BANGALORE CITY COOPERATIVE HOUSING SOCIETY LTD.

v.

STATE OF KARNATAKA AND OTHERS

(Civil Appeal Nos. 7425-7426 of 2002)

FEBRUARY 02, 2012

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

Land Acquisition Act, 1894:

ss. 4, 6 and 3(f)(vi) – Acquisition of land for public purpose for appellant-Co-operative Housing Society – Agreement entered into between the Housing Society and the State Government – Issuance of notification u/s. 4(1) and 6 – Passing of award – Quashing of acquisition of land by the High Court on the ground that it was vitiated due to violation of the provisions of the Act and the manipulation done by Housing Society through Estate Agent while acquiring the land – On appeal, held: Agreement entered into between the Housing Society and the State Government did not contain any inkling about the housing scheme framed by the Housing Society – It merely mentioned about the proposed formation of sites and construction of houses for the members of the Housing Society and payment of cost for the acquired land – Housing Society did not frame any housing scheme and did not obtain approval by the State Government before the issuance of notification u/s. 4(1) – No material produced before the High Court or Supreme Court to show that a scheme had been framed and approved by the State Government – Thus, the High Court rightly held that in the absence of housing scheme framed by the housing society, acquisition of land belonging to the land owner was not for public purpose as defined in s. 3(f)(vi) – Housing society executed agreement with the Estate Agent for facilitating the acquisition of land in lieu of payment of more than rupees five

crores – Said amount was charged by Estate Agent for manipulating the State Apparatus for facilitating the acquisition of land and sanction of layout etc. without any obstruction – Thus, such agreement is violative of s. 23 of the 1872 Act – However, the member of the society who had already constructed their houses on the land allotted to them allowed to negotiate with the State for purchase of their land at the prevailing market price to the rightful land owners – Contract Act, 1872.

ss. 3(f), 3(f)(vi) – Expression 'public purpose' – Meaning and scope of – Held: Expression 'public purpose' contained in s. 3(f) is inclusive – Acquisition of land for carrying out any education, housing, health or slum clearance scheme by a registered society or a Co-operative society can be regarded as an acquisition for public purpose only if the Scheme has been approved by the appropriate Government before initiation of the acquisition proceedings – In case acquisition of land is for any purpose other than public purpose as defined in s. 3(f), then provisions of Part VII would be attracted and mandate thereof would have to be complied with.

ss. 3(f)(vi), 41 – Acquisition of land for public purpose – Housing scheme of Co-operative housing society – Agreement signed by the State Government with the co-operative society – Nominal contribution of Rs. 100/- by the Special Deputy Commissioner – Held: The nominal contribution cannot be construed as State Government's implicit approval of the housing scheme which had never been prepared.

s. 5A – Opportunity of hearing under – Finding by Division Bench of High Court that land owner not given opportunity of hearing – Correctness of – Held: Land owner was given opportunity of hearing as her son appeared before the Special Land Acquisition Officer along with his advocate – Said error not sufficient to nullify the conclusion by the Division Bench of the High Court that land acquisition was not

for a public purpose and the exercise undertaken by the State Government was vitiated due to the influence of the extraneous considerations.

Mysore High Court Act, 1884 – ss. 17, 18 and 19 – Karnataka High Court Act, 1961 – ss. 4, 9 and 10 – Writ appeal – Jurisdiction of High Court – Division Bench sustaining the order of Single Judge on a new ground by relying upon the Supreme Court's decision – Challenge to, on the ground that the Division Bench did not have the jurisdiction to decide the appeal relying upon the Supreme Court's judgment because that ground was not taken by the Single Judge and should have remitted the matter – Held: The ground is not sustainable since parties agreed for that course – Thus, the Division Bench not acted in violation of the provisions of the 1884 and 1961 Act.

Constitution of India, 1950 – Article 226 – Land acquisition – Challenge to, by filing writ petition after a long delay – Explanation by land owner that she was hopeful that after having withdrawn the acquisition in respect of one parcel of land, the State Government would accept her prayer for withdrawal of the acquisition in respect of adjoining land – Writ petition dismissed by the High Court on the ground of delay – Division Bench holding that land owner not guilty of laches – On appeal, held: Non-consideration of the vital facts and documents by the Single Judge resulted in miscarriage of justice – Division Bench did not commit any error by holding that the land owner was not guilty of laches – Delay/laches.

Doctrines – Doctrine of prospective overruling – Invocation of – Acquisition of land by State Government for the benefit of appellant-Cooperative Housing Society quashed by the High Court on the ground of violation of the provisions of the Land Acquisition Act and the manipulations made for the acquisition of land – Plea of the appellant that the doctrine of prospective overruling be invoked since crores of rupees spent for formation of layouts, 17191 plots allotted to members and 200 already constructed, 50% land given to Development Authority and some land given to Power Transmission Corporation, such that people who have already constructed houses would not suffer incalculable harm – Held: Doctrine of prospective overruling cannot be invoked since it would result in conferring legitimacy to the influence of money power over the rule of law, which is edifice of the Constitution.

There was unprecedented increase in the population of Bangalore City. Since it was not possible for the Bangalore Development Authority to meet the demand of developed residential sites, the State Government decided to encourage formation of private layouts by the house building co-operative societies. The guidelines for the approval of private layouts were revised. The appellant-Co-operative Housing Societies filed representation to the State Government for the acquisition of land for formation of a layout for its members. The appellant entered into an agreement with the Estate Agent 'RE' who promised to secure the acquisition of land on payment of the specific amount. The State Level Co-ordination Committee (SLCC) considered the case of the appellant and declared that it was eligible for the acquisition of 208 acres 18 guntas land. The State Government directed the Deputy Commissioner, Bangalore to initiate acquisition proceedings of 207 acres 29 guntas land at place 'V' and 'R' for the appellant by issuing notification under Section 4(1) of the 1894 Act. Thereafter, the appellant entered into an agreement with the State Government. The Deputy Commissioner, Bangalore issued notification under Section 4(1) of the Land Acquisition Act, 1894 for the acquisition of the land including the land comprised in Survey Nos. 49 and 50/1 belonging to respondent No. 3 and Survey Nos. 7/1 and 8/1 belonging to the predecessor of 'PR' and others. The land owners-

