wireless Planning & Coordination (WPC) Wing of Department of Telecom and Defence services. The Ministry of Defence would coordinate release additional spectrum in a number of cities for which requirements have been projected within a month.

(2) The Ministry of Finance will provide necessary budgetary support to Ministry of Defence for modernization of their existing equipment to facilitate release of required spectrum. The actual fund requirements including its phasing will be worked out between the Ministry of Defence Ministry of Finance and the Department of Telecom in a time bound manner.

(3) The Department of Telecom and Ministry of Finance would discuss and finalise spectrum pricing formula which will include incentive for efficient use of spectrum as well as disincentive for sub-optimal usages

(4) The allotment of additional spectrum be transparent fair and equitable, avoiding monopolistic situation regarding spectrum allotment usage

(5) The long term 15-20 years, spectrum requirements along with time frames would also be worked out by

Department of Telecom.

(6) As per the directions of GoM, a Task Force has been constituted under the chairmanship of Wireless Adviser to the Govt. of India with representatives from Department of Telecom, Ministry of Defence and Ministry of Finance. The terms of reference of the Task Force and the progress of its work so far are given in Annexures II & III.(Page 17-18).

2.4. 4th Term of Reference:- To chart the course to a Universal Licence:

2.4.1. The GoM took note of the exercise that had already been indicated by Telecom Regulatory Authority of India (TRAI), in regard to Unified Licensing Regime in the Telecom Sector Chairman, TRAI and Chairman HDFC were specially invited made presentations before the GoM.

2.4.2. TRAI submitted its recommendations to the Government on this matter on 27.10.2003. TRAI has recommended that the present system of licensing in the Telecom Sector should be replaced by Unified Licensing/ Automatic Authorization Regime. The Unified Licensing/ Automatic Authorization Regime has been recommended to be achieved in a two-stage process with the Unified Access Regime for basic and cellular services in the first phase to be implemented immediately. This is to be followed by a process of consultation to define the guidelines and rules for achieving a fully Unified Licensing/ Authorization Regime. TRAI has recommended that it will enter into a consultation process so that the replacement of the existing licensing regime by a Unified Licensing Regime gets initiated within 6 months. Broad rationale key recommendations and some key policy issues that have been addressed by TRAI are listed in the Annexure IV(pages 19-21).

2.4.3. The salient points of TRAI recommendations in regard to the Unified Access Licensing (basic and cellular mobile), are as under:

(i) Unification of licenses to be done in two stages

(a) Unified access regime for basic and cellular services in the first phase immediately

(b) Unified authorization regime encompassing all telecom services in the second phase.

(ii) Fee paid by fourth cellular operator to be benchmark for migration of basic players to the new access regime.

(iii) Cellular operators not to pay any entry fee for migration to the unified access regime while basic operators to pay the differences between fourth cellular operators licence fee and the BSO fee already paid by them

(iv) Reliance Infocom required to pay Rs. 1096 crores for migration in addition to penalty of Rs. 485 crores for offering cellular type services.

(v) Process of migration to the new regime to be voluntary.

(vi) The existing BSOs after migration to Unified Access Licensing Regime may offer full mobility however WLL(M) operators after migration will be required to offer limited mobility service to such customers who so desire.

(vii) No additional fee to be paid for any of the circles where there is no fourth cellular operator.

2.4.4 Enhancing the scope of current Telecom Policy (NTF-99) to provide category of Unified License and Unified Access Service License

NTP-99 recognises access service providers as a distinct

class. For the purpose of licensing, this has been sub-divided into cellular fixed and cable service providers. NTP-99 also states that convergence of both markets and technologies is a reality that is forcing realignment of the industry. This convergence now allows operators to use their facilities to deliver some services reserved for other operators necessitating a re-look at NTP-94 policy framework.

For bringing into effect the regime of Unified Access Service for basic and cellular service licenses and Unified Licensing comprising all telecom services, it would be necessary to enhance the scope of NTP-99 to include these as distinct categories of licenses as pet of NTP-99.

2.4.5 TRAI recommendations on entry fee of WLL(M) based on TDSAT judgement:

TRAI has also submitted its recommendations in regard to additional entry fee payable by basic service operators for providing WLL(M) services on which Government had sought its recommendations based on the judgment of TDSAT dated 8/8/03 in the WLL(M) case. TRAI has given detailed reasoning on this matter and has recommended additional entry fee for such of the Basic Service Operators who provide WLL(M) service. The salient features are in Annexure-V (page 22).

2.4.6 Based on the above the GoM has recommended the following course of action

(i) The scope of NTP-99 may be enhanced to provide for licensing of Unified Access Service for basic and cellular license services and Unified Licensing comprising all telecom services. Department of Telecommunications may be authorized to issue necessary addendum to NTP-99 to this effect.

(ii) The recommendations of TRAI with regard to

implementation of the Unified Access Licensing Regime for basic and cellular services may be accepted.

DoT may be authorized to finalise the details of implementation with the approval of the Minister of Communication & IT in this regard including the calculation of the entry fee depending upon the date of payment based on the principles given by TRAI in its recommendations.

(iii) The recommendations of TRAI in this regard to the course of action to be adopted subsequently in regard to the implementation of the fully Unified License Authorisation Regime may be approved.

DoT may be authorized to finalise the details of implementation with the approval of the Minister of Communications & IT on receipt of recommendations of TRAI in this behalf.

(iv) The recommendations of TRAI in regard to additional entry fee payable by basic service operators for providing WLL(M) service on which Government sought its recommendations based on the judgment of TDSAT dated 8.8.2003 in the WLL(M) case may be accepted.

(v) While there appears to be no case for giving any compensation package to them, because of the perception that the finances of the cellular operators are strained and because of the effect these may have on financial institutions. Finance Ministry would address the difficulties of the cellular operators, if any, separately and appropriately.

(vi) If new services are introduced as a result of technological advancements which require additional spectrum over and above the spectrum already allotted/ contracted allocation of such spectrum will be considered

on payment of additional fee or charges, these will be determined as per guidelines to be evolved in consultation with TRAI."

(emphasis supplied)

20. The recommendations of the Group of Ministers were accepted by the Council of Ministers on 31.10.2003.

21. Thereafter, DoT issued Office Memorandum dated 11.11.2003 and made some additions to NTP 1999. The same day, DoT issued new guidelines for UAS Licences. Two salient features of these guidelines were that the existing operators would have an option to continue under the existing licensing regime or to migrate to new UAS Licence and the licence fee, service area, rollout obligations and performance bank guarantee under UAS Licence was to be the same as the 4th CMTS.

22. Vide letter dated 14.11.2003, the Chairman, TRAI, on his own, made recommendation regarding entry fee to be charged from the new UAS Licensees. On 24.11.2003, the Minister of C&IT accepted the recommendation that entry fee for new UAS Licensees will be the entry fee of 4th cellular operator and where there is no 4th cellular operator, it will be the entry fee fixed by the Government for the basic operator. A decision was also taken by him in F. No.20-231/2003-BS-III (LOIs for UASL) at 4/N that,

"As regards the point raised about the grant of new licences on first-come-first-served basis, the announced guidelines have made it open for new licences to be issued on continuous basis at any time. However, the spectrum is to be allotted subject to availability. This in effect would imply that an applicant who comes first will be granted the spectrum first so it will result in grant of licence on first-come-first-served basis."

Although, in terms of the decision taken by the Minister of C&IT,

the applications for grant of UAS Licence could be made on continuous basis and were required to be processed within 30 days, some applications were made in 2004 and 2006 and the same were kept pending.

23. On 13.5.2005, TRAI made comprehensive recommendations on various issues relating to spectrum policy, i.e., efficient utilisation of spectrum, spectrum allocation, *spectrum pricing,* spectrum charging and allocation for other terrestrial wireless links. These recommendations were not placed before the Telecom Commission. Though, the then Secretary, DoT submitted the file to the then Minister of C&IT on 16.8.2005 for information with a note that he will go through the recommendations and put up the file to the Minister for policy decision, the file was returned on 12.9.2006, i.e., after one year and no further action appears to have been taken.

24. In the meanwhile, on 23.2.2006, the Prime Minister approved constitution of a Group of Ministers, consisting of the Ministers of Defence, Home Affairs, Finance, Parliamentary Affairs, Information and Broadcasting and C&IT, to look into issues relating to vacation of spectrum. Deputy Chairman, Planning Commission was special invitee. The Terms of Reference of the Group of Ministers, among other things, included suggesting a *Spectrum Pricing Policy* and examining the possibility of creation of a spectrum relocation fund. After five days, the Minister C&IT wrote letter dated 28.2.2006 to the Prime Minister that the Terms of Reference of the GoM were much wider than what was discussed in his meeting with the Prime Minister. He appears to have protested that the Terms of Reference would impinge upon the work of his Ministry and requested that the Terms of Reference be modified in accordance with the draft enclosed with the letter. Interestingly, the Minister's draft did not include the important issue relating to Spectrum Pricing. Thereafter, vide letter 7.12.2006, the Cabinet Secretary conveyed the Prime Minister's approval to the modification of the Terms of Reference. The revised Terms

of Reference did not include the issue relating to Spectrum Pricing.

25. On 14.12.2005, the DoT issued revised guidelines for UAS Licence. Paragraph 11 of the new guidelines reads as under:

> "The licences shall be issued without any restriction on the number of entrants for provision of unified access services in a Service Area."

In terms of paragraph 14 of the guidelines, the licensee was required to pay annual licence fee at 10/8/6% of Adjusted Gross Revenue (AGR) for category A/B/C service areas, respectively excluding spectrum charges. This was in addition to the non-refundable entry fee. In terms of paragraph 19 the licensee was required to pay spectrum charges in addition to the licence fee on revenue share basis. However, while calculating AGR for limited purpose of levying spectrum charges, revenue from wireless subscribers was not to be taken into account.

26. After one year and about six months, the DoT vide its letter dated 13.4.2007, requested TRAI to furnish its recommendations under Section 11(1)(a) of the 1997 Act on the issues of limiting the number of access providers in each service area and review of the terms and conditions in the access provider licence mentioned in the letter. Paragraph 2 of that letter is extracted below:

> "2. Fast changes are happening in the Telecommunication sector. In order to ensure that the policies keep pace with the changes/developments in the Telecommunication sector, the government is contemplating to review the following terms and conditions in the Access provider (CMTS/UAS/Basic) license
>
> i. Substantial equity holding by a company / legal person in more than one licensee company in the

same service area (clause 1.4 of UASL agreement).

ii. Transfer of licences (clause 6 of the UASL)

iii. Guidelines dated 21.02.2004 on Mergers and Acquisitions. TRAI in its recommendations dated 30.1.2004 had opined that the guidelines may be reviewed after one year.

iv. Permit service providers to, offer access services using combination of technologies (CDMA, GSM and/or any other) under the same license.

v. Roll-out obligations (Clause 34 of UASL).

vi. Requirement to publish printed telephone directory."

27. In furtherance of the aforesaid communication, TRAI made recommendations dated 28.8.2007. The main emphasis of these recommendations was the principles of fair competition, no restriction on the number of access service providers in any service area, need for spectrum management, measures to increase spectrum efficiency, allocation of spectrum and compliance of roll out obligations by the service providers. It was also recommended that in future all spectrum excluding the spectrum in 800, 900 and 1800 MHz bands in 2G services should be auctioned. In paragraphs 2.33, 2.39, 2.41, 2.54 and 2.63, TRAI repeatedly mentioned about scarce availability of spectrum. Paragraphs 2.37, 2.40, 2.69 and 2.73 to 2.79 of the TRAI's recommendations dated 28.8.2007 are extracted below:

"2.37 *Accordingly, the Authority recommends that no cap be placed on the number of access service providers in any service area.*

2.40 *The present spectrum allocation criteria, pricing methodology and the management system suffer*

from a number of deficiencies and therefore the Authority recommends that this whole issue is not to be dealt with in piecemeal but should be taken up as a long term policy issue. There is an urgent need to address the issues linked with spectrum efficiency and its management.

2.69 The Entry fee for acquiring a UASL license enables the licensee to become eligible for spectrum allocation in certain specified bands without any additional fee for acquisition of spectrum which means that allocation of spectrum follows the grant of license subject however to availability of spectrum. There is only one direct cost to the operator for spectrum i.e. spectrum charge in the form of royalty.

2.73 The allocation of spectrum is after the payment of entry fee and grant of license. The entry fee as it exists today is, in fact, a result of the price discovered through a markets based mechanism applicable for the grant of license to the 4th cellular operator. In today's dynamism and unprecedented growth of telecom sector, the entry fee determined then is also not the realistic price for obtaining a license. Perhaps, it needs to be reassessed through a market mechanism. On the other hand spectrum usage charge is in the form of a royalty which is linked to the revenue earned by the operators and to that extent it captures the economic value of the spectrum that is used. Some stakeholders have viewed the charges/fee as a hybrid model of extracting economic rent for the acquisition and also meet the criterion of efficiency in the utilization of this scarce resource. *The Authority in the context of 800, 900 and 1800 MHz is conscious of the legacy i.e. prevailing practice and the overriding consideration of level playing*

field. Though the dual charge in present form does not reflect the present value of spectrum it needed to be continued for treating already specified bands for 2G services i.e. 800, 900 and 1800 MHz. It is in this background that the Authority is not recommending the standard options pricing of spectrum, however, it has elsewhere in the recommendation made a strong case for adopting auction procedure in the allocation of all other spectrum bands except 800, 900 and 1800 MHz.

2.74 Some of the existing service providers have already been allocated spectrum beyond 6.2 MHz in GSM and 5 MHz in CDMA as specified in the license agreements without charging any extra one time spectrum charges. The maximum spectrum allocated to a service provider is 10 MHz so far. However, the spectrum usage charge is being increased with increased allocation of spectrum. The details are available at Table 8.

2.75 The Authority has noted that the allocation beyond 6 2 MHz for GSM and 5 MHz for CDMA at enhanced spectrum usage charge has already been implemented. Different licensees are at different levels of operations in terms of the quantum of spectrum. Imposition of additional acquisition fee for the quantum beyond these thresholds may not be legally feasible in view of the fact that higher levels of usage charges have been agreed to and are being collected by the Government. Further, the Authority is conscious of the fact that further penetration of wireless services is to happen in semi-urban and rural areas where affordability of services to the common man is the key to further expansion.

2.76 However, the Authority is of the view that the approach needs to be different for allocating and pricing spectrum beyond 10 MHz in these bands i.e. 800, 900 and 1800 MHz. In this matter, the Authority is guided by the need to ensure sustainable competition in the market keeping in view the fact that there are new entrants whose subscriber acquisition costs will be far higher than the incumbent wireless operators. Further, the technological progress enables the operators to adopt a number of technological solutions towards improving the efficiency of the radio spectrum assigned to them. A cost- benefit analysis of allocating additional spectrum beyond 10 MHz to existing wireless operators and the cost of deploying additional CAPEX towards technical improvements in the networks would show that there is either a need to place a cap on the maximum allocable spectrum at 10 MHz or to impose framework of pricing through additional acquisition fee beyond 10 MHz. The Authority feels it appropriate to go in for additional acquisition fee of spectrum instead of placing a cap on the amount of spectrum that can be allocated to any wireless operator. In any case, the Authority is recommending a far stricter norm of subscriber base for allocation of additional spectrum beyond the initial allotment of spectrum. *The additional acquisition fee beyond 10 MHz could be decided either administratively or through an auction method from amongst the eligible wireless service providers.* In this matter, the Authority has taken note of submissions of a number of stakeholders who have cited evidences of the fulfillment of the quality of service benchmarks of the existing wireless operators at 10 MHz and even below in almost all the licensed service areas. Such an

approach would also be consistent with the Recommendation of the Authority in keeping the door open for new entrant without putting a limit on the number of access service providers.

2.77 The Authority in its recommendation on "Allocation and pricing of spectrum for 3G and broadband wireless access services" had recommended certain reserve price for 5 MHz of spectrum in different service areas. The recommended price are as below:

Service Areas	Price (Rs.in million) for 2X5 MHz
Mumbai, Delhi and Category A	800
Chennai, Kolkatta and Category B	400
Category C	150

The Authority recommends that any licensee who seeks to get additional spectrum beyond 10 MHz in the existing 2G bands i.e. 800,900 and 1800 MHz after reaching the specified subscriber numbers shall have to pay a onetime spectrum charge at the above mentioned rate on prorata basis for allotment of each MHz or part thereof of spectrum beyond 10 MHz. For one MHz allotment in Mumbai, Delhi and Category A service areas, the service provider will have to pay Rs. 160 million as one time spectrum acquisition charge.

2.78 As far as a new entrant is concerned, the question arises whether there is any need for change in the pricing methodology for allocation of spectrum in the 800, 900 and 1800 MHz bands. *Keeping in view the objective of growth, affordability, penetration of wireless services in semi-urban and rural areas, the Authority is not in favour of*

changing the spectrum fee regime for a new entrant. Opportunity for equal competition has always been one of the prime principles of the Authority in suggesting a regulatory framework in telecom services. Any differential treatment to a new entrant vis-a-vis incumbents in the wireless sector will go against the principle of level playing field. This is specific and restricted to 2G bands only i.e. 800, 900 and 1800 MHz. This approach assumes more significance particularly in the context where subscriber acquisition cost for a new entrant is likely to be much higher than for the incumbent wireless operators.

2.79. In the case of spectrum in bands other than 800, 900 and 1800 MHz i.e. bands that are yet to be allocated, the Authority examined various possible approaches for pricing and has come to the conclusion that it would be appropriate in future for a market based price discovery systems. In response to the consultation paper, a number of stakeholders have also strongly recommended that the allocation of spectrum should be immediately de-linked from the license and the future allocation should be based on auction. The Authority in its recommendation on "Allocation and pricing of spectrum for 3G and broadband wireless access services" has also favored auction methodology for allocation of spectrum for 3G and BWA services. *It is therefore recommended that in future all spectrum excluding the spectrum in 800, 900 and 1800 bands should be auctioned so as to ensure efficient utilization of this scarce resource. In the 2G bands (800 MHz/900 MHz/1800 MHz), the allocation through auction may not be possible as the service providers were allocated spectrum at different times of their license and the amount of*

spectrum with them varies from 2X4.4 MHz to 2X10 MHz for GSM technology and 2X2.5 MHz to 2X5 MHz in CDMA technology. Therefore, to decide the cut off after which the spectrum is auctioned will be difficult and might raise the issue of level playing field."

(underlining is ours)

28. The aforesaid recommendations of TRAI were first considered by an Internal Committee of the DoT constituted vide letter dated 21.9.2007 under the Chairmanship of Member, Telecommunication. The report of the Committee was placed before the Telecom Commission on 10.10.2007. However, the four non-permanent members, i.e., Finance Secretary; Secretary, Department of Industrial Policy and Promotion; Secretary, Department of Information Technology and Secretary, Planning Commission were not even informed about the meeting. In this meeting of the Telecom Commission, which was attended by the officials of the DoT only, the report of the Internal Committee was approved. On 17.10.2007, the Minister of C&IT accepted the recommendations of the Telecom Commission and thereby approved the recommendations made by TRAI. However, neither the Internal Committee of the DoT and the Telecom Commission nor the Minister of C&IT took any action in terms of paragraph 2.40 of the recommendations wherein it was emphasised that the existing spectrum allocation criteria, pricing methodology and the management system suffer from a number of deficiencies and the whole issue should be addressed keeping in view issues linked with spectrum efficiency and its management. The DoT also did not get in touch with the Ministry of Finance to discuss and finalise the spectrum pricing formula which had to include incentive for efficient use of spectrum as well as disincentive for sub-optimal usage in terms of the Cabinet decision of 2003.

29. In the meanwhile, on 24.9.2007, Shri A.K. Srivastava,

DDG (AS), DoT prepared a note mentioning therein that as on that date, 167 applications had been received from 12 companies for 22 service areas and opined that it may be difficult to handle such a large number of applications at any point of time. He suggested that 10.10.2007 may be announced as the cut-off date for receipt of new UAS Licence applications. Shri A. Raja who was, at the relevant time, Minister of C&IT did not agree with the suggestion and ordered that 1.10.2007 be fixed as the cut-off date for receipt of applications for new UAS Licence. Accordingly, press note dated 24.9.2007 was issued by the DoT stating that no new application for UAS Licence will be accepted after 1.10.2007.

30. It is borne out from the record that Vodafone Essar Spacetel Ltd. (respondent No.12) had made an application for UAS Licence in 2004 and 3 others, namely, Idea Cellular Ltd. (respondent No.8), Tata Teleservices Ltd. (respondent No.9) and M/s. Aircel Ltd. (respondent No.11) had made similar applications in 2006. However, the same were not disposed of by the DoT and they were included in the figure of 167. Between 24.9.2007 and 1.10.2007, over 300 applications were received for grant of UAS Licences. Member (Technology), Telecom Commission and Ex-officio Secretary to Government of India sent a letter dated 26.10.2007 to Secretary, Department of Legal Affairs, Ministry of Law and Justice seeking the opinion of the Attorney General of India/Solicitor General of India on the issue of the mechanism to deal with what he termed as an unprecedented situation created due to receipt of large number of applications for grant of UAS Licence. The statement of case accompanying the letter of Member (Technology) contained as many as 14 paragraphs. Paragraph 11 outlined the following four alternatives:

(I) The applications may be processed on first-come-first-served basis in chronological order of receipt of applications in each service area as per existing procedure. LoI may be issued simultaneously to applicants (the numbers will vary based

on availability of spectrum to be ascertained from WPC Wing) who fulfil the eligibility conditions of the existing UASL Guidelines and are senior most in the queue. The time limit for compliance should be 7 days as per the existing provision of LoI and 15 days for submission of PBG, FBG, entry fee, etc. as per the existing procedure. However, those who fulfil the conditions of LoI within stipulated time, their seniority of license/ spectrum will be on the basis of their application date. The compliance of eligibility conditions as on the date of issue of LoI may be accepted. No relaxation of this time limit will be given and LoI shall stand terminated after the stipulated time period (however, the applicant may have the right to apply for new UAS Licence again as and when the window for submission of new UAS Licence is opened again). Subsequent applications may be considered for issue of LoI if the spectrum is available.

(II) LoIs to all those who applied by 25.9.2007 (date on which the cut-off date for receipt of applications were made public through press) may be issued in each service area as it is expected that only serious players will deposit the entry fee and seniority for license/spectrum be based on (i) the date of application or (ii) the date/time of fulfilment of all LoI conditions.

(III) DoT may issue LoIs to all eligible applications simultaneously received up to cut-off date. Since LoIs will clearly stipulate that spectrum allocation is subject to availability and is not guaranteed, the LoI holders are supposed to pay the entry fee if their business case permits them top wait for spectrum allocation subject to availability an initial roll out using wire line technology.

(IV) Any other better approach which may be legally tenable and sustainable for issue of new licences.

Paragraph 13 of the statement of case is extracted below:

"Issue of LoIs to M/s. TATA and others for usage of Dual

Technology spectrum based on their applications received after 18.10.2007. Whether

(i) To treat their request prior to existing applicants

or

(ii) To treat their request after processing all 575 applications."

31. The Law Secretary placed the papers before the Minister of Law and Justice on 1.11.2007, who recorded the following note:

"I agree. In view of the importance of the case and various options indicated in the statement of the case, it is necessary that whole issue is first considered by an empowered Group of Ministers and in that process legal opinion of Attorney General can be obtained."

32. When the note of the Law Minister was placed before the Minister of C&IT, he recorded the following note on 2.11.2007 – "Discuss please". On the same day, i.e., 2.11.2007 the Minister of C&IT did two things. He approved the note prepared by Director (AS-1) containing the following issues:

(i) Issuing of LoIs to new applicants as per the existing policy,

(ii) Number of LoIs to be issued in each circle,

(iii) Approval of draft LoI,

(iv) Considering application of TATAs for dual technology after the decision of TDSAT on dual technology, and

(v) Authorising Shri R.K. Gupta, ADG (AS-1) for signing the LoIs on behalf of President of India.

33. While approving the note, the Minister of C&IT on his own recorded the following – "LoI may be issued to the applicants received upto 25th Sept. 2007". Simultaneously, he sent D.O. No.20/100/2007-AS.I dated 2.11.2007 to the Prime Minister and criticised the suggestion made by the Law Minister by describing it as totally out of context. He also gave an indication of what was to come in the future by mentioning that the DoT has decided to continue with the existing policy of first-come-first-served for processing of applications received up to 25.9.2007 and the procedure for processing the remaining applications will be decided at a later date, if any spectrum is left available after processing the applications received up to 25.9.2007. Paragraphs 3 and 4 of the letter of the Minister of C&IT are extracted below:

"3. The Department wanted to examine the possibility of any other procedure in addition to the current procedure of allotment of Licences to process the huge number of applications. A few alternative procedures as debated in the Department and also opined by few legal experts were suggested by the Department of Telecom to Ministry of Law & Justice to examine its legal tenability to avoid future legal complications, if any. Ministry of Law and Justice, instead of examining the legal tenability of these alternative procedures, suggested referring the matter to empowered Group of Ministers. Since, generally new major policy decisions of a; Department or inter-departmental issues are referred to GOM, and, needless to say that the present issue relates to procedures, the suggestion of Law Ministry is totally out of context.

4. Now, the Department has decided to continue with the existing policy (first-come-first-served) for processing of applications received up to 25th September 2007, i. e. the date when the news-item on announcement of cut-off date appeared in the newspapers. The procedure for processing the remaining applications will be decided at a later date, if any spectrum is left available after processing the applications received up to 25th September 2007.

4. As the Department is not deviating from the existing procedure, I hope this will satisfy the Industry."

34. In the meanwhile, the Prime Minister who had received representations from telecom sector companies and had read reports appearing in a section of media sent letter dated 2.11.2007 to the Minister of C&IT and suggested that a fair and transparent method should be adopted for grant of fresh licences. That letter reads as under:

"Prime Minister

New Delhi
2 November, 2007

Dear Shri Raja,

A number of issues relating to allocation of spectrum have been raised by telecom sector companies as well as in sections of the media. Broadly, the issues relate to enhancement of subscriber linked spectrum allocation criteria, permission to CDMA service providers to also provide services on the GSM standard and be eligible for spectrum in the GSM service band, and the processing of a large number of applications received for fresh licenses against the backdrop of **inadequate spectrum to cater to overall demand**. Besides these, there are some other issues recommended by TRAI that require early decision. The key issues are summarized in the annexed note.

I would request you to give urgent consideration to the issues being raised with a view to ensuring fairness and transparency and let me know of the position before you take any further action in this regard.

With regards,

Yours sincerely,
Sd/-
(Manmohan Singh)

Shri A. Raja

Minister of Communications and IT

New Delhi.

Annexure

1. Enhancement of subscriber linked spectrum allocation criteria

In August 2007, the TRAI has recommended interim enhancement of subscriber linked spectrum allocation criteria. Service providers have objected to these recommendations, alleging errors in estimation / assumptions as well as due procedure not having been followed by the TRAI while arriving at the recommendations.

2. Permission to CDMA service providers to also provide services on the GSM standard and be eligible for spectrum in the GSM service band

Based on media reports, it is understood that the DoT has allowed 'cross technology' provision of services by CDMA service providers and three such companies have already paid the license fee. With the deposit of the fee, they would be eligible for GSM spectrum, for which old incumbent operators have been waiting since last several years. The Cellular Operators Association of India (COAI), being the association of GSM service providers, has represented against this. It is understood that the COAI has also approached the TDSAT against this.

3. Processing of a large number of applications received for fresh licenses against the backdrop of inadequate spectrum to cater to overall demand

The DoT has received a large number of applications for new licenses in various telecom circles. Since spectrum is very limited, even in the next several years all these licensees may never be able to get spectrum. The Telecom Policy that had been approved by the Union Cabinet in 1999 specifically stated that new licenses would be given subject to availability of spectrum.

4. **In order that spectrum use efficiency gets directly linked with correct pricing of spectrum, consider (i) introduction of a transparent methodology of auction, wherever legally and technically feasible, and (ii) revision of entry fee, which is currently benchmarked on old spectrum auction figures**

5. Early decision on issues like rural telephony, infrastructure sharing, 3G, Broadband, Number Portability and Broadband Wireless Access, on which the TRAI has already given recommendations."

(emphasis supplied)

35. The Minister of C&IT did not bother to consider the suggestion made by the Prime Minister, which was consistent with the Constitutional principle of equality, that keeping in view the inadequate availability of spectrum, fairness and transparency should be maintained in the allocation of spectrum, and within few hours of the receipt of the letter from the Prime Minister, he sent a reply wherein he brushed aside the suggestion made by the Prime Minister by saying that it will be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants as it will not give them a level playing field. The relevant portions of paragraph 3 of the

Minister's letter are extracted below:

> "3. Processing of a large number of applications received for fresh licenses against the backdrop of inadequate spectrum to cater to overall demand
>
> The issue of auction of spectrum was considered by the TRAI and the Telecom Commission and was not recommended as the existing licence holders who are already having spectrum upto 10 MHz per Circle have got it without any spectrum charge. It will be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants as it will not give them level playing field.
>
> I would like to bring it to your notice that DoT has earmarked totally 800 MHz in 900 MHz and 1800 MHz bands for 2G mobile services. Out of this, so for a maximum of about 35 to 40 MHz per Circle has been allotted to different operators and being used by them. The remaining 60 to 65 MHz, including spectrum likely to be vacated by Defence Services, is still available for 2G services.
>
> Therefore, there is enough scope for allotment of spectrum to few new operators even after meeting the requirements of existing operators and licensees. An increase in number of operators will certainly bring real competition which will lead to better services and increased teledensity at lower tariff. Waiting for spectrum for long after getting licence is not unknown to the Industry and even at present Aircel, Vodafone, Idea and Dishnet are waiting for initial spectrum in some Circles since December 2006."

36. On 20.11.2007, the Secretary, DoT had made a presentation on the spectrum policy to the Cabinet Secretary. The Finance Secretary, who appears to have witnessed the

presentation, dispatched letter dated 22.11.2007 to the Secretary, DoT and expressed his doubt as to how the rate of Rs.1600 crores determined in 2001, could be applied without any indexation for a licence to be given in 2007. He also emphasized that in view of the financial implications, the Ministry of Finance should have been consulted before the matter was finalised at the level of the DoT. Secretary, DoT promptly replied to the Finance Secretary by sending letter dated 29.11.2007 in which he mentioned that as per the Cabinet decision dated 31.10.2003, the DoT had been authorised to finalise the details of implementation of the recommendations of TRAI and in its recommendations dated 28.8.2007, TRAI had not suggested any change in the entry fee/licence fee.

37. In the context of letter dated 22.11.2007 sent by the Finance Secretary, Member (Finance), DoT submitted note dated 30.11.2007 suggesting that the issue of revision of rates should be examined in depth before any final decision is taken in the matter. When the note was placed before the Minister of C & IT, he observed that the matter of entry fee has been deliberated in the department several times in light of various guidelines and the TRAI recommendations and accordingly decision was taken not to revise the entry fee and that the Secretary, DoT had also replied to the Finance Secretary's letter on the above lines.

38. Although, the record produced before this Court does not show as to when the policy of first-come-first-served was distorted by the Minister of C&IT, in an apparent bid to show that he had secured the Prime Minister's approval to this act of his, the Minister C&IT sent letter dated 26.12.2007 to the Prime Minister, paragraphs 1 and 2 of which are extracted below:

> "1. Issue of Letter of Intent (LOI): DOT follows a policy of First-cum-First Served for granting LOI to the applicants for UAS licence, which means, an application received first

will be processed first and if found eligible will be granted LOI.

2. Issue of Licence: The First-cum-First Served policy is also applicable for grant of licence on compliance of LOI conditions. Therefore, any applicant who complies with the conditions of LOI first will be granted UAS licence first. This issue never arose in the past as at one point of time only one application was processed and LOI was granted and enough time was given to him for compliance of conditions of LOI. However, since the Government has adopted a policy of "No Cap" on number of UAS Licence, a large number of LOI's are proposed to be issued simultaneously. *In these circumstances, an applicant who fulfils the conditions of LOI first will be granted licence first, although several applicants will be issued LOI simultaneously. The same has been concurred by the Solicitor General of India during the discussions."*

(underlining is ours)

39. After 12 days, DDG (AS), DoT prepared a note incorporating therein the changed first-come-first-served policy to which reference had been made by the Minister of C&IT in letter dated 26.12.2007 sent to the Prime Minister. On the same day the Minister of C&IT approved the change.