respondent No. 3 and 'PR' and others filed objections against the proposed acquisition of their land. Thereafter, the Special Land Acquisition Officer issued declaration under Section 6(1) and the same was published. During the currency of the acquisition proceedings, an inquiry was conducted into the membership of the appellant and other societies and it was found that they had admitted ineligible persons as their members. Subsequently, the Special Land Acquisition Officer, Bangalore passed an award and determined market value of the acquired land. The award was approved by the State Government. However, before the possession of the acquired land could be taken, the State Government withdrew the acquisition proceedings in respect of land comprised in Survey No. 50/2. Respondent No. 3 made a representation for withdrawal of the acquisition of Survey No. 49 but no final decision was taken. After eighteen months of the passing of the award, the State Government issued Notification under Section 16(2) in respect of various parcels of lands including Survey No. 49. The Special Land Acquisition Officer handed over the possession of 150 acres 9½ guntas of land at place 'V' and 'R' to the appellant-Society. However, the entire exercise showing taking over of possession of the respondents' land and transfer thereof to the appellant was only on papers and physical possession continued with them. Respondent No. 3 challenged the acquisition of her land comprised in Survey No. 49 by filing a writ petition. Appellant also filed a writ petition questioning the legality of notification issued under Section 48(1). The Single Judge of the High Court dismissed the writ petition filed by respondent No. 3 on the ground of 2½ years' delay between the issue of the declaration under Section 6(1) of the 1894 Act and filing of the writ petition. The writ petition of the appellant was dismissed holding that the State Government has absolute power to withdraw the acquisition before the possession of the acquired land can be taken. 'PR" and

others also filed challenged the acquisition proceedings but the same was allowed. Respondent No. 3 challenged the order of the Single Judge in Writ Appeal. The appellant, the State Government and the Special Land Acquisition Officer also filed writ appeal. The Division Benches of the High Court quashed the acquisition of lands by the State Government for the benefit of the appellant on the grounds of violation of the provisions of the Land Acquisition Act, 1894 and the manipulations made by the appellant through the Estate Agent for acquiring the land. Therefore, the appellants filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1 The framers of the Constitution have not prescribed any period of limitation for filing a petition under Article 226 of the Constitution and it is only one of the several rules of self-imposed restraint evolved by the superior Courts that the jurisdiction of the High Court under Article 226 of the Constitution, which is essentially an equity jurisdiction, should not be exercised in favour of a person who approaches the Court after long lapse of time and no cogent explanation is given for the delay. [Para 8] [346-E-F]

1.2 In the writ petition respondent no. 3 spell out the reasons for her seeking intervention of the High Court. The said averments were not controverted by respondent Nos. 1 and 2. Notwithstanding this, the Single Judge refused to accept the explanation given by respondent No. 3 that she was hopeful that after having withdrawn the acquisition in respect of one parcel of land, i.e., Survey No. 50/2, the State Government would accept her prayer for withdrawal of the acquisition in respect of Survey No. 49 as well. Unfortunately, the Single Judge altogether ignored the fact that soon after the issue of the

declaration under Section 6(1) of the 1894 Act and notices under Sections 9 and 10 of the said Act, the writ petitioner received letter that she should make herself available for inspection of the land and the then Land Acquisition Officer inspected the site and felt satisfied that the same could be deleted because it was an orchard and was at the end of the area proposed to be acquired. The Single Judge also omitted to consider that the notices were issued to respondent No.3 informing her about the proposed inspection of the site; that she made a complaint to the Revenue Secretary that no one had come for inspection; that yet another notice was received by respondent No.3 for inspection would be held on 14.5.1990 but the concerned officer did not turn up; that letters were sent by the Revenue Department to Special Deputy Commissioner, Bangalore requiring him to submit report in the matter of withdrawal of acquisition; and in writ petition, she had disclosed the cause for her filing the writ petition after the long delay. Non-consideration of these vital facts and documents by the Single Judge resulted in miscarriage of justice. The Division Bench did not commit any error by holding that respondent No.3 was not guilty of laches. [Para 12] [347-H; 348-A-H]

Tilokchand Motichand v. H.B. Munshi **(1969) 1 SCC 110 – relied on.**

Ajodhya Bhagat v. State of Bihar **(1974) 2 SCC 501;** *State of Mysore v. V.K. Kangan* **(1976) 2 SCC 895: 1976 (1) SCR 369;** *Pt. Girdharan Prasad Missir v. State of Bihar* **(1980) 2 SCC 83;** *Hari Singh v. State of U.P.* **(1984) 2 SCC 624: 1984 (3) SCR 417;** *Municipal Corpn. of Greater Bombay v. Industrial Development Investment Co. (P) Ltd.* **(1996) 11 SCC 501 1996 (5) Suppl. SCR 551;** *Urban Improvement Trust, Udaipur v. Bheru Lal* **(2002) 7 SCC 712: 2002 (2) Suppl. SCR 512;** *Swaika Properties (P) Ltd. v. State of Rajasthan* **(2008) 4 SCC 695: 2008 (2) SCR 521;** *Sheikhupura Transport Co. Ltd. v. Northern India Transport Insurance Company* **(1971) 1 SCC 785;** *C.K. Prahalada v. State of Karnataka* **(2008) 15 SCC 577: 2008 (7) SCR 852 – referred to.**