40. The meeting of the full Telecom Commission, which was scheduled to be held on 9.1.2008 to consider two important issues i.e., performance of telecom sector and pricing of spectrum was postponed to 15.1.2008.

41. On 10.1.2008 i.e., after three days of postponement of the meeting of the Telecom Commission, a press release was issued by the DoT under the signature of Shri A.K. Srivastava, DDG (AS), DoT. The same reads as under:

"In the light of Unified Access Services Licence (UASL) guidelines issued on 14th December 2005 by the department regarding number of Licenses in a Service Area, a reference was made to TRAI on 13-4-2007. The TRAI on 28-08-2007 recommended that No cap be placed on the number of access service providers in any service area. The government accepted this recommendation of TRAI. Hon'ble Prime Minister also emphasized on increased competition while inaugurating India Telecom 2007. Accordingly, DOT has decided to issue LOI to all the eligible applicants on the date of application who applied up-to 25-09-2007.

UAS license authorises licencee to rollout telecom access services using any digital technology which includes wire-line and/or wireless (GSM and/or CDMA) services. They can also provide Internet Telephony, Internet Services and Broadband services. UAS licence in broader terms is an umbrella licence and does not automatically authorize UAS licensees usage of spectrum to rollout Mobile (GSM and/or CDMA) services. For this, UAS licencee has to obtain another licence, i.e. Wireless Operating Licence which is granted on first-come-first-served basis subject to availability of spectrum in particular service area.

DOT has been implementing a policy of First-cum-First Served for grant of UAS licences under which initially an application which is received first will be processed first and thereafter if found eligible will be granted LOI and then who so ever complied with the conditions of LOI first will be granted UAS licence.

———————

Department of Telecom

(AS Cell)

10-01-2008”

(underlining is ours)

42. On the same day, another press release was issued asking all the applicants to assemble at the departmental headquarters within 45 minutes to collect the response(s) of the DoT. They were also asked to submit compliance of the terms of LoIs within the prescribed period. The second press release is also reproduced below:

“Department of Telecommunications

Press Release

Date : 10th January 2008

Sub : UASL applicants to depute their authorised representative to collect responses of DOT on 10.1.2008.

The applicant companies who have submitted applications to DOT for grant of UAS licences in various service areas on or before 25.9.2007 are requested to depute their Authorised signatory/Company Secretary/ authorised representative with authority letter to collect response(s) of DOT. They are requested to bring the company’s rubber stamp for receiving these documents to collect letters from DOT in response to their UASL applications. Only one representative of the Company/ group Company will be allowed. Similarly, the companies who have applied for usage of dual technology spectrum are also requested to collect the DOT’s response.

All above are requested to assemble at 3:30 pm on 10.1.2008 at Committee Room, 2nd Floor, Sanchar Bhawan, New Delhi. The companies which fail to report before 4:30 P.M. on 10.1.2008, the responses of DOT will be dispatched by post.

All eligible LOI holders for UASL may submit compliance to DOT to the terms of LOIs within the prescribed period during the office hours i.e. 9:00 A.M. to 5:30 P.M. on working days.

File No.20-100/2007-AS-I Dated 10.1.2008

(A.K. Srivastava)
DDG(AS)
Dept. of Telecom

DDG(C&A): The above Press Release may kindly be uploaded on DOT website immediately.”

43. All the applicants including those who were not even eligible for UAS Licence collected their LoIs on 10.1.2008. The acceptance of 120 applications and compliance with the terms and conditions of the LoIs for 78 applications was also received on the same day.

44. Soon after obtaining the LoIs, 3 of the successful applicants offloaded their stakes for thousands of crores in the name of infusing equity, their details are as under:

(i) Swan Telecom Capital Pvt. Ltd. (now known as Etisalat DB Telecom Pvt. Ltd.) which was incorporated on 13.7.2006 and got UAS Licence by paying licence fee of Rs. 1537 crores transferred its 45% (approximate) equity in favour of Etisalat Mauritius Limited, a wholly owned subsidiary of Emirates Telecommunications Corporation of UAE for over Rs.3,544 crores.

(ii) Unitech which had obtained licence for Rs.1651 crores transferred its stake 60% equity in favour of Telenor Asia Pte. Ltd., a part of Telenor Group (Norway) in the name of issue of fresh equity shares for Rs.6120 crores between March, 2009 and February, 2010.

(iii) Tata Tele Services transferred 27.31% of equity worth Rs. 12,924 crores in favour of NTT DOCOMO.

(iv) Tata Tele Services (Maharashtra) transferred 20.25% of equity worth Rs. 949 crores in favour of NTT DOCOMO.

45. S. Tel Ltd., who had applied for grant of licence pursuant to press note dated 24.9.2007, but was ousted from the zone of consideration because of the cut-off date fixed by the Minister of C&IT, filed Writ Petition No.636 of 2008 in the Delhi High Court with the prayer that the first press release dated 10.1.2008 may be quashed. After hearing the parties, the learned Single Judge vide his order dated 1.7.2009 declared that the cut-off date, i.e., 25.9.2007 was totally arbitrary and directed the respondents in the writ petition to consider the offer made by the writ petitioner to pay Rs.17.752 crores towards additional revenue share over and above the applicable spectrum revenue share. The observations made by the learned Single Judge on the justification of fixing 25.9.2007 as the cut-off date read as under:

> "Thus on the one hand the respondent has accepted the recommendation of the TRAI in the impugned press note, but acted contrary thereto by amending the cut-off date and thus placed a cap on the number of service providers. The stand taken by respondent and the justification sought to be given for fixing a cut-off date retrospectively is on account of large volume of applications, is without any force in view of the fact that neither any justification was rendered during the course of argument, nor any justification has been rendered in the counter affidavit as to what is the effect of receipt of large number of applications in view of the fact that a recommendation of the TRAI suggests no cap on the number of access service providers in any service area. This recommendation was duly accepted and published in the newspaper. Further as

> per the counter affidavit 232 UASL applications were received till 25.9.2007 from 22 companies. Assuming there was increase in the volume of applications, the respondent has failed to answer the crucial question as to what was the rationale and basis for fixing 25.9.2007 as the cut-off date. Even otherwise, admittedly 232 applications were made by 25.9.2007 and between 25.9.2007 and 1.10.2007 only 76 were applications were received. It was only on 1.10.2007 that 267 applications were made. Thus on 28.09.2007 it cannot be said that large number of applications were received. Thus taking into consideration the opinion of the expert body, which as per the press note of the respondent itself was accepted by the respondent, certainly the respondent cannot be allowed to change the rules of the game after the game had begun, to put it in the words of the Apex Court especially when the respondent has failed to give any plausible justification or the rationale for fixing the cut-off date by merely a week. Taking into consideration that on 13.4.2007 the Government of India had recommended TRAI to furnish its recommendation in terms of 11 (e) of the TRAI Act, 1997 on the issue as to whether a limit should be put on the number of access service providers in each service area. The TRAI having given its recommendations on 28.8.2007 which were duly accepted by the Government, the respondent cannot be allowed to arbitrarily change the cut-off date and that too without any justifiable reasons."

46. The letters patent appeal filed against the order of the learned Single Judge was dismissed by the Division Bench of the High Court vide judgment dated 24.11.2009, paragraphs 13 and 14 whereof are reproduced below:

> "13. We are unable to agree with the submission of the learned Attorney General that the parameters that would apply to revising a cut-off date that has been earlier fixed prior to the receipt of the applications would be no different

from fixing a cut-off date in the first place. While the decision in D.S. Nakara which has subsequently been distinguished in N. Subbarayudu is about fixing a cut-off date which might be an exercise in the discretion of the Appellant, those decisions are not helpful in deciding the revision of a cut-off date after applications have been received in terms of the previous cut-off date, is amenable to judicial review on administrative and constitutional law parameters. We are of the view that the two situations cannot be equated. The Government would have to justify its decision to revise a cut-off date already fixed, after applications have been received from persons acting on the basis of the earlier cut-off date. It would be for the court to be satisfied when a challenge is made, that the decision to revise a cut-off date after receiving applications on the basis of the cut-off date earlier fixed was based on some rational basis and was not intended to benefit a few applicants while discriminating against the rest. In the present case, for the reasons pointed out by the learned Single Judge, with which we concur, the Appellant has been unable to show that its decision to revise the cut-off date after receiving the application of the Respondent was based on some rational criteria. It is vulnerable to being labelled arbitrary and irrational.

14. We are not able to appreciate, in the instant case, the submission of the learned Attorney General that the mere advancing of the cut-off date would not tantamount to changing the rules after the game has begun. In a sense it does. It makes ineligible for consideration the applicants who had applied, after 25th September 2007 but on or before 1st October 2007. Further this ineligibility is announced after the applications have been made. In other words, while at the time of making the application there was no such ineligibility, it is introduced later and that too for a select category of applicants. This cannot but be a change in the rule after the game has begun. We do not

think that the decisions relied upon by the learned Attorney General contemplate such a situation. On the other hand the decisions in Monarch Infrastructure (P) Ltd. and K. Manjushree fully support the Respondent's case for invalidation of the Appellant's impugned decision revise the cut-off date from 1st October 2007 to 25th September 2007, long after receiving the application from the Respondent."

47. The Union of India challenged the judgment of the Division Bench in SLP(C) No.33406/2009. During the pendency of the special leave petition, some compromise appears to have been reached between the writ petitioner and the authorities and, therefore, an additional affidavit was filed along with agreed minutes of order before this Court on 12.3.2010. In view of this development, the Court disposed of the appeal arising out of the special leave petition but specifically approved the findings recorded by the High Court with regard to the cut-off date by making the following observations:

"Taking the additional affidavit and the suggestions made by the learned Attorney General, this appeal is disposed of as requiring no further adjudication.

However, we make it clear that the findings recorded by the High Court with regard to the cut off date is not interfered with and disturbed by this Court in the present case."

GROUNDS OF CHALLENGE

48. The petitioners have questioned the grant of UAS Licences to the private respondents by contending that the procedure adopted by the DoT was arbitrary, illegal and in complete violation of Article 14 of the Constitution. They have relied upon the order passed by the learned Single Judge of the Delhi High Court as also the judgment of the Division Bench,

which was approved by this Court and pleaded that once the Court has held that the cut-off date, i.e., 25.9.2007 fixed for consideration of the applications was arbitrary and unconstitutional, the entire procedure adopted by the DoT for grant of UAS Licences with the approval of the Minister of C&IT is liable to be declared illegal and quashed. Another plea taken by the petitioners is that the DoT violated the recommendations made by TRAI that there should be no cap on the number of Access Service Providers in any service area and this was in complete violation of Section 11(1) of the 1997 Act. The petitioners have relied upon the report of the Comptroller and Auditor General (CAG) and pleaded that the consideration of large number of ineligible applicants and grant of LoIs and licenses to them is *ex facie* illegal and arbitrary. The petitioners have also pleaded that the entire method adopted by the DoT for grant of licence is flawed because the recommendations made by TRAI for grant of licences at the entry fee determined in 2001 was wholly arbitrary, unconstitutional and contrary to public interest. Yet another plea of the petitioners is that while deciding to grant licences, which are bundled with spectrum, at the price fixed in 2001 the DoT did not bother to consult the Finance Ministry and, thereby, violated the mandate of the decision taken by the Council of Ministers in 2003. The petitioners have also pleaded that the policy of first-come-first-served is by itself violative of Article 14 of the Constitution and in any case distortion thereof by the Minister of C&IT and the consequential grant of licences is liable to be annulled. Another ground taken by the petitioners is that even though a number of licensees failed to fulfil the roll out obligations and violated conditions of the licence, the Government of India did not take any action to cancel the licences.

COUNTER AFFIDAVITS OF THE RESPONDENTS

49. Most of the respondents have filed separate but similar counter affidavits in both the petitions. The main points raised

by the respondents are:

(i) The petitioners are not entitled to challenge the recommendations made by TRAI and the policy decisions taken by the Government for grant of UAS Licences.

(ii) The Court cannot review and nullify the recommendations made by TRAI in the matter of allocation of spectrum in 800, 900 and 1800 MHz bands at the rates fixed in 2001.

(iii) The report prepared by the CAG cannot be relied upon for the purpose of recording a finding that the procedure adopted for the grant of UAS Licences is contrary to Article 14 of the Constitution. The private respondents have also claimed that the observations made by the CAG and the conclusions recorded by him are seriously flawed and are based on totally unfounded assumptions.

(iv) The UAS Licences were given strictly in accordance with the modified first-come-first-served policy. That the respondents were able to fulfil LoI conditions because newspapers had already published stories about the possible grant of licences in the month of January, 2008.

(v) That those who had made applications in 2004 and 2006 cannot be clubbed with those who had applied in the month of August and September, 2007 because in terms of the existing UASL guidelines they were entitled to licences.

(vi) That private respondents have made huge investments for creating infrastructure to provide services in different parts of the country and if the licences granted to them are cancelled at this stage, public interest would be adversely affected.

(vii) That the private respondents have been able to secure foreign direct investment of thousands of crores for providing better telecom services in remote areas of the country and any

intervention by the Court would result in depriving the people living in those areas of telecom services.

(viii) The Government and TRAI have already initiated action for levy of penalty/liquidated damages for non-compliance of the roll out obligations and violation of conditions of the license. That the licensees have not violated any conditions of the license and that the notices issued by TRAI alleging the same have already been challenged before TDSAT and in most cases, interim orders have been passed. That the remedy, if any, available to the petitioners is to approach the TDSAT.

(ix) Some of the respondents have also questioned the application of the policy of first-come-first-served by asserting that even though they had applied in 2004 and 2006, and licences had been granted to them before 25.9.2007, the allocation of spectrum was delayed till 2008 and those who had applied in 2007 were placed above them because they could fulfil the conditions of LoI in terms of the distorted version of the policy first-come-first-served.

50. The petitioners have filed rejoinder affidavit and reiterated the assertions made in the main petition that the grant of UAS Licences is fundamentally flawed and is violative of the Constitutional principles. They have also placed on record report dated 31.1.2011 submitted by the One Man Committee, (hereinafter referred to as 'One-Man Committee Report'), comprising Justice Shivaraj V. Patil (former Judge of this Court), which was constituted by the Government of India vide Office Memorandum dated 13.12.2010 to examine the appropriateness of the procedure followed by the DoT in issuance of licences and allocation of spectrum during the period 2001 to 2009. They have also placed on record photostat copies of the notings recorded on the files of the DoT.

ARGUMENTS

51. Shri Prashant Bhushan, learned counsel for the petitioners in Writ Petition (C) No. 423 of 2010 and Dr. Subramanian Swamy, who is petitioner-in-person in Writ Petition (C) No. 10 of 2011 made the following submissions:

(i) The spectrum, which is a national asset, cannot be distributed by adopting the policy of first-come-first-served on the basis of the application received by the DoT without any advertisement and without holding auction.

(ii) The grant of licences bundled with spectrum is *ex-facie* arbitrary illegal and violative of Article 14 of the Constitution.

(iii) The decision of the Minister of C&IT to pre-pone the cut-off date from 1.10.2007 to 25.9.2007, which eliminated large number of applications, is violative of Article 14 of the Constitution and the entire exercise undertaken with reference to this cut-off date has resulted in discrimination vis-à-vis other eligible applicants.

(iv) Once the cut-off date fixed by the Minister of C&IT for consideration of the applications received in the light of the earlier press release fixing the last date as 1.10.2007 has been declared to be arbitrary and unconstitutional by the High Court, the consequential actions taken by the DoT on that basis are liable to be annulled.

(v) The first-come-first-served policy suffers from a fundamental flaw inasmuch as there is no defined criterion for operating that policy. There is no provision for issue of advertisement notifying obligations for grant of licence and allocation of spectrum and any person who makes an application becomes entitled to get licence and spectrum.

(vi) The first-come-first-served policy was manipulated by the Minister of C&IT to favour some of the applicants including those who were not even eligible. Shri Bhushan pointed out that, out of 122 applications, 85 were found to

be ineligible and those who could obtain information either from the concerned Minister or the officers of DoT about the change of the criteria for implementing the first-come-first-served policy got advantage and acquired priority over those who had applied earlier.

(vii) The meeting of the Telecom Commission scheduled for 9.1.2008 was deliberately postponed because vide letter dated 22.11.2007 the Finance Secretary had strongly objected to the charging of entry fee fixed in 2001.