2.1 All the co-operative societies have been classified into two categories. The first category consists of the co-operative societies in which not less than 51% of the paid-up share capital is held by the Central Government or any State Government or partly by the Central Government and partly by one or more State Governments. The second category consists of the co-operative societies other than those falling within the definition of the expression 'corporation owned or controlled by the State' [Section 3(cc)]. The definition of the term 'company' contained in Section 3(e) takes within its fold a company as defined in Section 3 of the Companies Act, 1956 other than a government company referred to in clause (cc), a society registered under the Societies Registration Act or under any corresponding law framed by the State legislature, other than a society referred to in clause (cc) and a co-operative society defined as such in any law relating to co-operative societies for the time being in force in any State, other than a co-operative society referred to in clause (cc). The definition of the expression 'public purpose' contained in Section 3(f) is inclusive. As per clause (vi) of the definition, the expression 'public purpose' includes the provision of land for carrying out any educational, housing health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such scheme, or, with the prior approval of the appropriate Government, by a Local Authority, or a society registered under the Societies Registration Act, 1860 or any corresponding law in force in a State or a co-operative society as defined

in any law relating to co-operative societies for the time being in force in any State. To put it differently, the acquisition of land for carrying out any education, housing, health or slum clearance scheme by a registered society or a co-operative society can be regarded as an acquisition for public purpose only if the scheme has been approved by the appropriate Government before initiation of the acquisition proceedings. If the acquisition of land for a co-operative society, which is covered by the definition of the term 'company' is for any purpose other than public purpose as defined in Section 3(f), then the provisions of Part VII would be attracted and mandate thereof would have to be complied with. [Para 19] [357-C-H; 358-A-C]

2.2 In the writ petition, respondent no. 3 averred that "the acquisition of any land under the Act for the benefit of the 2nd respondent would not be for a public purpose and would have to be in accordance with the provisions contained in Part VII of the Act. In any case, even if the acquisition is for carrying out any educational, housing, health or slum clearance scheme of the 2nd respondent, the same shall be with the prior approval of the appropriate Government. The appellant neither controverted the said averments nor produced any document before the High Court to show that it had prepared a housing scheme and the same had been approved by the State Government before the issue of notification under Section 4(1) of the 1894 Act. Therefore, the Division Bench of the High Court rightly held that the acquisition was not for a public purpose as defined in Section 3(f)(vi) of the 1894 Act. The submission that the Division Bench of the High Court committed an error by recording a finding on the issue of violation of Section 3(f)(vi) of the 1894 Act because respondent No. 3 had not raised any such plea in the writ petition, cannot be accepted. [Para 20] [358-C-G]

2.3 A close and careful reading of the documents-representation dated 7.12.1984 made by the Executive Director of the appellant to the Minister of Revenue, Government of Karnataka, letter dated 21.5.1988 sent by the State Government to Deputy Commissioner, Bangalore to issue notification under Section 4(1) of the 1894 Act and agreement dated 7.8.1988 entered into between the Executive Director of the appellant and the State Government, reveals that although, in the representation made by him to the Revenue Minister, the Executive Director of the appellant did make a mention that the object of the society is to provide house sites to its members who belong to working class and other backward class people belonging to weaker class of society and the members are poor and siteless people, there was not even a whisper about any housing scheme. The direction issued by the State Government to Deputy Commissioner, Bangalore to issue the preliminary notification for an extent of 207 acres 29 guntas land also does not speak of any housing scheme. The agreement entered into between the appellant through its Executive Director and the State Government does not contain any inkling about the housing scheme framed by the appellant. It merely mentions about the proposed formation of sites and construction of houses for the members of the appellant and payment of cost for the acquired land. The agreement also speaks of an inquiry having been got made by the State Government in conformity with the provisions of the 1894 Act and the grant of consent for the acquisition of land for the benefit of society's members. The agreement then goes on to say that the appellant shall pay to the Government the entire costs of the acquisition of land and expenses. Paragraph 2 of the conditions incorporated in the agreement speaks of transfer of land to the society as to vest in the company. Clause 9(a) of the agreement did provide for token contribution of Rs.100 by the Deputy

Commissioner/Special Deputy Commissioner towards the compensation to be determined by the Assistant Commissioner/Special Land Acquisition Officer, but that is not relatable to any housing scheme framed by the appellant. It is, thus, evident that the appellant had not framed any housing scheme and obtained its approval before the issue of notification under Section 4(1) of the Act. [Para 21] [359-A-H; 360-A]

2.4 Although, the appellant may not have been required to frame a scheme in strict conformity with the provisions of the 1976 Act and the Karnataka Housing Board Act, but it was bound to frame scheme disclosing the total number of members eligible for allotment of sites, the requirement of land including the size of the plots and broad indication of the mode and manner of development of the land as a layout. The State Government could then apply mind whether or not the housing scheme framed by the appellant should be approved. However, the appellant did not produce any evidence before the High Court to show that it had framed a housing scheme and the same was approved by the State Government before the issue of notification under Section 4(1) of the 1894 Act. Even before this Court, no material was produced to show that, in fact, such a scheme had been framed and approved by the State Government. Therefore, the Division Bench of the High Court rightly referred to Section 3(f)(vi) and held that in the absence of a housing scheme having been framed by the appellant, the acquisition of land belonging to respondent No. 3 was not for a public purpose as defined in Section 3(f)(vi). [Para 23] [361-B-E]

2.5 In the instant case, no housing scheme was framed by the appellant which is *sine qua non* for treating the acquisition of land for a co-operative society as an acquisition for public purpose within the meaning of

Section 3(f). Not only this, the appellant executed agreement dated 21.2.1988 for facilitating the acquisition of land in lieu of payment of a sum of rupees more than 5 crores. The Estate Agent engaged by the appellant had promised that it would get the notifications issued under Sections 4(1) and 6(1) within four months and three months respectively. The huge amount which the appellant had agreed to pay to the Estate Agent had no co-relation with the services provided by it. Rather, the amount was charged by the Estate Agent for manipulating the State apparatus and facilitating the acquisition of land and sanction of layout etc. without any obstruction. Such an agreement is clearly violative of Section 23 of the Contract Act. [Para 29] [371-G-H; 371--B]