(viii) Shri Bhushan pointed out that the recommendations made by TRAI on 28.8.2007 were contrary to public interest as well as financial interest of the nation because at the time of entry of 4th cellular operator the same TRAI had suggested multi-stage bidding and even for allocation of 3G spectrum the methodology of auction was suggested but, for no ostensible reason, the so-called theory of level playing field was innovated for grant of UAS Licences in 2007 on the basis of the entry fee fixed in 2001. Learned counsel emphasized that the transfer of equity by three of the licensees immediately after issue of licences for gain of many thousand crores shows that if the policy of auction had been followed, the nation would have been enriched by many thousand crores.

(ix) Both, Shri Prashant Bhushan and Dr. Subramanian Swamy pointed out that although the Prime Minister had suggested that a fair and transparent method be adopted for grant of UAS Licences through the process of auction, the Minister of C&IT casually and arbitrarily brushed aside the suggestion and granted licence to the applicants for extraneous reasons.

(x) Shri Prashant Bhushan also questioned the grant of the benefit of the policy of dual technology to Tata Teleservices Ltd. by contending that this was a result of manipulation made by the service provider. Dr. Subramanian Swamy

also raised a concern regarding the national security and pointed out that some of the applicants who have trans-border connections have received licences and they may ultimately prove to be dangerous for the nation.

52. Shri G.E. Vahanvati, learned Attorney General referred to NTP 1994 and NTP 1999 and submitted that the policy decision taken by the Government of India for private sector participation, which could bring in the funds required for expansion of telecommunication services in different parts of the country, cannot be scrutinized by the Court. He submitted that in the last more than 20 years, the telecom services have expanded beyond anybody's expectation because of private sector participation and it cannot be said that granting UAS Licences by charging the entry fee determined at 2001 prices is unconstitutional. Learned counsel referred to the history of development in the field of telecommunications and the concept of spectrum, and submitted that the policy decision taken by the DoT for migration of CDMA service providers was neither illegal nor unconstitutional.

53. Shri Salve, learned senior counsel appearing for respondent No. 9, pointed out that Tata Teleservices had sent an application through fax for grant of GSM for the existing licences which were issued on 19.10.2007 and no exception can be taken to this because Reliance Telecom, which had applied for GSM on 6.2.2006, was given the benefit of migration to dual technology on 18.10.2007, i.e. even before the policy was made public. Learned senior counsel argued that the decision not to auction UAS Licences was based on the recommendations of TRAI and as the petitioners have not challenged the recommendations for two years, the exercise undertaken by the DoT for grant of UAS Licences in 2008 and subsequent allotment of spectrum should not be nullified. Shri Salve argued that the question of institutional integrity is involved in the matter and if the Court comes to the conclusion that auction is the only method for grant of licences and

allocation of spectrum then everything should be annulled right from 2001. Learned senior counsel submitted that multi-stage bidding was done only for the purpose of entry of 4th cellular operator but, thereafter, no auction was held. He submitted that if the spectrum was allotted free of charge till 2007, there could be no justification for auction of licences or spectrum in 2007.

54. Shri C.A. Sundaram, learned counsel appearing for respondent Nos. 2 and 4, heavily relied on paragraphs 7.2, 7.4, 7.12, 7.29, 7.30, 7.37 and 7.39 of TRAI's recommendations dated 27.10.2003 and argued that the recommendations made in 2007 were nothing but a continuation of the old policy and, therefore, the petitioners are not entitled to question the method adopted for grant of UAS Licences pursuant to the 2007 recommendations. Learned senior counsel submitted that the policy for grant of UAS Licences and allocation of spectrum cannot be said to be *per se* arbitrary because the same was decided after great deliberations and consideration of international practices. He also relied upon the speech made by the Prime Minister on 2.11.2007 and submitted that the action of the DoT should not be nullified because that will have a far-reaching adverse impact on the availability of telecommunication services in the country.

55. Shri Vikas Singh, learned senior counsel appearing for respondent no. 10, argued that the recommendations made by TRAI in 2007, which were approved by the Minister of C&IT are in national interest because the same would attract investment by foreign players and would benefit the people at large. Learned counsel emphasised that his client has already invested Rs. 6,000 crores and it would be totally unjust if the licence granted in 2008 is cancelled. Shri Vikas Singh also submitted that after the grant of licences and allocation of spectrum the people have been hugely benefited inasmuch as the telecom services have become competitive with the international market and even cheaper than that.

56. Shri C. S. Vaidyanathan, learned senior counsel appearing for respondent No. 8, argued that the application made by his client was pending since June, 2006 and its priority was pushed down due to the application of the distorted version of the first-come-first-served policy. Shri Vaidyanathan pointed out that when the Minister of C&IT announced that applications will not be received after 1.10.2007, there was a huge rush of applications and a large number of players who had no experience in the field of telecom made applications and got the licences.

57. Dr. Abhishek Manu Singhvi, learned senior counsel appearing for respondent nos. 11 and 12, argued that his clients had made applications much prior to 2007 but they were unfairly clubbed with those who had applied in 2007 and in this manner the principle of equality was violated. Dr. Singhvi submitted that if the applications made prior to 2007 had been processed as per the existing policy, respondent Nos. 11 and 12 would have received licences bundled with spectrum without competition/objection from anyone.

58. Shri Dayan Krishnan, learned counsel for respondent No. 6, adopted the arguments of other learned counsel and submitted that the licences granted in 2007 should not be quashed at this belated stage.

59. Shri Rakesh Dwivedi, learned senior counsel for TRAI, referred to TRAI's written submissions to justify why it had not recommended auction of licences. Learned senior counsel extensively referred to the recommendations made by TRAI in 2007 and submitted that even though it was specifically suggested that the DoT should take a comprehensive decision on the allocation of spectrum, no effort was made in that direction and the licences were granted without determining availability of spectrum. Shri Dwivedi also submitted that TRAI has already initiated action for cancellation of licences of those respondents who have violated the terms of licence and/or failed to fulfil roll-out obligations.

60. Learned counsel for both the sides relied upon a large number of decisions. Shri Prashant Bhushan and Dr. Subramanian Swamy relied upon the following judgements: *K. Manjusree v. State of Andhra Pradesh* (2008) 3 SCC 512, *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corpn.* (2000) 5 SCC 287, *Home Communication Ltd. and Anr. v. Union of India and Ors.* 52 (1993) DLT 168, *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai* (2004) 3 SCC 214, *Chaitanya Kumar v. State of Karnataka* (1986) 2 SCC 594, *Shivsagar Tiwari v. Union of India,* (1996) 6 SCC 558, *Common Cause, A Registered Society (Petrol pumps matter) v. Union of India* (1996) 6 SCC 530 and *Nagar Nigam v. Al Faheem Meat Exports (P) Ltd.* (2006) 13 SCC 382. Learned Attorney General and learned counsel appearing for the private respondents relied upon *Delhi Science Forum v. Union of India* (1996) 2 SCC 405, *BALCO Employees' Union (Regd.) v. Union of India* (2002) 2 SCC 333, *Villianur Iyarkkai Padukappu Maiyam v. Union of India* (2009) 7 SCC 561, *Ministry of Labour and Rehabilitation v. Tiffin's Barytes Asbestos & Paints Ltd.* (1985) 3 SCC 594, *United India Fire and General Insurance Co. Ltd. v. K.S. Vishwanathan* (1985) 3 SCC 686, *State of T.N. v. M.N. Sundararajan* (1980) 4 SCC 592, *Sunil Pannalal Banthia v. City & Industrial Development Corporation of Maharashtra Ltd.* (2007) 10 SCC 674, *Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group* (2006) 3 SCC 434, *Prem Chand Somchand Shah v. Union of India (1991) 2 SCC 48 and Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.* (1983) 1 SCC 147.

61. Before dealing with the arguments of the learned counsel for the parties and adverting to some of the precedents, we consider it necessary to mention that during the course of hearing, Shri Prashant Bhushan and Dr. Subramanian Swamy heavily relied upon the CAG report as also the One-Man Committee Report. Learned Attorney General and learned senior counsel appearing for some of the private respondents

also referred to the One-Man Committee Report. However, as the CAG report is being examined by the Public Accounts Committee and Joint Parliamentary Committee of Parliament we do not consider it proper to refer to the findings and conclusions contained therein. Likewise, we do not consider it necessary to advert to the observations made, and the suggestions given by the One-Man Committee because the Government of India has already taken a decision to segregate spectrum from licence and allot the same by auction. This is evident from the following extracts of the press statement dated 29.1.2011 issued by the present Minister of C&IT:

> "In future, the spectrum will not be bundled with licence. The licence to be issued to telecom operators will be in the nature of 'unified licence' and the licence holder will be free to offer any of the multifarious telecom services. In the event the licence holder would like to offer wireless services, it will have to obtain spectrum through a market driven process. In future, there will be no concept of contracted spectrum and, therefore, no concept of initial or start-up spectrum. Spectrum will be made available only through market driven process.
>
> While moving towards a new policy dispensation, it is necessary to ensure a level playing field between all players. Hence going forward, any new policy of pricing would need to be applied to equally to all players. Additionally, assignment of balance of contracted spectrum may need to be ensured for the existing licensees who have so far been allocated only the start up spectrum of 4.4 MHz. It may be recalled that showcause notices have been issued to certain licensees for cancellation. Only in respect of the licences that will be found valid after the process is completed, the additional 1.8 MHz will be assigned on their becoming eligible, but the spectrum will be assigned to them at a price determined under the new policy.

We need to seriously consider the adoption of an auction process for allocation and pricing of spectrum beyond 6.2 MHz while ensuring that there is adequate competition in the auction process.

TRAI had made recommendations in May 2010 and indicated that it would apprise the Government of the findings of a study on the question of pricing of 2G spectrum in future. This is expected shortly. We would examine their recommendations speedily as soon as they are received, keeping the perspectives that I have outlined, while finalizing our new policy. I am confident that we will be able to design a policy that ensures that existing licence holders get the spectrum they need and are entitled to, while simultaneously, ensuring that the Government also receives revenues commensurate with the current market value of spectrum."

62. We shall now consider the questions enumerated in the opening paragraph of the judgment.

63. **Question No.1:**

At the outset, we consider it proper to observe that even though there is no universally accepted definition of natural resources, they are generally understood as elements having intrinsic utility to mankind. They may be renewable or non renewable. They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural, form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value. The

State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best sub-serve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection. Of course, environment laws enacted by Parliament and State legislatures deal with specific natural resources, i.e., Forest, Air, Water, Costal Zones, etc.

64. The ownership regime relating to natural resources can also be ascertained from international conventions and customary international law, common law and national constitutions. In international law, it rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) over (their) natural resources as asserted in the 17th Session of the United Nations General Assembly and then affirmed as a customary international norm by the International Court of Justice in the case of Democratic Republic of Congo v. Uganda. Common Law recognizes States as having the authority to protect natural resources insofar as the resources are within the interests of the general public. The State is deemed to have a proprietary interest in natural resources and must act as guardian and trustee in relation to the same. Constitutions across the world focus on establishing natural resources as owned by, and for the benefit of, the country. In most instances where constitutions specifically address ownership of natural resources, the Sovereign State, or, as it is more commonly expressed, 'the people', is designated as the owner of the natural resource.

65. Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilisation. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to States as per international norms.

66. In India, the Courts have given an expansive interpretation to the concept of natural resources and have from time to time issued directions, by relying upon the provisions contained in Articles 38, 39, 48, 48A and 51A(g), for protection and proper allocation/distribution of natural resources and have repeatedly insisted on compliance of the constitutional principles in the process of distribution, transfer and alienation to private persons. The doctrine of public trust, which was evolved in *Illinois Central Railroad Co. v. People of the State of Illinois* 146 U.S. 387 (1892), has been held by this Court to be a part of the Indian jurisprudence in *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388 and has been applied in *Jamshed Hormusji Wadia v. Board of Trustee, Port of Mumbai* (2002) 3 SCC 214, *Intellectuals Forum, Tirupathi v. State of A.P.* (2006) 3 SCC 549 and *Fomento Resorts and Hotels Limited v. Minguel Martins* (2009) 3 SCC 571. In *Jamshed Hormusji Wadia's* case, this Court held that the State's actions and the actions of its agencies/instrumentalities must be for the public good, achieving the objects for which they exist and should not be arbitrary or capricious. In the field of contracts, the State and its instrumentalities should design their activities in a manner which would ensure competition and non-discrimination. They can augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods. In Fomento Resorts and Hotels Limited case, the Court referred to the article of Prof. Joseph L. Sax and made the following observations:

"53. The public trust doctrine enjoins upon the Government

to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. This doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management thereof.

54. The heart of the public trust doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially future generations. For example, renewable and non-renewable resources, associated uses, ecological values or objects in which the public has a special interest (i.e. public lands, waters, etc.) are held subject to the duty of the State not to impair such resources, uses or values, even if private interests are involved. The same obligations apply to managers of forests, monuments, parks, the public domain and other public assets. Professor Joseph L. Sax in his classic article, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" (1970), indicates that the public trust doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust.

55. The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such

resources in a manner as not to impair or diminish the people's rights and the people's long-term interest in that property or resource, including down slope lands, waters and resources."

67. In *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal,* (1995) 2 SCC 161, the Court was dealing with the right of organizers of an event, such as a sport tournament, to its live audio-visual broadcast, universally, through an agency of their choice, national or foreign. In paragraph 78, the Court described the airwaves/ frequencies as public property in the following words:

"There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies."

68. In *Reliance Natural Resources Limited v. Reliance Industries Limited,* (2010) 7 SCC 1, P. Sathasivam J., with whom Balakrishnan, C.J., agreed, made the following observations:

"It must be noted that the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word "vest" must be seen in the context of the public trust doctrine (PTD). Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application."

The Learned Judge then referred to the judgments, In re Special Reference No. 1 of 2001 (2004) 4 SCC 489, *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388 and observed:

"This doctrine is part of Indian law and finds application in the present case as well. It is thus the duty of the

Government to provide complete protection to the natural resources as a trustee of the people at large."

The Court also held that natural resources are vested with the Government as a matter of trust in the name of the people of India, thus it is the solemn duty of the State to protect the national interest and natural resources must always be used in the interests of the country and not private interests.

69. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: *first*, it regulates the rights and obligations of the State vis-à-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and *second*, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.

70. In *Akhil Bharatiya Upbhokta Congress v. State of M.P.* (2011) 5 SCC 29, this Court examined the legality of the action taken by the Government of Madhya Pradesh to allot 20 acres land to an institute established in the name of Kushabhau Thakre on the basis of an application made by the Trust. One of the grounds on which the appellant challenged the allotment of land was that the State Government had not adopted any rational method consistent with the doctrine of equality. The High Court negatived the appellant's challenge. Before this Court, learned senior counsel appearing for the State relied upon the judgments in *Ugar Sugar Works Ltd. v. Delhi Administration* (2001) 3 SCC 635, *State of U.P. v. Choudhary Rambeer Singh* (2008) 5 SCC 550, *State of Orissa v. Gopinath*

Dash (2005) 13 SCC 495 and *Meerut Development Authority v. Association of Management Studies* (2009) 6 SCC 171 and argued that the Court cannot exercise the power of judicial review to nullify the policy framed by the State Government to allot Nazul land without advertisement. This Court rejected the argument, referred to the judgments in *Ramanna Dayaram Shetty v. International Airport Authority of India* (1979) 3 SCC 489, S.G. *Jaisinghani v. Union of India* AIR 1967 SC 1427, *Kasturilal Lakshmi Reddy v. State of J & K* (1980) 4 SCC 1, *Common Cause v. Union of India (supra), Shrilekha Vidyarthy v. State of U.P.* (1991) 1 SCC 212, *LIC v. Consumer Education and Research Centre* (1995) 5 SCC 482, *New India Public School v. HUDA* (1996) 5 SCC 510 and held:

> "What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/ decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."

71. In *Sachidanand Pandey v. State of West Bengal* (1987) 2 SCC 295, the Court referred to some of the precedents and laid down the following propositions:

> "State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

72. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good.