2.6 None of the orders and judgments referred to, could be relied upon for holding that even though the appellant had not framed any housing scheme, the acquisition in question should be deemed to have been made for a public purpose as defined in Section 3(f)(vi) simply because in the representation made by him to the Revenue Minister of the State, the Executive Director of the appellant had indicated that the land would be used for providing sites to poor and people belonging to backward class and on receipt of the recommendations of SLCC the State Government had directed Special Deputy Commissioner to issue notification under Section 4(1) of the 1894 Act and that too by ignoring the ratio of the judgments of three Judge Benches in ***1st and ***2nd H.M.T. cases and the judgment of two Judge Bench in ****Vyalikawal House Building Cooperative Society's case. In the instant case, whereby the Estate Agent agreed to ensure the acquisition of land within a specified time frame subject to payment of huge money and the fact that agreement entered into between the society and the Government was in the nature of an agreement

contemplated by Part VII. While in *_1st H.M.T.'s_ case, the amount paid to 'SR' Constructions was rupees one crore, in the instant case, the appellant had agreed to pay more than rupees five crores for facilitating issue of Notifications under Sections 4(1) and 6(1) and sanction of the layouts and plans by the BDA within a period of less than one year. The High Court did not commit any error by relying upon the judgment in *_1st H.M.T_ case for declaring that the acquisition was not for a public purpose. [Para 32] [378-F-H; 379-G-H; 380-A]

H.M.T. House Building Cooperative Society v. Syed Khader and Ors.* **(1995) 2 SCC 677: 1995 (2) SCR 200; ***H.M.T.House Building Co-operative Society v. M. Venkataswamappa* **(1995) 3 SCC 128;** ****Vyalikawal House Building Co-operative Society v. V. Chandrappa* **(2007) 9 SCC 304 – relied on.**

M/s. Tulasidas Khimji v. Their Workmen **(1963) 1 SCR 675;** *Third Income-tax Officer, Mangalore v. M. Damodar Bhat* **(1969) 2 SCR 29;** *Ram Sarup v. Land Acquisition Officer* **(1973) 2 SCC 56;** *Sockieting Tea Co. (P) Ltd. v. Under Secy. to the Govt. of Assam* **(1973) 3 SCC 729;** *Bharat Singh v. State of Haryana* **(1988) 4 SCC 534: 1988 (2) Suppl. SCR 10;** *Umashanker Pandey v. B.K. Uppal* **(1991) 2 SCC 408;** *M/s. Jindal Industries Ltd. v. State of Haryana* **1991 Supp (2) SCC 587;** *D.S. Parvathamma v. A. Srinivasan* **(2003) 4 SCC 705: 2003 (3) SCR 197;** *Shipping Corpn. of India Ltd. v. Machado Bros***. (2004) 11 SCC 168: 2004 (3) SCR 584;** ***J.P. Srivastava & Sons (P) Ltd. v. Gwalior Sugar Co. Ltd.;*** **(2005) 1 SCC 172: 2004 (5) Suppl. SCR 648;** *Shakti Tubes Ltd. v. State of Bihar* **(2009) 7 SCC 673: 2009 (10) SCR 739;** *Kanaka Gruha Nirmana Sahakara Sangha v. Narayanamma* **(2003) 1 SCC 228: 2002 (3) Suppl. SCR 97;** *The State of Punjab and Ors.* **(1963) 2 SCR 774;** *Pratibha Nema v. State of M.P.* **(2003) 10 SCC 626;** *Narayana Reddy v. State of Karnataka* **ILR 1991 (3) KAR 2248;** *Narayana Raju v. State of Karnataka* **ILR 1989 KAR 376;** *Narayana Raju v. State of*

Karnataka **ILR 1989 KAR 406;** *State of Gujarat v. Chaturbhai Narsibhai* **AIR 1975 SC 629: 1975 (3) SCR 284;** *General Government Servants Co-operative Housing Society Limited v. Kedar Nath* **(1981) 2 SCC 352 :1981 (3) SCR 46;** *M/s. Fomento Resorts and Hotels Limited v. Gustavo Ranato Da Cruz Pinto* **AIR 1985 SC 736: 1985 (2) SCR 937;** *Rattan Chand Hira Chand v. Askar Nawaz Jung* **JT 1991 (1) SC 433: 1991 (1) SCR 327;** *Kanaka Gruha Nirmana Sahakara* Sangha *v. Narayanamma* **(2003) 1 SCC 228: 2002 (3) Suppl. SCR 97;** *Subramani v Union of India* **ILR 1995 Kar 3139 – referred to.**

3. The appellant's challenge to the judgment in the case of respondent No. 3 that even if there was no express approval by the State Government to the acquisition of land, the approval would be deemed to have been granted because the State Government had contributed Rs.100 towards the acquisition of land; and that the decision of the State Government to execute an agreement with the appellant should be construed as its approval of the proposal made for the acquisition of land, lacks merit. The agreement was signed by the Executive Director of the appellant and the State Government in compliance of Section 41, which finds place in Part VII of the 1894 Act. Therefore, a nominal contribution of Rs.100 by the Special Deputy Commissioner cannot be construed as the State Government's implicit approval of the housing scheme which had never been prepared. [Para 33] [381-B-E]

Smt. Somavanti and Ors. v. The State of Punjab and Ors. **(1963) 2 SCR 774;** *Pratibha Nema v. State of M.P.* **(2003) 10 SCC 626: 2003 (1) Suppl. SCR 890 – Distinguished.**

4. The ground of challenge that in view of the provisions contained in Sections 17, 18 and 19 of the Mysore High Court Act, 1884 and Sections 4, 9 and 10 of the Karnataka High Court Act, 1961, the Division Bench

did not have the jurisdiction to decide the appeal by relying upon the judgment in **1st H.M.T.* case because that was not the ground on which the Single Judge had quashed the acquisition proceedings; that if the Division Bench was of the view that the order of the Single Judge should be sustained on a new ground by relying upon the judgment of this Court in **1st H.M.T.* case, then it should have remitted the matter to the Single Judge for fresh disposal of the writ petition, is rejected since the Division Bench had decided the writ appeal preferred by the appellant by relying upon the judgment in **1st H.M.T.* case because the counsel appearing for the parties had agreed for that course. It is nobody's case that the advocate who appeared on behalf of the appellant had not made a request that instead of remanding the case to the Single Bench, the Division Bench should hear the parties on merits and dispose of the matter. Therefore, it is not open for the appellant to make a grievance that the Division Bench had acted in violation of the provisions of the Mysore High Court Act, 1884 and the Karnataka High Court Act, 1961. [Paras 35, 36, 37] [382-F-H; 383-C-G-H]