73. **Question No.2**:

Although, while making recommendations on 28.8.2007, TRAI itself had recognised that spectrum was a scarce commodity, it made recommendation for allocation of 2G spectrum on the basis of 2001 price by invoking the theory of level playing field. Paragraph 2.40 of the recommendations dated 28.8.2007 shows that as per TRAI's own assessment the existing system of spectrum allocation criteria, pricing methodology and the management system suffered from number of deficiencies and there was an urgent need to address the issues linked with spectrum efficiency and its management and yet it decided to recommend the allocation of spectrum at the price determined in 2001. All this was done in the name of growth, affordability, penetration of wireless services in semi urban and rural areas, etc. Unfortunately, while

doing so, TRAI completely overlooked that one of the main objectives of NTP 1999 was that spectrum should be utilised efficiently, economically, rationally and optimally and there should be a transparent process of allocation of frequency spectrum as also the fact that in terms of the decision taken by the Council of Ministers in 2003 to approve the recommendations of the Group of Ministers, the DoT and Ministry of Finance were required to discuss and finalise the spectrum pricing formula. To say the least, the entire approach adopted by TRAI was lopsided and contrary to the decision taken by the Council of Ministers and its recommendations became a handle for the then Minister of C&IT and the officers of the DoT who virtually gifted away the important national asset at throw away prices by willfully ignoring the concerns raised from various quarters including the Prime Minister, Ministry of Finance and also some of its own officers. This becomes clear from the fact that soon after obtaining the licences, some of the beneficiaries off-loaded their stakes to others, in the name of transfer of equity or infusion of fresh capital by foreign companies, and thereby made huge profits. We have no doubt that if the method of auction had been adopted for grant of licence which could be the only rational transparent method for distribution of national wealth, the nation would have been enriched by many thousand crores.

74. While it cannot be denied that TRAI is an expert body assigned with important functions under the 1997 Act, it cannot make recommendations overlooking the basic constitutional postulates and established principles and thereby deny people from participating in the distribution of national wealth and benefit a handful of persons. Therefore, even though the scope of judicial review in such matters is extremely limited, as pointed out in *Delhi Science Forum v. Union of India* (supra) and a large number of other judgments relied upon by the learned counsel of the respondents, keeping in view the facts which have been brought to the notice of the Court that the

mechanism evolved by TRAI for allocation of spectrum and the methodology adopted by the then Minister of C&IT and the officers of DoT for grant of UAS Licences may have caused huge loss to the nation, we have no hesitation to record a finding that the recommendations made by TRAI were flawed in many respects and implementation thereof by the DoT resulted in gross violation of the objective of NPT 1999 and the decision taken by the Council of Ministers on 31.10.2003.

75. We may also mention that even though in its recommendations dated 28.8.2007, TRAI had not specifically recommended that entry fee be fixed at 2001 rates, but paragraph 2.73 and other related paragraphs of its recommendations state that it has decided not to recommend the standard option for pricing of spectrum in 2G bands keeping in view the level playing field for the new entrants. It is impossible to approve the decision taken by the DoT to act upon those recommendations. We also consider it necessary to observe that in today's dynamism and unprecedented growth of telecom sector, the entry fee determined in 2001 ought to have been treated by the TRAI as wholly unrealistic for grant of licence along with start up spectrum. In our view, the recommendations made by TRAI in this regard were contrary to the decision of the Council of Ministers that the DoT shall discuss the issue of spectrum pricing with the Ministry of Finance along with the issue of incentive for efficient use of spectrum as well as disincentive for sub-optimal usages. Being an expert body, it was incumbent upon the TRAI to make suitable recommendations even for the 2G bands especially in light of the deficiencies of the present system which it had itself pointed out. We do not find merit in the reasoning of TRAI that the consideration of maintaining a level playing field prevented a realistic reassessment of the entry fee.

76. **Question Nos.3 and 4:**

There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or

accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the Government files or the files of the agency/ instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.

77. The exercise undertaken by the officers of the DoT between September, 2007 and March 2008, under the leadership of the then Minister of C&IT was wholly arbitrary,

capricious and contrary to public interest apart from being violative of the doctrine of equality. The material produced before the Court shows that the Minister of C&IT wanted to favour some companies at the cost of the Public Exchequer and for this purpose, he took the following steps:

(i) Soon after his appointment as Minister of C&IT, he directed that all the applications received for grant of UAS Licence should be kept pending till the receipt of TRAI recommendations.

(ii) The recommendations made by TRAI on 28.8.2007 were not placed before the full Telecom Commission which, among others, would have included the Finance Secretary. The notice of the meeting of the Telecom Commission was not given to any of the non permanent members despite the fact that the recommendations made by TRAI for allocation of spectrum in 2G bands had serious financial implications. This has been established from the pleadings and the records produced before this Court which show that after issue of licences, 3 applicants transferred their equities for a total sum of Rs.24,493 crores in favour of foreign companies. Therefore, it was absolutely necessary for the DoT to take the opinion of the Finance Ministry as per the requirement of the Government of India (Transaction of Business) Rules, 1961.

(iii) The officers of the DoT who attended the meeting of the Telecom Commission held on 10.10.2007 hardly had any choice but to approve the recommendations made by TRAI. If they had not done so, they would have incurred the wrath of the Minister of C&IT.

(iv) In view of the approval by the Council of Ministers of the recommendations made by the Group of Ministers in 2003, the DoT had to discuss the issue of spectrum pricing with the Ministry of Finance. Therefore, the DoT was under an obligation to involve the Ministry of Finance before any

decision could be taken in the context of paragraphs 2.78 and 2.79 of TRAI's recommendations. However, as the Minister of C&IT was very much conscious of the fact that the Secretary, Finance, had objected to the allocation of 2G spectrum at the rates fixed in 2001, he did not consult the Finance Minister or the officers of the Finance Ministry.

(v) The Minister of C&IT brushed aside the suggestion made by the Minister of Law and Justice for placing the matter before the Empowered Group of Ministers. Not only this, within few hours of the receipt of the suggestion made by the Prime Minister in his letter dated 2.11.2007 that keeping in view the inadequacy of spectrum, transparency and fairness should be maintained in the matter of allocation thereof, the Minister of C&IT rejected the same by saying that it will be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants because it will not give them level playing field.

(vi) The Minister C&IT introduced cut off date as 25.9.2007 for consideration of the applications received for grant of licence despite the fact that only one day prior to this, press release was issued by the DoT fixing 1.10.2007 as the last date for receipt of the applications. This arbitrary action of the Minister of C&IT though appears to be innocuous, actually benefitted some of the real estate companies who did not have any experience in dealing with telecom services and who had made applications only on 24.9.2007, i.e., one day before the cut off date fixed by the Minister of C&IT on his own.

(vii) The cut off date, i.e. 25.9.2007 decided by the Minister of C&IT on 2.11.2007 was not made public till 10.1.2008 and the first-come-first-served policy, which was being followed since 2003 was changed by him on 7.1.2008 and was incorporated in press release dated 10.1.2008. This enabled some of the applicants, who had access either to the Minister or the officers of the DoT to get the demand

drafts, bank guarantee, etc. prepared in advance for compliance of conditions of the LoIs, which was the basis for determination of seniority for grant of licences and allocation of spectrum.

(viii) The meeting of the full Telecom Commission, which was scheduled to be held on 9.1.2008 to consider issues relating to grant of licences and pricing of spectrum was deliberately postponed on 7.1.2008 so that the Secretary, Finance and Secretaries of three other important Departments may not be able to raise objections against the procedure devised by the DoT for grant of licence and allocation of spectrum by applying the principle of level playing field.

(ix) The manner in which the exercise for grant of LoIs to the applicants was conducted on 10.1.2008 leaves no room for doubt that every thing was stage managed to favour those who were able to know in advance the change in the implementation of the first-come-first served policy. As a result of this, some of the companies which had submitted applications in 2004 or 2006 were pushed down in the priority and those who had applied between August and September 2007 succeeded in getting higher seniority entitling them to allocation of spectrum on priority basis.

78. The argument of Shri Harish Salve, learned senior counsel, that if the Court finds that the exercise undertaken for grant of UAS Licences has resulted in violation of the institutional integrity, then all the licences granted 2001 onwards should be cancelled does not deserve acceptance because those who have got licence between 2001 and 24.9.2007 are not parties to these petitions and legality of the licences granted to them has not been questioned before this Court.

79. In majority of judgments relied upon by learned Attorney General and learned counsel for the respondents, it has been

held that the power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters. When matters like these are brought before the judicial constituent of the State by public spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest and ensure that the institutional integrity is not compromised by those in whom the people have reposed trust and who have taken an oath an to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill will and who, as any other citizen, enjoy fundamental rights and, at the same time, are bound to perform the duties enumerated in Article 51A. Reference in this connection can usefully be made to the judgment of the three Judge Bench headed by Chief Justice Kapadia in Centre for *P.I.L. v. Union of India* (2011) 4 SCC 1.

80. Before concluding, we consider it imperative to observe that but for the vigilance of some enlightened citizens who held important constitutional and other positions and discharged their duties in larger public interest and Non Governmental Organisations who have been constantly fighting for clean governance and accountability of the constitutional institutions, unsuspecting citizens and the Nation would never have known how the scarce natural resource spared by the

Army has been grabbed by those who enjoy money power and who have been able to manipulate the system.

81. In the result, the writ petitions are allowed in the following terms:

(i) The licences granted to the private respondents on or after 10.1.2008 pursuant to two press releases issued on 10.1.2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.

(ii) The above direction shall become operative after four months.

(iii) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band.

(iv) The Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licences be granted by auction.

(v) Respondent Nos.2, 3 and 9 who have been benefited at the cost of Public Exchequer by a wholly arbitrary and unconstitutional action taken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band and who off-loaded their stakes for many thousand crores in the name of fresh infusion of equity or transfer of equity shall pay cost of Rs.5 crores each. Respondent Nos. 4, 6, 7 and 10 shall pay cost of Rs.50 lakhs each because they too had been benefited by the wholly arbitrary and unconstitutional exercise undertaken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band. We have not imposed cost on the respondents who had submitted their applications in 2004 and 2006 and whose applications were kept pending till 2007.

(vi) Within four months, 50% of the cost shall be deposited with the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants. The remaining 50% cost shall be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

(vii) However, it is made clear that the observations made in this judgment shall not, in any manner, affect the pending investigation by the CBI, Directorate of Enforcement and others agencies or cause prejudice to those who are facing prosecution in the cases registered by the CBI or who may face prosecution on the basis of chargesheet(s) which may be filed by the CBI in future and the Special Judge, CBI shall decide the matter uninfluenced by this judgment. We also make it clear that this judgment shall not prejudice any person in the action which may be taken by other investigating agencies under Income Tax Act, 1961, Prevention of Money Laundering Act, 2002 and other similar statutes.

D.G. Writ Petitions allowed.

ZELIA M. XAVIER FERNANDES E. GONSALVES

v.

JOANA RODRIGUES AND ORS.

(Civil Appeal No. 1544 of 2012)

FEBRUARY 03, 2012

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

Goa Panchayat Raj Act, 1994 – s.10(f) – Disqualification from membership of panchayat – Appellant is a Panch member in a Village Panchayat in the State of Goa – Respondent no.2-village panchayat awarded contract to appellant's husband(respondent no.4) – Whether appellant can be said to have any indirect share or monetary interest in the contract of her husband with the Village Panchayat and she incurred disqualification as a Panch member from the Village Panchayat u/s.10(f) of the 1994 Act – Held: Respondent no.4 and appellant are husband and wife and are governed by the Portuguese Code – By virtue of Article 1098 and Article 1108 thereof, in absence of any contract, marriage between appellant and respondent no.4 is governed by the system 'Communiao Dos Bens' i.e. community of property whereunder, each spouse is entitled to one-half income of the other spouse unless contracted otherwise – On facts, no evidence of exclusion of appellant from her husband's assets and income – Money acquired by appellant's husband from the contract with the Village Panchayat is 'community property' – Provisions contained in Articles 1098 and 1108 of the Portuguese Code and s.5A of the Income Tax Act give appellant a participation in the profits of the contract and advantages like apportionment of income from that contract – Appellant's participation in the profits of the contract constitute an "indirect monetary interest" in the contract awarded to her husband – Consequently, appellant incurred disqualification u/s.10(f) of the 1994 Act – Portuguese Civil Code, 1860 – Arts. 1098 and 1108 – Income Tax Act, 1961 – s.5A.

Goa Panchayat Raj Act, 1994 – s.10(f) – Disqualification of member from panchayat in terms of s.10(f) – Purpose and interpretation of – Held: The purpose and object of providing for disqualification for membership of the Panchayat in clause (f) of s.10 is to ensure that there is no conflict between the private interest of the member and his duty as a member of the Panchayat – It is based on general principle of conflict

between duty and interest – Prohibition in s.10(f) should not receive unduly narrow or restricted construction.

Words and Phrases – "Interest" – Meaning of – Held: The word 'interest' has a basic meaning of participation in advantage, profit and responsibility – 'Interest' is a right, title or share in a thing.

The appellant was a Panch member in Raia Village Panchayat of Salcete Taluka, State of Goa. Respondent no. 2-Village Panchayat of Raia invited bids for collection of market fee within its jurisdiction. The bid of appellant's husband (respondent no.4) was accepted as his bid was the highest and the contract for collection of market fee was awarded to him. Respondent no.1 filed election petition under Section 11 of the Goa Panchayat Raj Act, 1994 before the State Election Commission for disqualification of appellant on ground that she had directly or indirectly a share or monetary interest in the contract given by respondent no.2 to her husband. The Commission ordered that the appellant was disqualified as a Panch Member of Village Panchayat of Raia in Salcete Taluka in terms of clause (f) of Section 10 of the Act. The appellant filed writ petition before the High Court which dismissed the same.

In the instant appeal, the question which arose for consideration was whether the appellant can be said to have any indirect share or monetary interest in the contract of her husband with the Village Panchayat of Raia and if the answer is in the affirmative whether she incurred disqualification as a Panch member from Raia Village Panchayat of Salcete Taluka in South Goa District, State of Goa under Section 10(f) of the 1994 Act.

Dismissing the appeal, the Court

HELD: 1. The purpose and object of providing for disqualification for membership of the Panchayat in

clause (f) of Section 10 of the Goa Panchayat Raj Act, 1994 is to ensure that there is no conflict between the private interest of the member and his duty as a member of the Panchayat. It is based on general principle of conflict between duty and interest. [Para 11] [265-E-F]

2.1. Respondent no.4 and the appellant are husband and wife and are governed by the provisions of the Portuguese Civil Code, 1860. By virtue of Article 1098 and Article 1108 thereof, in the absence of any contract, the marriage between the appellant and the respondent no.4 is governed by the system 'Communiao Dos Bens' i.e. community of property. Accordingly, on marriage, the property of the spouses gets merged. Each spouse, by operation of law, unless contracted otherwise, becomes 50% shareholder in all their properties, present and future and each spouse is entitled to a one-half income of the other spouse. [Para 17] [269-H; 270-A-B]

2.2. Section 5A(1) of the Income Tax Act provides that where the husband and wife are governed by the system of "Communiao Dos Bens" in force in the State of Goa the income of the husband and the wife under any head of income shall not be assessed as that of such community of property but such income of the husband and the wife from all sources, except from salary, shall be apportioned equally between the husband and the wife and the income so apportioned shall be included separately in the total income of the husband and of the wife respectively and the remaining provisions of the Income Tax Act shall apply accordingly. Sub-section (2) of Section 5A provides that where the husband or the wife governed by system of community of property has any income under the head 'salaries', such income shall be included in the total income of the spouse who has actually earned it. [Para 18] [270-C-E]

Gulam Yasin Khan v. Sahebrao Yeshwantrao Walaskar

and another **AIR 1966 SC 1339 – distinguished.**

3. The word 'interest' has a basic meaning of participation in advantage, profit and responsibility. 'Interest' is a right, title or share in a thing. [Para 20] [271-D]

P. Ramanatha Aiyar's The Law Lexicon, **2nd Edition (reprint 1999) – referred to.**

4.1. Section 10(f) of the 1994 Act speaks of monetary interest. The general rule that the wife's interest is not necessarily the husband's interest has no application where the husband and the wife are governed by the system 'community of property' because under that system, on marriage, each spouse is entitled to a one-half income of the other spouse unless contracted otherwise. During the subsistence of marriage, the husband and the wife each have a share in the corpus as well as the income of communion property. [Para 21] [271-E-F]

4.2. Section 10(f) contemplates that share or monetary interest (direct or indirect) has to be in the contract itself. The expression 'in any contract' means in regard to any contract. It cannot be said that the appellant had no indirect share or monetary interest in regard to her husband's contract with the Village Panchayat Raia when, by operation of law, she is entitled to the profits of that contract. Money acquired by the appellant's husband from the contract with the Village Panchayat Raia is 'community property' and, therefore, the conclusion is inescapable that the appellant has indirect share, or, in any case, monetary interest in the contract awarded to her husband by the Village Panchayat Raia as the profits from the contract shall be apportioned equally between her and her husband. There is no evidence of exclusion of the appellant from her husband's assets and income. The provisions contained in Articles 1098 and 1108 of the 1860 Code and Section 5A of the Income Tax Act give the

appellant a participation in the profits of the contract and advantages like the apportionment of income from that contract. The appellant, by operation of law, becomes entitled to share in the profits of the contract awarded to her husband by the Village Panchayat. From whatever way it is seen, the appellant's participation in the profits of the contract does constitute an "indirect monetary interest" in the contract for collection of market fee awarded to her husband within Section 10(f) prohibiting the member of the Village Panchayat from having such an interest. [Para 22] [271-G-H; 272-A-D]

5. The prohibition in Section 10(f) should not receive unduly narrow or restricted construction. The answer to the first question must be in the affirmative and it must consequently be held that the appellant has incurred disqualification under Section 10(f) of the 1994 Act. [Para 23] [272-F-G]

Gulam Yasin Khan v. Sahebrao Yeshwantrao Walaskar and another **AIR 1966 SC 1339 – followed.**

Case Law Reference:

AIR 1966 SC 1339	**distinguished**	**Para 14**
AIR 1966 SC 1339	**followed**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1544 of 2012.

From the Judgment & Order dated 22.07.2009 of the High Court of Bombay at Goa in Writ Petition No. 437 of 2009.

R. Sundaravardhan, Vipin Nair, P.B. Suresh, (for Temple Law Firm) for the Appellant.

Arun Francis (for Dua Associates) for the Respondets.

The Judgment of the Court was delivered by

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

2. The question which we have to consider is whether the appellant can be said to have any indirect share or monetary interest in the contract of her husband with the Village Panchayat of Raia and if the answer is in the affirmative whether she has incurred disqualification as a Panch member from Raia Village Panchayat of Salcete Taluka in South Goa District, State of Goa under Section 10(f) of the Goa Panchayat Raj Act, 1994 (for short, '1994 Act').

3. The appellant was declared as a returned candidate from Ward No. 9 of Raia Village Panchayat of Salcete Taluka, State of Goa at the election held in May 2007 for a period 2007-2012.

4. On or about March 18, 2008, the respondent no. 2— Village Panchayat of Raia — invited bids for the collection of market fee within its jurisdiction for 2008-09. Mrs. Joana Rodrigues (respondent no. 1), Xavier Fernandes (appellant's husband) and one Bernard Mario Fernandes submitted their bids. On March 28, 2008, the tender forms were opened in the office of the respondent no. 2 and the bid of the appellant's husband was accepted as his bid was the highest. Her husband, on acceptance of his bid, paid the first installment of 1/4th part of the bidding amount collection.

5. On March 31, 2008, the respondent no. 1 made a representation to the Deputy Director of Panchayat, Madgaon, Goa bringing to his notice that the appellant was liable for disqualification under Section 10(f) of the 1994 Act. It appears that the respondent no. 1 also made an application to the State Election Commission (for short, 'Commission), State of Goa, on which the Commission directed the respondent no. 1 to file a formal election petition seeking disqualification of the appellant. Accordingly, the respondent no. 1 filed an election petition under Section 11 before the Commission for disqualification of the appellant on the ground that she has directly or indirectly a share or monetary interest in the above contract given by the respondent no. 2 to her husband.

6. The Commission, on hearing the parties, vide its order dated July 3, 2009 held that the present appellant had indirectly a share or monetary interest in the contract executed by the Village Panchayat of Raia with her husband and ordered that the appellant was disqualified as a Panch Member of Village Panchayat of Raia in Salcete Taluka in terms of clause (f) of Section 10.

7. The appellant, aggrieved by the above order of the Commission, filed a writ petition before the High Court of Bombay at Goa. The Single Judge of that Court on July 22, 2009 dismissed the writ petition. It is from this order of the High Court that this appeal, by special leave, has arisen.

8. We have heard Mr. R. Sundaravardhan, learned senior counsel for the appellant and Mr. Arun Francis, learned counsel for the respondent no. 1. The contention of Mr. Sundaravardhan, learned senior counsel for the appellant is that mere relationship of husband and wife will not create that type of interest which is contemplated by Section 10(f). He heavily relied upon the decision of this Court in the case of *Gulam Yasin Khan vs. Sahebrao Yeshwantrao Walaskar and another*[1]. Mr. Arun Francis stoutly supported the view of the High Court.

9. Gram Sabha — Constitution of Panchayats – is dealt with in Chapter II of the 1994 Act. Section 7, inter alia, provides that all the members of panchayat shall be elected. Section 9 provides for qualification for membership while Section 10 makes a provision for disqualification for membership. We are concerned with Section 10(f) and the said provision reads as follows:

> "S. 10. Disqualification for membership.— A person shall be disqualified for being chosen as, and for being, a member of the Panchayat if,—
>
> xxx xxx xxx
>
> (f) he has directly or indirectly any share or monetary

1. AIR 1966 SC 1339

interest in any work done by or to the Panchayat or any contract or employment with, under or by or on behalf of, the Panchayat;

xxx xxx xxx"

10. Section 11 provides that if any question arises as to whether a member of a Panchayat has become subject to any disqualification referred to in Section 10, it shall be referred to the State Election Commission for decision and its decision thereon shall be final.

11. The purpose and object of providing for disqualification for membership of the Panchayat in clause (f) of Section 10 is to ensure that there is no conflict between the private interest of the member and his duty as a member of the Panchayat. It is based on general principle of conflict between duty and interest.

12. Insofar as the present matter is concerned, we have to consider the applicability of clause (f) of Section 10 to the extent, "he has…..indirectly any share or monetary interest in …..any contract ….by or on behalf of the Panchayat" in the fact situation noticed above. A similar provision came up for consideration before a 5-Judge Bench of this Court in the case of *Gulam Yasin Khan1*. That was a case where the appellant and the respondent No. 1 therein, namely, Gulam Yasin Khan and Sahebrao Yeshwantrao Walaskar respectively were candidates for election as members to the Municipal Committee, Malkapur. They had filed their nomination papers. At the stage of scrutiny, Sahebrao Yeshwantrao Walaskar objected to the validity of the candidature of Gulam Yasin Khan on the ground that Gulam Yasin Khan's son Khalildad Khan was a Moharir on Octroi Naka employed by the Committee and on account of the employment of Gulam Yasin Khan's son by the Municipal Committee, Gulam Yasin Khan had an interest in the Municipal Committee and so he was disqualified from standing for election under clause (l) of Section 15 of the Central Provinces and Berar Municipalities Act, 1922 (for short, 'CP

Municipalities Act'). Gulam Yasin Khan disputed the validity of the objection and he stated that his son was not staying with him and had no connection whatsoever. The Supervising Officer overruled the objection raised by Sahebrao Yeshwantrao Walaskar. The order of Supervising Officer was challenged by Sahebrao Yeshwantrao Walaskar in the writ petition before the High Court. The High Court allowed his writ petition and set aside the order of the Supervising Officer and declared Sahebrao Yeshwantrao Walaskar elected to the Municipal Committee. It is from this controversy that the matter reached this Court. This Court in the backdrop of the above facts considered the question whether by virtue of his relationship with Khalildad Khan, Gulam Yasin Khan could be said to have any indirect share or interest in the employment of Khalildad Khan with the Municipal Committee. The provision under consideration read, "no person shall be eligible for election, selection or nomination as a member of a committee, if such person has directly or indirectly any share or interest in any contract with, by or on behalf of the committee, while owning such share or interest".

13. In light of the above factual and legal position, this Court in *Gulam Yasin Khan*[1] (Pgs. 1341-1342) held as under :

"7. ……We are assuming for the purpose of dealing with this point that the contract to which clause (l) refers, includes employment, though unlike other similar statutes, the word "employment" is not specifically mentioned in the said clause. In order to incur disqualification, what the clause requires is "interest or share in any contract"; it may either be a share or an interest; and if it is an interest, the interest may be direct or indirect. But it is plain that the interest to which the clause refers, cannot mean mere sentimental or friendly interest; it must mean interest which is pecuniary, or material, or of a similar nature. If the interest is of this latter category, it would suffice to incur disqualification even if it is indirect. But it is noticeable that the clause also requires that the person who incurs

disqualification by such interest must "own such share or interest". It is not easy to determine the scope of the limitation introduced by this last sub-clause. Mr. Gauba for respondent No. 1 urged that the clause "owning such share or interest" is tautologous when it refers to direct interest or share, and is meaningless when it refers to indirect share or interest. Prima facie, there is some force in this contention; but whatever may be the exact denotation of this clause, it does serve the purpose of limiting the character of the share or interest which incurs disqualification prescribed by the clause and it would not be easy to ignore the existence of the last portion of the clause altogether.

8. It is quite true that the purpose and the object of prescribing the several disqualifications enumerated in clauses (a) to (l) of s. 15 of the Act is to ensure the purity of the administration of Municipal Committees, and in that sense, it may be permissible to hold that the different clauses enumerated in S.15 should not receive an unduly narrow or restricted construction. But even if we were to adopt a liberal construction of S. 15(l), we cannot escape the conclusion that the interest or share has to be in the contract itself. When we are enquiring as to whether the appellant is interested directly or indirectly in the employment of his son, we cannot overlook the fact that the enquiry is not as to whether the appellant is interested in the son, but the enquiry is whether the appellant is interested in the employment of the son. The distinction between the two enquiries may appear to be subtle, but, nevertheless, for the purpose of construing the clause, it is very relevant. Considered from this point of view, on the facts proved in this case, we find it difficult to hold that by mere relationship with his son, the appellant can be said to be either directly or indirectly interested in his employment.

xxx xxx xxx xxx

12. It would, we think, be unreasonable to hold that mere relationship of a person with an employee of the Municipal Committee justifies the inference that such a person has interest, direct or indirect, in the employment under the Municipal Committee. In the circumstances of this case, what is proved is the mere relationship between the appellant and his son who is the employee of the Municipal Committee; and on that relationship the High Court has based its conclusion that the appellant is disqualified under S. 15(l) of the Act. We are satisfied that this conclusion is erroneous in law."

14. In *Gulam Yasin Khan*[1] while construing Section 15 (l) of the CP Municipalities Act, this Court held that the interest or share has to be in the contract itself; mere relationship of a person with an employee of the Municipal Committee shall not justify the inference that such a person has interest, direct or indirect. Ordinarily, there would not have been any difficulty in applying Section 10(f) in the same manner but we think *Gulam Yasin Khan*[1] is clearly distinguishable and cannot be applied to the present fact situation which concerns money affairs of husband and wife governed by the provisions contained in Articles 1098 and 1108 of Portuguese Civil Code, 1860 ('1860 Code') and Section 5A of the Indian Income Tax Act, 1961 ('Income Tax Act').

15. Articles 1098 and 1108 of the 1860 Code which is applicable in the State of Goa read as under :

1098. - In the absence of any contract, it is deemed that the marriage is done as per the custom of the country, except when it is solemnized in contravention of the provisions of Article 1058 clause 1 and 2; because in such a case it is deemed that the spouses are married under the simple communion of acquired properties.

x x x x x x x x x

1108. - The marriage as per the custom of the country consists in the communion between the spouses of all their properties, present and future, not excluded by law.

16. Section 5A of the Income Tax Act is as follows :

5A. **Apportionment of income between spouses governed by Portuguese Civil Code**. – (1) Where the husband and wife are governed by the system of community of property (known under the Portugese Civil Code of 1860 as "COMMUNIAO DOS BENS") in force in the State of Goa and in the Union territories of Dadra and Nagar Haveli and Daman and Diu, the income of the husband and of the wife under any head of income shall not be assessed as that of such community of property (whether treated as an association of persons or a body of individuals), but such income of the husband and of the wife under each head of income (other than under the head "Salaries") shall be apportioned equally between the husband and the wife and the income so apportioned shall be included separately in the total income of the husband and of the wife respectively, and the remaining provisions of this Act shall apply accordingly.

(2) Where the husband or, as the case may be, the wife governed by the aforesaid system of community of property has any income under the head "Salaries", such income shall be included in the total income of the spouse who has actually earned it.

17. There is no dispute that the respondent no. 4 and the appellant are husband and wife and are governed by the provisions of the 1860 Code. By virtue of Article 1098 and Article 1108 thereof, in the absence of any contract, the marriage between the appellant and the respondent no. 4 is governed by the system 'Communiao Dos Bens' i.e. community of property. Accordingly, on marriage, the property of the spouses gets merged. Each spouse, by operation of law, unless contracted otherwise, becomes 50% shareholder in all

their properties, present and future and each spouse is entitled to a one-half income of the other spouse.

18. Section 5A(1) of the Income Tax Act provides that where the husband and wife are governed by the system of "Communiao Dos Bens" in force in the State of Goa the income of the husband and the wife under any head of income shall not be assessed as that of such community of property but such income of the husband and the wife from all sources, except from salary, shall be apportioned equally between the husband and the wife and the income so apportioned shall be included separately in the total income of the husband and of the wife respectively and the remaining provisions of the Income Tax Act shall apply accordingly. Sub-section (2) of Section 5A provides that where the husband or the wife governed by system of community of property has any income under the head 'salaries', such income shall be included in the total income of the spouse who has actually earned it.

19. In *P. Ramanatha Aiyar's* The Law Lexicon, 2nd Edition (reprint 1999) the term 'interest' is explained thus:

> "Interest. Legal concern, right, pecuniary stake the legal concern of a person in the thing or property or in the right to some of the benefits or use from which the property is inseparable ; such a right in or to a thing capable of being possessed or enjoyed as property which can be enforced by judicial proceedings. The word is capable of different meanings, according to the context in which it is used or the subject-matter to which it is applied. It may have even the same meaning as the phrase "right title and interest" but it has been said also to mean any right in the nature of property, but less than title. The word is sometimes employed synonymous with estate, or property.
>
> Interest means concern, advantage, good ; share, portion, part, or participation.
>
> A person interested is one having an interest ; i.e. a right of property or in the nature of property, less than title.

The word 'interest' is the broadest term applicable to claims in or upon real estate in its ordinary signification among men of all classes. It is broad enough to include any right, title, or estate in or lien upon real estate. One who holds a mortgage upon a piece of land for half its value is commonly and truly said to be interested in it.

xxx xxx xxx".

20. The word 'interest' has a basic meaning of participation in advantage, profit and responsibility. 'Interest' is a right, title or share in a thing.

21. Section 10(f) speaks of monetary interest. The general rule that the wife's interest is not necessarily the husband's interest has no application where the husband and the wife are governed by the system 'community of property' because under that system, on marriage, each spouse is entitled to a one-half income of the other spouse unless contracted otherwise. During the subsistence of marriage, the husband and the wife each have a share in the corpus as well as the income of communion property.

22. There is no doubt that Section 10(f) contemplates that share or monetary interest (direct or indirect) has to be in the contract itself. The expression 'in any contract' means in regard to any contract. Could it be said that the appellant had no indirect share or monetary interest in regard to her husband's contract with the Village Panchayat Raia when, by operation of law, she is entitled to the profits of that contract? The answer has to be in the negative. Money acquired by the appellant's husband from the contract with the Village Panchayat Raia is 'community property' and, therefore, the conclusion is inescapable that the appellant has indirect share, or, in any case, monetary interest in the contract awarded to her husband by the Village Panchayat Raia as the profits from the contract shall be apportioned equally between her and her husband. There is no evidence of exclusion of the appellant from her husband's assets and income. The provisions contained in

Articles 1098 and 1108 of the 1860 Code and Section 5A of the Income Tax Act give the appellant a participation in the profits of the contract and advantages like the apportionment of income from that contract. The appellant, by operation of law, becomes entitled to share in the profits of the contract awarded to her husband by the Village Panchayat. From whatever way it is seen, the appellant's participation in the profits of the contract does constitute an "indirect monetary interest" in the contract for collection of market fee awarded to her husband within Section 10(f) prohibiting the member of the Village Panchayat from having such an interest.