5.1 The appellant's challenge to the finding recorded by the Division Bench that respondent No. 3 had not been given opportunity of hearing under Section 5A is well-founded. From the proceedings of the Special Land Acquisition Officer it is found that son of respondent no. 3 had appeared along with his Advocate and after hearing him along with other objectors, the concerned officers submitted report to the State Government. However, this error in the impugned judgment of the Division Bench is not sufficient for nullifying the conclusion that the acquisition of land was not for a public purpose and that the exercise undertaken by the State Government was vitiated due to the influence of the extraneous considerations. The appellant's challenge to the judgment

in '*PR's* case on the ground that no evidence had been produced by the writ petitioner to show that the Estate Agent had indulged in malpractices is rejected in view of the conclusion recorded in relation to the case of respondent No.3. [Para 38] [384-A-D]

5.2 The appellant criticized the decision of the State Government to entertain the representation made by respondent No. 3 for withdrawal of the notification, and submitted that notification under Section 48 could not have been issued without hearing the beneficiary, i.e., the appellant. This argument appears to have substance, but it is not necessary to examine the same in detail because the appellant's challenge to notification dated 3.9.1991, vide which the acquisition of land comprised in Survey No. 50/2 was withdrawn, was negatived by the Single Judge and the Division Bench of the High Court and the appellant is not shown to have challenged the judgment of the Division Bench and insofar as notification dated 25.6.1999 is concerned, the State Government had withdrawn the same on 15.11.1999. [Para 39] [384-E-H]

Larsen & Toubro Ltd. v. State of Gujarat **(1998) 4 SCC 387;** *State Government Houseless Harijan Employees' Association v. State of Karnataka* **(2001) 1 SCC 610 – referred to.**

6.1 The submission of the appellant that they have already spent Rs. 18.73 crores for formation of the layouts and 1791 plots were allotted to the members, out of which, 200 have already constructed their houses; they pointed out that 50% of the land was given to the BDA for providing civil amenities and 16154 sq. ft. was given to Karnataka Power Transmission Corporation, and as such it is a fit case for invoking the doctrine of prospective overruling so that those who have already constructed houses may not suffer incalculable harm, cannot be accepted. [Paras 40 and 41] [385-A-C]

6.2 The instant case is not a fit case for invoking the doctrine of prospective overruling because that would result in conferring legitimacy to the influence of money power over the rule of law, which is the edifice of our Constitution. The Estate Agent, namely, 'RE' with whom the appellant had entered into an agreement dated 21.2.1988 had played crucial role in the acquisition of land. The tenor of that agreement does not leave any manner of doubt that the Estate Agent has charged huge money from the appellant for getting the notifications issued under Sections 4(1) and 6(1) of the 1894 Act and sanction of layout plan by the BDA. The respondents could not have produced any direct evidence that the Estate Agent had paid money for facilitating the acquisition of land but it is not too difficult for any person of reasonable prudence to presume that the appellant had parted with crores of rupees knowing fully well that a substantial portion thereof would be used by the Estate Agent for manipulating the State apparatus. Therefore, there is no any justification to invoke the doctrine of prospective overruling and legitimize what was found by the Division Bench of the High Court to be *ex-facie* illegal. [Paras 40, 41] [385-G-H; 386-B-E]

ECIL v. B. Karunakar **(1993) 4 SCC 727: 1993 (2) Suppl. SCR 576;** *Abhey Ram v. Union of India* **(1997) 5 SCC 421: 1997 (3) SCR 931;** *Baburam v. C.C. Jacob* **(1999) 3 SCC 362;** *Somaiya Organics (India) Ltd. v. State of U.P.* **(2001) 5 SCC 519: 2001 (3) SCR 33;** *Padma Sundara Rao v. State of T.N.* **(2002) 3 SCC 533: 2002 (2) SCR 383;** *Sarwan Kumar v. Madan Lal Aggarwal* **(2003) 4 SCC 147: 2003 (1) SCR 918;** *Girias Investment Private Limited v. State of Karnataka* **(2008) 7 SCC 53;** *G. Mallikarjunappa v. Shamanur Shivashankarappa;* **(2001) 4 SCC 428;** *Uday Shankar Triyar v. Ram Kalewar Prasad Singh* **(2006) 1 SCC 75: 2005 (5) Suppl. SCR 157;** *I.C. Golak Nath v. State of Punjab* **AIR 1967 SC 1643: (1967) 2 SCR 762 – referred to.**

7. Keeping in view the fact that some of the members of the appellant may have built their houses on the sites allotted to them, liberty is given to the appellant to negotiate with the respondents for purchase of their land at the prevailing market price and hope that the landowners would, notwithstanding the judgments of the High Court and this Court, agree to accept the market price so that those who have built the houses may not suffer. At the same time, it is made clear that the appellant must return the vacant land to the respondents irrespective of the fact that it may have carved out the sites and allotted the same to its members. This must be done within the stipulated period and during that period the appellant shall not change the present status of the vacant area/sites. The members of the appellant who may have been allotted the sites shall also not change the present status/character of the land. [Para 43] [387-B-D]

Case Law Reference:

ILR 1995 KAR 3139	**Referred to**	**Para 5.4**
(1971) 1 SCC 785	**Referred to**	**Para 7.2**
2008 (7) SCR 852	**Referred to**	**Para 7.2**
(1969) 1 SCC 110	**Relied on**	**Para 8**
(1974) 2 SCC 501	**Referred to**	**Para 13**
1976 (1) SCR 369	**Referred to**	**Para 13**
(1980) 2 SCC 83	**Referred to**	**Para 13**
1984 (3) SCR 417	**Referred to**	**Para 13**
1996 (5) Suppl. SCR 551	**Referred to**	**Para 13**
2002 (2) Suppl. SCR 512	**Referred to**	**Para 13**
2008 (2) SCR 521	**Referred to**	**Para13**

(1963) 1 SCR 675	**Referred to**	**Para 14**
(1969) 2 SCR 29	**Referred to**	**Para 14**
(1973) 2 SCC 56	**Referred to**	**Para 14**
(1973) 3 SCC 729	**Referred to**	**Para 14**
1988 (2) Suppl. SCR 10	**Referred to**	**Para 14**
(1991) 2 SCC 408	**Referred to**	**Para 14**
1991 Supp (2) SCC 587	**Referred to**	**Para 14**
2003 (3) SCR 197	**Referred to**	**Para 14**
2004 (3) SCR 584	**Referred to**	**Para 14**
2004 (5) Suppl. SCR 648	**Referred to**	**Para 14**
2009 (10) SCR 739	**Referred to**	**Para 14**
2002 (3) Suppl. SCR 97	**Referred to**	**Para 15**
ILR 1991 (3) KAR 2248	**Referred to**	**Para 24**
ILR 1989 KAR 376	**Referred to**	**Para 24**
ILR 1989 KAR 406	**Referred to**	**Para 21**
1975 (3) SCR 284	**Referred to**	**Para 24**
1981 (3) SCR 46	**Referred to**	**Para 24**
1985 (2) SCR 937	**Referred to**	**Para 24**
1991 (1) SCR 327	**Referred to**	**Para 25**
2002 (3) Suppl. SCR 97	**Referred to**	**Para 30**
1995 (2) SCR 200	**Relied on**	**Para 32**
(1995) 3 SCC 128	**Relied on**	**Para 32**
(2007) 9 SCC 304	**Referred to**	**Para32**
(1963) 2 SCR 774	**Distinguished**	**Para 33**

2003 (1) Suppl. SCR 890	**Distinguished**	**Para 33**
1993 (2) Suppl. SCR 576	**Referred to**	**Para 40**
1997 (3) SCR 931	**Referred to**	**Para 40**
(1999) 3 SCC 362	**Referred to**	**Para 40**
2001 (3) SCR 33	**Referred to**	**Para 40**
2002 (2) SCR 383	**Referred to**	**Para 40**
2003 (1) SCR 918	**Referred to**	**Para 40**
(2008) 7 SCC 53	**Referred to**	**Para 40**
(2001) 4 SCC 428	**Referred to**	**Para 40**
2005 (5) Suppl. SCR 157	**Referred to**	**Para 40**
(1967) 2 SCR 762	**Referred to**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7245-7426 of 2002.

From the Judgment & Order dated 16.3.1998 & 9.7.1999 of the High Court of Karnataka at Bangalore in Writ Appeal No. 9913 of 1996 & Civil Petition No. 366 of 1998.

WITH

C.A. No. 774-778 of 2005

Dushyant Dave, P. Vishwanatha Shetty, Shashi Kiran Shetty, M. Sreenivasa, Bramjeet Mishra, Yatish Mohan, Haripriya Padmanabhan, E.C. Vidya Sagar, V. Mohana for the Appellant.

P.P. Rao, R.S. Hegde, Chandra Prakash, Amit Wadhwa, A.S. Bhasme, P.P. Singh, Sanjay R. Hegde, A. Rohen Singh, Ramesh K. Mishra, Ramesh S. Jadhav, Vikrant Yadav for the Respondent.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. These appeals are directed against two sets of judgments and orders passed by the Division Benches of the Karnataka High Court whereby the acquisition of lands by the State Government for the benefit of the appellant was quashed. Civil Appeal Nos. 7425-26/2002 are directed against judgment dated 16.03.1998 passed by the High Court in Writ Appeal No. 9913/1996 and order dated 09.07.1999 passed in Civil Petition No. 366/1998. Civil Appeal Nos. 774-78/2005 are directed against judgment dated 06.02.2004 passed in Writ Appeal No. 4246/1998, C/W W.A. No. 6039/1998 and orders dated 11.02.2004 and 15.09.2004 passed in I.A. No. 1 for rectification in Writ Appeal No. 4246/1998, C/W W.A. No. 6039/1998 and Review Petition Nos. 166 and 170 of 2004, respectively.

2. Although, the High Court quashed the acquisition proceedings mainly on the grounds of violation of the provisions of the Land Acquisition Act, 1894 (for short, 'the 1894 Act') and the manipulations made by the appellant through the Estate Agent for acquiring the land, during the pendency of these appeals the parties filed voluminous papers and arguments were advanced by both the sides by relying upon those documents as also the records summoned by the Court from the State Government.

3. For appreciating the contentions of the parties in a correct perspective, it will be useful to notice the events which culminated in the acquisition of the lands belonging to the private respondents and others.

3.1 Bangalore Development Authority (BDA) was constituted by the State Government under Section 3 of the Bangalore Development Authority Act, 1976, (for short, 'the 1976 Act'), which was enacted by the State legislature for ensuring planned development of the City of Bangalore and

areas adjacent thereto. In terms of Section 15 of the 1976 Act, the BDA is empowered to draw up detailed schemes for the development of the Bangalore Metropolitan Area and with the previous approval of the Government, undertake works for the development of the Bangalore Metropolitan Area and incur expenditure therefor. Under Section 15(2), the BDA can take up new or additional development schemes either on its own or on the recommendations of the Local Authority or as per the directions of the State Government. Section 16 lays down that every development scheme shall, within the limits of the area comprised in the scheme, provide among other things for the acquisition of any land necessary for or affected by the execution of the scheme. Section 16(3) lays down that the scheme may provide for construction of houses. Sections 17 and 18 contain the procedure for finalization and sanction of the scheme. Section 19 provides for the acquisition of land for the purposes of the Scheme.