23. While considering Section 15(l) of the CP Municipalities Act which provided for the disqualifications to the elections of the Municipal Committees, this Court in *Gulam Yasin Khan*[1] held that the purpose and the object of prescribing several disqualifications in that provision is to ensure the purity of the administration of the Municipal Committees and in that sense the different clauses of disqualifications should not receive unduly narrow or restricted construction. We also hold the view that the prohibition in Section 10(f) should not receive unduly narrow or restricted construction. In what we have considered above, the answer to the first question must be in the affirmative and it must consequently be held that the appellant has incurred disqualification under Section 10(f) of the 1994 Act. We hold accordingly.

24. Civil Appeal is dismissed with no order as to costs.

B.B.B. Appeal dismissed.

VIKAS KALRA

v.

THE COMMISSIONER OF INCOME TAX-VIII, NEW DELHI

(Civil Appeal No. 1915 of 2012)

FEBRUARY 08, 2012

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

Income Tax Act, 1961 – ss. 80 HHC and 28(iiid) – Deductions in respect of profits retained for export business – Claim for, by exporter –Assessing Officer held that the entire sale value of Duty Entitlement Pass Book (DEPB) represents profit on transfer of DEPB u/s 28(iiid) and did not allow exemption/deduction u/s 80 HHC – Order upheld by Commissioner of Income Tax (Appeals) – Appellate Tribunal relying on a decision of Special Bench of the Tribunal in M/s Topman Exports holding that the face value of DEPB would be cash assistance against export and would fall u/s 28 (iiid) and sale value less the face value of DEPB would be profit on transfer of DEPB – High Court remitted the case to the Appellate Tribunal since the decision of the Special Bench was reversed by the High Court in CIT v Kalpataru Colours and Chemicals – As regards the additional issue whether the Tribunal was correct in law in ignoring explanation (baa) u/s 80 HHC which specifically excludes profits of DEPB from total turnover, the High Court held that the issue was covered by CIT v Shri Ram Honda Power Equip – On appeal held: Appeals disposed of in terms of the judgment passed by this Court in M/s Topman Exports v. Commissioner of Income Tax, Mumbai and other connected appeals setting aside the judgment of the High Court in CIT v Kalpataru Colours and Chemicals; and M/s ACG Associated Capsules Private Limited v. Commissioner of Income Tax, Central-IV, Mumbai and other connected appeals affirming the judgment of the High Court in CIT v Shri Ram Honda Power Equip.

Appellant-exporter filed returns of income claiming deductions in respect of profits retained for export business under Section 80HHC of the Income Tax Act, 1961. The Assessing Officer held that the entire sale value of Duty Entitlement Pass Book (DEPB) represented the profit on transfer of DEPB under Section 28(iiid) of the Act and did not allow the amount of deduction under Section 80HHC. The Commissioner of Income Tax (Appeals) upheld the order. On appeal, the Tribunal following the

order of the Special Bench of the Tribunal in the M/s Topman Exports's case allowed the deductions holding that the face value of the DEPB would be 'cash assistance' against export and would fall under Section 28(iiib) of the Act and the sale value less the face value of the DEPB would be profit on transfer of DEPB. Aggrieved the Revenue filed appeals. The High Court held that the tribunal had simply followed the decision of the Special Bench of the Tribunal which was reversed by the High Court in *Commissioner of the Income Tax* v. *Kalpataru Colours and Chemicals* **ITA(L) 2887 of 2009 and remitted the case to the tribunal to decide the appeals on merits. As regards the issue whether the Tribunal was correct in law in ignoring Explanation (baa) under Section 80HHC of the Act which specially excludes profits of DEPB from total turnover, the High Court held that the issue was covered by its judgment in the** *Commissioner of Income-Tax v. Shri Ram Honda Power Equip* **(2007) 289 ITR 475 (Delhi). Therefore, the appellant filed the instant appeals.**

Disposing of the appeals, the Court

HELD: The instant appeals are disposed of in terms of the judgment in Civil Appeal arising out SLP (C) No.26558 of 2010 (*M/s Topman Exports v. Commissioner of Income Tax, Mumbai***) and other connected appeals setting aside the judgment of the High Court in** *Commissioner of the Income Tax* v. *Kalpataru Colours and Chemical;* **and in terms of the judgment in Civil Appeal arising out of S.L.P. (C) No.32450 of 2010 (***M/s ACG Associated Capsules Private Limited v. Commissioner of Income Tax, Central-IV, Mumbai***) and other connected appeal affirming the judgment of the High Court in** *Commissioner of Income Tax* v. *Shri Ram Honda Power Equip's* ***case*****. [Para 5] [277-D-F]**

Commissioner of the Income Tax v. Kalpataru Colours and Chemicals **ITA (L) 2887 of 2009;** *Commissioner of*

Income-Tax v. Shri Ram Honda Power Equip **(2007) 289 ITR 475 (Delhi);** *M/s Topman Exports v. Commissioner of Income Tax, Mumbai* **[2012] 4 SCR 684;** *M/s ACG Associated Capsules Private Limited v. Commissioner of Income Tax, Central-IV, Mumbai* **2012 (2) SCR 401, referred to.**

Case Law Reference:

ITA (L) 2887 of 2009	**Referred to**	**Para 4**
(2007) 289 ITR 475(Delhi)	**Referred to**	**Para 4**
2012 (2) SCR 401	**Referred to**	**Para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1915 of 2012.

From the Judgment & Order dated 21.02.2011/22.03.2011 of the High Court of Delhi at New Delhi in ITA No. 308 of 2011.

With

C.A. No. 1916 of 2012.

D.R. Thadani, Ashwani Kumar for the Appellant.

R.P. Bhatt, V. Shekhar, Arijit Prasad, D.D. Kamat, Aman Ahluwalia, Kunal Bahri, Fuzail A. Ayyubi, Abhigya, Jatin Rajput, Deepakshi Jain, Vishal Saxena, B.V. Balram Das for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. Leave granted.

2. These are the appeals against the order dated 18.02.2011 as modified by the order dated 22.03.2011 of the Delhi High Court in ITA No.185 of 2011 and the order dated 21.02.2011 as modified by the order dated 22.03.2011 of the Delhi High Court in ITA No.308 of 2011.

3. The facts very briefly are that the appellant is engaged

in manufacturing and exporting leather garments. For the assessment years 2001-2002 and 2004-2005, the appellant filed returns of income claiming deductions in respect of profits retained for export business under Section 80HHC of the Income Tax Act, 1961 (for short 'the Act'). The Assessing Officer held in the assessment orders that the entire sale value of Duty Entitlement Pass Book (for short 'DEPB') represents profit on transfer of DEPB under Section 28(iiid) of the Act and did not allow the amount of deduction claimed by the appellant under Section 80HHC. The appellant filed appeals before the Commissioner of Income Tax (Appeals) but the Commissioner of Income Tax (Appeals) sustained the orders of the Assessing Officer. The appellant filed appeals before the Income Tax Appellate Tribunal (for short 'the Tribunal') and the Tribunal following the order dated 11.08.2009 of the Special Bench of the Tribunal at Mumbai in the case of M/s Topman Exports allowed the appeals and held that the face value of the DEPB will be 'cash assistance' against export and will fall under Section 28(iiib) of the Act and the sale value less the face value of the DEPB will be profit on transfer of DPB and will fall under Section 28(iiid) of the Act.

4. Aggrieved, the Revenue preferred the appeals ITA No.185 of 2011 in respect of assessment year 2001-2002 and ITA No.308 of 2011 in respect of assessment year 2004-2005 before the Delhi High Court against the orders of the Tribunal. In both the appeals, the High Court held in the impugned orders that the Tribunal simply followed the decision of the Special Bench of the Tribunal at Mumbai in M/s Topman Exports and the decision of the Special Bench in M/s Topman Exports has been reversed by the Bombay High Court in *Commissioner of the Income Tax v. Kalpataru Colours and Chemicals* (ITA(L) 2887 of 2009). The High Court accordingly set aside the orders of the Tribunal and remitted the case to the Tribunal to decide the appeals of the appellant on merits after taking into account the facts of the cases. In ITA No.308 of 2011, an additional issue raised before the High Court was whether the Tribunal was

correct in law in ignoring Explanation (baa) under Section 80HHC of the Act which specially excludes profits of DEPB from total turnover and the High Court held that this issue was covered by its judgment in the case of *Commissioner of Income-Tax v. Shri Ram Honda Power Equip* [(2007) 289 ITR 475 (Delhi)].

5. We have today delivered judgment in Civil Appeal arising out SLP (C) No.26558 of 2010 (*M/s Topman Exports v. Commissioner of Income Tax, Mumbai*) and other connected appeals setting aside the judgment of the Bombay High Court in *Commissioner of the Income Tax* v. *Kalpataru Colours and Chemicals.* We have also delivered a separate judgment in Civil Appeal arising out of S.L.P. (C) No.32450 of 2010 (*M/s ACG Associated Capsules Private Limited v. Commissioner of Income Tax, Central-IV, Mumbai*) and other connected appeal affirming the judgment of the Delhi High Court in *Commissioner of Income Tax v. Shri Ram Honda Power Equip* (supra). These two appeals are disposed of in terms of our aforesaid two judgments. There shall be no order as to costs.

N.J. Appeals disposed of.

DIPAK SHUBHASHCHANDRA MEHTA
v.
C.B.I. AND ANR.
(Criminal Appeal No. 348 of 2012)

FEBRUARY 10, 2012

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

Bail – Grant of – Detention in jail custody for long period

– Delay in trial – Effect of – Held: When there is delay in trial, bail should be granted to the accused, though the same should not be applied to all cases mechanically – In the instant case, it is clear that due to various factors the trial may take a longer time – Considering the non-possibility of chommencement of trial in near future and also of the fact that the accused-appellant is in custody from 31.03.2010, except the period of interim bail, i.e. from 15.09.2011 to 30.11.2011, it is not a fit case to fix any outer limit taking note of the materials collected by the prosecution – When undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated – Appellant was charged with economic offences of huge magnitude – At the same time, though the Investigating Agency had completed the investigation and submitted charge sheet including additional charge sheet, the necessary charges were not framed, therefore, presence of appellant in custody may not be necessary for further investigation – In view of the same, considering the precarious health condition of the appellant, as supported by the documents including the certificate of the Medical Officer, Central Jail Dispensary, the appellant is entitled to an order of bail pending trial on stringent conditions in order to safeguard the interest of the CBI – Constitution of India, 1950 – Art. 21.

Bail – Grant of – Exercise of discretion by Court – Manner of – Held: The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course – Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of having committed a serious offence – Factors to be considered by the Court granting bail, stated.

Appellant alongwith other persons was charged with economic offences of huge magnitude and detained in jail custody. His application for regular bail was rejected by the High Court. The appellant filed SLP, whereupon this Court taking into account the assurance of the Additional Solicitor General (ASG) that the trial will be completed within a period of three months did not grant bail to the appellant, but permitted him to move bail application before the Special CBI Court in case of continuation of trial beyond period of three months. However, the trial could not be concluded and though the prosecution submitted charge sheet the charges were not framed. The appellant filed another application for regular bail which also was rejected by the High Court.

The appellant is suffering from various medical ailments and is in custody from 31-03-2010, except a short period of interim bail from 15-9-2011 to 30-11-2011 and his application under S. 239 CrPC for discharge is pending. Two other accused had been granted bail by the High Court on medical grounds.

The question for consideration in the instant appeal was whether the appellant had made out a case for regular bail.

Disposing the appeal, the Court

HELD: 1.1. The assurance of the ASG for completion of the case within three months was not fulfilled due to various reasons. Also, though the charge sheet and additional charge sheet were submitted to the Court, the same have not been approved and framed. In the meanwhile, apart from absence of some of the accused on various dates, due to some reasons or other including medical grounds, the appellant has also filed a petition for 'discharge'. Further, even in the counter affidavit filed by the CBI, it is stated that the accused persons moved

applications under Section 239 CrPC for discharge and the same are pending for hearing and disposal and further the Madhao Merchantile Bank case is going on day-to-day basis before the Special CBI Court and in addition to the same, Sohrabuddin Fake Encounter case is also pending for trial before the same Court. It is clear that the said Special CBI Court is over burdened and in view of the voluminous materials the prosecution has collected, undoubtedly the trial may take a longer time. When there is a delay in the trial, bail should be granted to the accused. But the same should not be applied to all cases mechanically. [Paras 16, 17] [291-G-H; 292-A-E]

1.2. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for *prima facie* concluding why bail was being granted, particularly, where the accused is charged of having committed a serious offence. The Court granting bail has to consider, among other circumstances, the factors such as a) the nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence; b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant and; c) *prima facie* satisfaction of the court in support of the charge. In addition to the same, the Court while considering a petition for grant of bail in a non-bailable offence apart from the seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses, have to be noted. Considering the present scenario and there is no possibility of commencement of trial in the near future and also of the fact that the appellant is in custody from

31.03.2010, except the period of interim bail, i.e. from 15.09.2011 to 30.11.2011, it is not a fit case to fix any outer limit taking note of the materials collected by the prosecution. When the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. [Para 18] [292-E-H; 293-A-C]

1.3. The appellant along with the others are charged with economic offences of huge magnitude. At the same time, though the Investigating Agency has completed the investigation and submitted the charge sheet including additional charge sheet, the fact remains that the necessary charges have not been framed, therefore, the presence of the appellant in custody may not be necessary for further investigation. In view of the same, considering the health condition as supported by the documents including the certificate of the Medical Officer, Central Jail Dispensary, the appellant is entitled to an order of bail pending trial on stringent conditions in order to safeguard the interest of the CBI. [Para 19] [293-D-F]

Babba vs. *State of Maharashtra* **(2005) 11 SCC 569;** *Vivek Kumar vs*. *State of U.P.* **(2000) 9 SCC 443** ***and*** *Sanjay Chandra v. Central Bureau of Investigation* **2012 (1) SCC 40: 2011 (13) SCR 309 – relied on.**

Case Law Reference:

2011 (13) SCR 309	**relied on**	**Para 6**
(2005) 11 SCC 569	**relied on**	**Para 17**
(2000) 9 SCC 443	**relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 348 of 2012.

From the Judgment & Order dated 20.10.2011 of the High Court of Gujrat at Ahmedabad in Criminal Misc. Application No. 14224 of 2011.

Mukul Rohtagi, Kamini Jaiswal, Anand Yagnik, Mohit D. Ram, Meenakshi Arora for the Appellant.

P.P. Malhotra, ASG, Harish Chandra, P.K. Dey, Padmalaxmi Nigam, Arvind Kumar Sharma for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 20.10.2011 passed by the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 14224 of 2011 whereby the High Court rejected the application for regular bail filed by the appellant herein.

3. Brief facts:

(a) The appellant herein is the Joint Managing Director of Vishal Exports Overseas Ltd., a Public Limited Company (hereinafter referred to as "the Company") incorporated in the year 1988 as a partnership firm which was converted into a Public Limited Company in 1995 under the provisions of Chapter IX of the Companies Act, 1956. The Company is engaged in the business of import and export of diverse commodities including agricultural products and diamonds. According to the appellant, the Company was a Government of India recognized Four Star Trading House with a turnover of about Rs.3935 crores in the year 2005-2006. It is also his claim that the Company has been accredited with many awards and was ranked 1st in India under the merchant exporter category in the years 2003-04 and 2005-06.

(b) Due to non-payment of advances from various banks, complaints were filed against the Company as well as the promoters and Directors. The FIRs filed by various banks are:

(i) In the year 2008, Punjab National Bank lodged an FIR with CBI bearing No. RC-I(E)/2008/BSFC, Mumbai. In the said case, only Pradip Shubhashchandra Mehta (A-3) was arrested. Remand was not granted by the Special CBI Court at Ahmedabad and bail was granted within a span of one day. The appellant herein was not arrested in this case and formal bail was granted to him on filing charge sheet.

(ii) In the year 2009, UCO Bank lodged an FIR with the CBI bearing No. RC 12(E)/2009 in which charge sheet was submitted on 15.11.2010 and the appellant was arrested on 1.11.2010 and was released on temporary bail for various durations.

(iii) Vijaya Bank had also lodged an FIR with the CBI bearing No. RC11(E)/2008 and submitted charge sheet on 26.06.2010 in which the appellant herein was arrested after filing of the charge sheet, he was also granted bail.

(iv) State Bank of Hyderabad has also lodged an FIR and the same is under investigation. No charge sheet has been submitted so far.