3.2 In exercise of the powers vested in it under Section 15 and other relevant provisions of Chapter III of the 1976 Act, the BDA has been preparing the development schemes and forming layouts for the purpose of allotment of houses/plots to various sections of the society.

3.3 Due to unprecedented increase in the population of Bangalore City (by 1981, the population of the Bangalore City had swelled to 29.13 lakhs), the State Government realized that it may not be possible for the BDA to meet the demand of developed residential sites and, therefore, it was decided to encourage formation of private layouts which is permissible under Section 32 of the 1976 Act, by the house building cooperative societies (for short, 'the housing societies'). For this purpose the existing guidelines, which were being followed by the erstwhile City Improvement Trust Board and the BDA for the approval of private layouts were revised vide Circular No. HUD 260 MNX 82 dated 3.3.1983, the relevant portions of which are extracted below:

"1. The area proposed for a layout should be within the residential zone of the Outline Development Plan/ Comprehensive Development Plan approved by Government. In special cases where lands are reserved for purposes other than green belt and which are suitable for residential purpose, layouts may be considered after obtaining prior approval of Government for the change in land use.

2. The Co-operation Department shall register the names of the Housing Societies only after getting the opinion of the planning Authority (BDA) which shall verify whether the lands proposed for the societies are in the residential zone or are suitable for residential purpose as indicated in para 1, or whether they are required by Bangalore Development Authority.

3. If the Housing Society has purchased land, no objection certificate from the competent authority, Urban land ceiling should be produced.

4. The Housing Societies/Private developers should produce the title deeds to prove ownership of the land.

5. The Bangalore City Corporation, the HAL Sanitary Board, ITI., Notification area, Yelahanka and Kengeri Municipal authorities and such other authorities shall not approve any bifurcation of land into plots or any private layout. Such approval should be done only by the planning Authority (BDA) according to the Karnataka Town & Country Planning Act, 1961.

6. Khatha shall not be issued by the Revenue Section of the Bangalore City Corporation and the Bangalore Development Authority HAL Sanitary Board, I.T.I. Notified area, Yelahanka Town Municipality, Kengeri Town Municipality/ Panchayaths and such other authorities, unless the layout is approved by the Bangalore

Development Authority.

7. The following minimum land allocations shall be insisted in the approval of private layouts by the Bangalore Development Authority.

Residential	Not Exceeding 50%
Parks & Playgrounds	15%
Roads	25% to 30%
Civic amenities	50% to 10%

8. (a) Except in case of layouts for economically weaker sections standard road width shall be enforced line 12 metre (40 feet) 18.5 metres (60 feet), 24.5 metres (80 feet) and 30.5 metres (100').

(b) While working out the road pattern of the private layouts, major road pattern of the outline Development Plan/ Comprehensive Development Plan should not be affected. Minor roads may be designed suitable within the framework of roads approved in the Outline Development Plan/Comprehensive Development Plan.

The civic amenity sites earmarked should be for specific purposes determined by Bangalore Development Authority. In cases where it is found necessary to allot sites for other purpose, proper justification will have to be furnished.

10. The purpose for which the sites are proposed shall not be violated by the housing societies/private developers.

11. Underground drainage and electricity works in private layouts shall be carried out only by the Bangalore Water Supply & Sewerage Board and Karnataka Electricity Board. Bangalore Development Authority may permit the Housing societies to carry out the civil works only in case

of societies getting the work done by Civil Engineers of the required competence.

12. After the formation of sites, allotment of sites to individual members of the housing societies must be in accordance with the eligibility conditions of allotment of the Bangalore Development Authority which are in force including the lease-cum-sale conditions.

13. Conditions shall be enforced in the approval of layouts in favour of housing societies that the sites should be allotted only to the members of the societies and not to other individuals for purposes of land speculation. A list of members shall be submitted by the societies along with the application for approval of private layouts."

3.4 The aforesaid decision of the State Government was misused by the housing societies which started purchasing lands directly from the landlords for forming the layouts resulting in uncontrolled, unplanned and haphazard development of the city. It also created acute problem of providing civic amenities, transport facilities etc. Therefore, by an order dated 18.6.1985, the State Government abandoned the existing policy of acquiring land through the Revenue Department and entrusted this task to the BDA for the Bangalore Metropolitan Area. The State Government also stopped registration of the housing societies and conversion of agricultural lands in favour of the existing societies. Simultaneously, the State Government constituted a Three Men Committee (TMC) consisting of the Registrar of Cooperative Societies, Karnataka, T. Thimme Gowda, Secretary, BDA and the Special Deputy Development Commissioner to scrutinize the land requirements of the housing societies which had already been registered and also fixed 30.6.1984 as the cut off date for consideration of the applications made by the housing societies for the acquisition of land. The constitution of the committee was made known to the public vide Order No. HUD 113 MNXA 85 dated 23.6.1986. It was also made clear that only those persons will be eligible

for allotment of sites who had been enrolled as members of the housing societies before the cut off date. Subsequently, the cut off date was extended to 30.6.1987.

3.5 The Executive Director of the appellant submitted representation dated 7.12.1984 to the Minister for Revenue, Government of Karnataka for the acquisition of 238 acres 27 guntas land at Vajarahalli and Raghuvanahalli villages for formation of a layout for its members. The relevant portions thereof are extracted below:

"We are happy to inform you that our society was registered under Section 7 of the Mysore Cooperative Societies Act, 1959 by the Registrar of Cooperative Societies, Bangalore, during the year 1927 vide No. 1737 C.S. dated 12.9.1927.

2. The object of the society is to provide house sites to its members who belong to working class and other backward class people belonging to weaker sections of the society. The members are poor people and they are siteless. They are residents of Bangalore City for several decades.

3. Because of the restrictions imposed by Land Reforms Act and other enactments, the activities of our society have come to stand still, with the result the society is not in a position to discharge its primary obligations entrusted as per the bye-laws.