(c) State Bank of India and 17 other banks filed O.A. No. 11 of 2008 before the Debts Recovery Tribunal (DRT), Ahmedabad seeking recovery of amount given by way of credit facilities under consortium arrangement to the Company. Ad-interim orders have been passed on 28.02.2008 to secure the interest of the banks and to ensure that the litigation does not become meaningless by the time final order is passed.

(d) On 19.01.2010, the appellant herein filed Civil Suit No. 145 of 2010 seeking damages to the tune of Rs.786 crores against the informant Andhra Bank and other banks before the Ahmedabad City Civil Court. The Andhra Bank, Zonal Office, Mumbai also lodged an FIR on 19.01.2010 which was registered by the CBI BS & FC/MUM bearing No. 1(E)/2010 for commission of offences punishable under Sections 406,

420, 467, 468, 471 read with Section 120B of the Indian Penal Code, 1860 (in short 'IPC'). In connection with the said FIR, the appellant herein was arrested on 31.03.2010 and remanded to police custody till 03.04.2010 and thereafter in the judicial custody. The appellant was granted temporary bail on three occasions on medical ground. After completing the investigation, the CBI submitted charge sheet on 10.06.2010 in which the appellant was arrayed as accused No.4.

(e) On 31.08.2010, the appellant preferred an application for bail after charge sheet was filed before the Special Court vide Criminal Misc. Application No. 141 of 2010 but the same was dismissed.

(f) Being aggrieved by the said order, the appellant filed Criminal Misc. Application No. 11415 of 2010 before the High Court for regular bail in connection with the FIR lodged by Andhra Bank, Zonal Office Mumbai bearing No. 1(E)/2010 which was dismissed by the High Court on 19.10.2010.

(g) After investigation in RC.12(E)/2009 lodged by UCO Bank charge sheet was submitted on 15.11.2010 and the appellant was arrested on 01.11.2010 and he was released on temporary bail.

(h) Against the order dated 19.10.2010 passed by the High Court, the appellant filed S.L.P.(Crl.)No. 83 of 2011 before this Court and the same was disposed of on 29.04.2011 directing the special Court to take all endeavour for an early completion of the trial.

(i) As there was no progress in the trial, the CBI filed a supplementary charge sheet on 02.02.2011 which was served on all the accused including the appellant herein only on 02.08.2011. Since the trial did not come to an end, the appellant filed Criminal Misc. Application No. 195 of 2011 for regular bail before the Special Court. In the meanwhile, Additional Chief Judicial Magistrate, vide order dated

15.09.2011 in Misc. Application No. 17/2011 in Spl. Case No. 03/2010 granted temporary bail up to 20.10.2011 to the appellant herein on the ground of medical exigencies. Again on 19.10.2011, considering the health of the appellant, the Special Court extended the temporary bail till 30.11.2011. Vide order dated 27.09.2011, Special Court rejected the application for regular bail filed by the appellant herein.

(j) The appellant filed an application being Criminal Misc. Application No. 14224 of 2011 before the High Court for regular bail but the same was rejected. Again the said application, the appellant has filed the above appeal by way of special leave before this Court.

4. Heard Mr. Mukul Rohtagi, learned senior counsel for the appellant and Mr. P.P. Malhotra, learned Addl. Solicitor General for the CBI.

5. The only point for consideration in this appeal is whether the appellant herein has made out a case for regular bail and whether the High Court is justified in dismissing his bail application.

6. We are conscious of the fact that this Court should not ordinarily, save in exceptional cases, interfere with the orders granting/refusing bail by the High Court. We are also provided with the facts and figures about the appellant's involvement in similar other proceedings. In the case on hand, out of four accused, A-1 is the Company and the appellant-A-4 is the Joint Managing Director of the Company. It is not in dispute that A-2 and A-3 were granted bail by the High Court on medical grounds. Mr. Rohtagi, learned senior counsel for the appellant apart from highlighting that the appellant-A-4 is entitled for regular bail and also submitted that he be considered on medical grounds because of his various ailments as certified by leading doctors including the Medical Officer, Central Jail Dispensary, Ahmedabad.

7. Insofar as the merits of the claim of the appellant is considered, it is useful to refer the recent decision of this Court in Sanjay Chandra vs. Central Bureau of Investigation, 2012 (1) SCC 40. Since in this decision, all the earlier decisions of this Court relating to grant of bail in a matter of this nature have been considered, we feel that no other earlier decisions need be referred to. Those appeals were directed against the common judgment and order of the learned Single Judge of the High Court of Delhi dated 23.05.2001 in Sanjay Chandra vs. CBI by which the learned Single Judge refused to grant bail to the appellant-accused therein. The allegations against those accused appellants were that they entered into a criminal conspiracy for providing telecom services to otherwise ineligible companies and by their conduct, the Department of Telecommunications (DoT) suffered huge loss. The learned Special Judge, CBI, New Delhi rejected the bail applications filed by them by order dated 20.04.2011. The appellants therein moved applications before the High Court under Section 439 of the Code of Criminal Procedure, 1973. The same came to be rejected by the learned Single Judge by his order dated 23.05.2011. Aggrieved by the same, the appellants approached this Court by filing appeals.

8. After considering the entire materials, arguments of the various senior counsel as well as the Addl. Solicitor General for the CBI and marshalling the earlier decisions of this Court and after finding that the trial may take considerable time and the appellants who are in jail have to remain in jail longer than the period of detention had they been convicted and also keeping in mind the fact that the accused are charged with economic offences of huge magnitude, ultimately this Court granted bail to all the appellants by imposing severe conditions.

9. It is also relevant to refer the order passed by this Court on 29.04.2011 in SLP (Criminal) No. 83 of 2011 filed by the appellant herein earlier. This Court directed as under:

"We have considered the rival contentions and also perused all the relevant documents. In view of the fact that the other two accused, namely, A-2 and A-3 were released mainly on the ground of illness and old age and of the assurance by the learned Additional Solicitor General that the trial will be completed within a period of three months, we are not inclined to accede to the request of the petitioner. However, we make it clear that for any reason if the trial continues beyond the period assured by the learned Additional Solicitor General, the petitioner is free to move bail application before the Special Court. In such event the Special Court is permitted to consider it in accordance with law. We also direct the Special Court to take all endeavour for an early completion of the trial as suggested by the learned Additional Solicitor General.

10. Though on the last date of hearing, learned Addl. Solicitor General assured this Court that the trial will be completed within a period of three months, in view of various reasons considering the magnitude of the issues involved, frequent absence of the accused at the hearing dates due to various reasons including health grounds, filing of petition for discharge and also the pressure of work on the Special Court hearing among other important matters, the fact remains that the trial could not be concluded. In fact, it is pointed out that though the prosecution has submitted charge sheet the charges have not been framed due to various reasons as mentioned above.

11. We have already pointed out that insofar as the present case is concerned among the four accused A-1 is a Company, A-2 and A-3 were granted bail on medical grounds. According to the present appellant i.e A-4, he was arrested on 31.03.2010 by the CBI and was remanded to police custody for three days. Since 03.04.2010, he is in the judicial custody at Sabarmati Central Jail, Ahmedabad and on 15.09.2011, he was granted interim bail up to 20.10.2011 and again on 19.10.2011,

considering his health conditions, the Special Court extended his interim bail till 30.11.2011. As stated earlier, the CBI has completed the investigation and submitted the charge sheet on 10.06.2010 and the offences alleged in the charge sheet are of the years 2006 and 2007.

12. Mr. Rohtagi, learned senior counsel, after taking us through various proceedings by the Civil Court as well as DRT under SARFESI Act submitted that entire properties of the appellant and their companies/firms were attached by the orders of the Court/Tribunal. According to him, before entering into transaction with the banks, all those properties have been mortgaged and as on date, the appellant cannot do anything with those properties without the permission of the Court/ Tribunal. In such circumstances, he submitted that there will not be any difficulty in realising the money payable to the banks, if any. In addition to the above factual information, it was pointed out that after the order of this Court, on 29.04.2011 there is no progress in the trial. It is also pointed out that the trial has not even commenced inasmuch as a supplementary charge sheet has been served upon the appellant herein only on 02.08.2011. It is further pointed out that the charge has not been framed till this date. It is also brought to our notice that prosecution has relied upon 286 documents and listed 47 witnesses in the charge sheets filed by it.

13. In addition to the above information, Mr. Rohtagi has also pointed out that at the time of arrest of the appellant on 31.03.2010, he was taken to the hospital and was diagnosed for hypertension and acidity. According to him, no other ailment was noted by the hospital in the discharge card. While so, when he was in custody since 31.03.2010, the appellant has suffered 40 per cent permanent partial disability in his left arm as a result of surgery for abnormal bone protrusion. It is also highlighted that on account of uncontrolled high blood pressure while in custody the appellant has suffered 30 per cent blindness in his right eye and has undergone a surgery for vitreous hemorrhage.

It is further pointed out that the hemorrhage having re-occurred, the doctors have advised a second surgery to save his eyes. However, according to him, the said surgery could not be performed due to continuing uncontrolled high blood pressure and resultant recurring bleeding in the vessel even after first surgery. It is also pointed out that after passing of order by this Court on 29.04.2011, the appellant while in custody has contracted obstructive jaundice requiring long intensive treatment. As a result of such obstructive jaundice, the appellant is also unable to undergo other required surgeries. Learned senior counsel has also pointed out that the appellant is now suffering from further disability of loss of hearing which can be corrected only through surgery. In support of the above claim, various certificates issued by doctors of private hospitals have been placed on record. In addition to the same, Mr. Rohtagi by drawing our attention to the certificate dated 07.08.2011 issued by the Central Prison Hospital, Sabarmati, Ahmedabad stated that even according to the Medical officer of the Central Jail Dispensary, the appellant is suffering from various ailments as mentioned in the certificate which reads as under:

"OUT NO. ACJD/346/2011
CENTRAL PRISON HOSPITAL
SABARMATI, AHMEDABAD
Date : 07.08.2011

CE RTIFICATE

This is to certify that Mr. Dipak Shubhash Mehta is an under trial prisoner of Central Jail, Ahmedabad with prisoner NO. 4077.

He complains of continuous precordial chest pain dullache like heaviness in chest, Gabharaman, giddiness, chronic Rt. Hypochondriach pain in abdomen, bleeding P/R. dimness of vision Rt. Eye vision deviation of Rt. Eye outward since 1 -1/2 years.

Patient is a known case of uncontrolled blood pressure since 4 years, chronic obstructive jaundice since 6 months and fissure in anno with piles. Patient was sent to eye dept. Civil Hospital Ahmedabad on 02.02.2011, seen by Dr. K.P.S. (Ophthalmic Surgical Unit) and diagnosed as Rt. Eye glaucoma, 3rd nerve palsy in Rt. Eye with vitreous hemorrhage, macular degeneration and percentage of blindness is 30%. CT report suggests Fatty replacement of belly and distal tendinous insertion of superectus muscle on Rt. Side.

On 25.03.2011, patient was operated for vitreous hemorrhage in private hospital even though, on 17.06.2011 eye examination found fresh vitreous hemorrhage present due to uncontrolled blood pressure and chronic obstructive jaundice.

On 27.09.2010, patient was sent to U.M. Mehta Institute of Cardiology & Research Centre for further investigation and treatment where his Echocardiography was done and report suggests Normal LV side and fair LV function reduced LV compliance and 55%.

On 08.01.2011, patient was operated for tardy ulner nerve paresis. It forearm and neurolysis done of Lt. ulner nerve and advised regular physiotherapy. Dated 26.02.2011 CDMO, Govt. General Hospital, Sola certified that patient is a case of physically disabled and has 40% permanent physical impairment in relation to his Lt. upper limb.

Patient needs to be under continuous observation under treating doctor and follow up. He is advised to avoid physical and mental stress to prevent any serious complications.

This certificate is issued on the basis of available case records at Central Jail Dispensary.

Date: 07.08.2011
Place: Ahmedabad Central Jail

Sd/-
Medical Officer
Central Jail Dispensary,
Ahmedabad."

14. Apart from the above certificate, the very same Medical Officer, Central Jail Dispensary, Ahmedabad has issued another Certificate on 08.09.2011. In the said Certificate, after reiterating the very same complaints finally he concluded "he needs treatment from the Specialist, Super Specialist, Cardiologist and Gastroenterologist & Ophthalmologist for his multiple problems".

15. The above information by a Medical Officer of the Central Jail Dispensary, Ahmedabad supports the claim of the appellant about his health condition. No doubt, Mr. P.P. Malhotra, learned ASG by drawing our attention to various details from the counter affidavit filed on behalf of the CBI submitted that in view of magnitude of the financial involvement by the appellant with the nationalised banks, it is not advisable to enlarge him on bail.

16. We have gone through all the details mentioned in the counter affidavit of the Senior Superintendent of Police, CBI, and Bank Securities and Fraud Cell, Mumbai. The appellant has also filed rejoinder affidavit repudiating those factual details. At this juncture, it is unnecessary to go into further details. In the earlier order, we have noted the assurance of the ASG for completion of the case within three months. Admittedly, the same was not fulfilled due to various reasons. It is also not in dispute that though the charge sheet and additional charge sheet were submitted to the Court, the same have not been approved and framed. In the meanwhile, apart from absence of some of the accused on various dates, due to some reasons or other including medical grounds, the appellant herein has also filed a petition for 'discharge'. Further, even in the counter

affidavit filed by the CBI, it is stated that the accused persons moved applications under Section 239 of the Code of Criminal Procedure, 1973 for discharge and the same are pending for hearing and disposal and further the Madhao Merchantile Bank case is going on day-to-day basis before the Special CBI Court and in addition to the same, Sohrabuddin Fake Encounter case is also pending for trial before the same Court. It is clear that the said Special CBI Court is over burdened and in view of the voluminous materials the prosecution has collected, undoubtedly the trial may take a longer time.

17. This Court has taken the view that when there is a delay in the trial, bail should be granted to the accused. [Vide *Babba vs. State of Maharashtra,* (2005) 11 SCC 569, *Vivek Kumar vs. State of U.P.,* (2000) 9 SCC 443.] But the same should not be applied to all cases mechanically.

18. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of having committed a serious offence. The Court granting bail has to consider, among other circumstances, the factors such as a) the nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence; b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant and; c) prima facie satisfaction of the court in support of the charge. In addition to the same, the Court while considering a petition for grant of bail in a non-bailable offence apart from the seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses, have to be noted. Considering the present scenario and there is no possibility of commencement of trial in the near future and also of the fact that the appellant

is in custody from 31.03.2010, except the period of interim bail, i.e. from 15.09.2011 to 30.11.2011, we hold that it is not a fit case to fix any outer limit taking note of the materials collected by the prosecution. This Court has repeatedly held that when the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. As posed in the *Sanjay Chandra's* case (supra) we are also asking the same question i.e. whether the speedy trial is possible in the present case for the reasons mentioned above.

19. As observed earlier, we are conscious of the fact that the present appellant along with the others are charged with economic offences of huge magnitude. At the same time, we cannot lose sight of the fact that though the Investigating Agency has completed the investigation and submitted the charge sheet including additional charge sheet, the fact remains that the necessary charges have not been framed, therefore, the presence of the appellant in custody may not be necessary for further investigation. In view of the same, considering the health condition as supported by the documents including the certificate of the Medical Officer, Central Jail Dispensary, we are of the view that the appellant is entitled to an order of bail pending trial on stringent conditions in order to safe guard the interest of the CBI.

20. In the light of what is stated above, the appellant is ordered to be released on bail on executing a bond with two solvent sureties, each in a sum of Rs. 5 lakhs to the satisfaction of the Special Judge, CBI, Ahmedabad on the following conditions:

(i) the appellant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him to disclose such facts to the Court or to any other authority.

(ii) the appellant shall remain present before the Court

on the dates fixed for hearing of the case, for any reason due to unavoidable circumstances for remaining absent he has to give intimation to the Court and also to the concerned officer of CBI and make a proper application that he may be permitted to be present through counsel;

(iii) the appellant shall surrender his passport, if any, if not already surrendered and in case if he is not a holder of the same, he shall file an affidavit;

(iv) In case he has already surrendered the Passport before the Special Judge, CBI, that fact should be supported by an affidavit.

(v) liberty is given to the CBI to make an appropriate application for modification/recalling the present order passed by us, if the appellant violates any of the conditions imposed by this Court.

21. The appeal is disposed of on the above terms.

B.B.B. Appeal disposed of.