4. Your Hon'ble authority is fully aware that it is humbly impossible to secure residential sites in these days of soaring prices of lands and sites which have gone up beyond all proportions.

5. The lands which are now requested by the society for acquisition are not fit for agricultural purposes and they are laying in the vicinity of residential layout abutting Bangalore City and there are no proposals for acquisition of these

survey numbers by the Bangalore Development Authority for any of its developmental activities, as per endorsement issued by B.D.A.

6. Due to our sincere efforts we are able to locate suitable land in the village Vajarahalli and Raghuvanahalli, Uttarahalli Hobli, Bangalore south Taluk to an extent of 250 acres. A list showing the sy. numbers and extent of lands is enclosed.

7. We request your kindself to acquire these lands in favour of our society and handover possession to form layout to distribute sites to the members who are in great need of sites to construct their own houses.

8. We have collected sital amounts from the members. The cost of acquisition will be met by the society. Necessary amount towards compensation will be deposited with the acquisition authorities on receipt of intimation and after obtaining approval of Government.

It is submitted that the society is agreeable to abide by all terms and conditions to be laid down by the Government in the matter."

3.6 The Revenue Department of the State Government vide its letter dated 29.12.1984 forwarded the aforesaid representation to Special Deputy Commissioner, Bangalore for being placed before the TMC constituted vide letter No. RD-109 AQB 84 dated 26.7.1984.

3.7 Between January, 1985 and 1987 the appellant's application made several rounds before the TMC, the State Level Coordination Committee (SLCC), constituted by the State Government and the officers of the Cooperative Department. The Assistant Registrar, Cooperative Societies issued several notices to the appellant to furnish the details of its members and supply other particulars along with copy of the agreement

entered with the Estate Agent engaged for formation of the layout, but the needful was not done. After lapse of long time, the President of the appellant submitted memorandum dated 17.9.1987 to the Joint Registrar, Cooperative Societies (for short, 'the Joint Registrar') stating therein that the appellant had engaged M/s. Manasa Enterprises (Estate Agent) for procuring 250 acres land from the landowners. The copies of agreements dated 1.6.1984 and 4.12.1984 executed with M/s. Manasa Enterprises were also submitted along with the memorandum. Along with letter dated 26.3.1987, the appellant furnished additional information to the Joint Registrar.

3.8 The appellant's application was considered in the meeting of the TMC held on 5.10.1987 and the Joint Registrar was asked to conduct verification of the information supplied by the appellant. After conducting the necessary inquiry, the Joint Registrar sent report dated 9.10.1987, of which the salient features were as follows:

i. The appellant had neither collected sital deposit from the members nor it had paid any advance to the Estate Agent or the landowners upto 30.6.1984.

ii. During 1984-85, the appellant collected Rs.20,72,500/- from the members and paid Rs.3,50,000/- to the Estate Agent as an advance for procurement of the land from the landowners.

iii. During 1985-86, another sum of Rs.5,45,500/- was collected from the members towards sital deposit and Rs.10,00,000/- were paid to the Estate Agent.

iv. Upto 30.6.1986, the total amount collected from the members was Rs.26,18,000/- and the total amount paid to the Estate Agent was Rs.13,50,000/- for procurement of 235 acres land in Vajarahally.

v. Letter dated 24.10.1986 of the Estate Agent revealed

that it had made advance payment of Rs.16,70,000/- to 17 landowners.

3.9 In its meeting on 17.10.1987, the TMC directed the Joint Registrar to conduct an investigation about the land available with the appellant before the cut off date. This was done in the wake of the information supplied by the appellant about the death of the proprietor of M/s. Manasa Enterprises in a car accident on 28.2.1987. However, before the Joint Registrar could make the necessary investigation, the appellant's application was considered in the meeting of the SLCC held on 24.10.1987 and the following proceedings were recorded:

"The Deputy Commissioner, Bangalore raised a question as to whether the entitlement for acquisition would depend upon the number of enrolled members as of the cut off date of 30.4.1984 or the number of enrolled members who had paid the sital value by that date. The Revenue Commissioner clarified that as per the GO, the entitlement depended on the total number of enrolled members irrespective of whether they had applied for a site. The Secretary, HUD also agreed with this and stated that as per the bye-laws of these societies, all members would be eligible for grant of sites so long as they had paid the membership fees prior to the cut off date. The Deputy Commissioner however pointed out that the previous and even the present Three Member Committee had based its recommendations disregarding those members who had not paid the sital value. The SLCC decided that as it would not be equitable or fair to follow two different sets of principles for determining extent of land entitlement for acquisition, the number of members who had paid required sital fee would be the sole guiding factor in determining land to be cleared for acquisition in the 1st stage. *But the Secretary, Cooperation may keep the Chief Minister informed of this decision and report back to the*

SLCC before pending cases are taken up for 2nd stage of scrutiny as per GO dt. 30.4.1987."

(underlining is ours)

3.10 The appellant's case was again considered in the meeting of the TMC held on 27.11.1987 and the following points were recorded:

"a. Society had 3821 members as on 30.6.1987 and sital value had been paid by 1362 as per which the Society's land requirement is 184 acres 11 guntas. If the SLCC decides that the Society is eligible for entitlement on this basis the Society will have to be allowed to select lands to this extent and furnish survey number-wise details.

b. The question of survey numbers and violation of various Acts does not arise as the Three Man Committee considers that the Society is not eligible for any entitlement as there are no agreements and also no member had paid the sital value as on 30.6.1984.

c. The JRCS reported that the Society had, in pursuance of an agreement, paid Rs. 13.5 lakhs to the estate agent who died in a car crash. But even this amount was paid after the cut off date."

3.11 In its 14th meeting held on 28.11.1987, the SLCC considered the cases of various societies and opined that the appellant was not eligible for acquisition of land in 1st and 2nd stages of scrutiny because it did not have valid agreements as on the cut off date i.e., 30.6.1984. However, in the next meeting of the SLCC held on 22.12.1987 cognizance was taken of the clarification given by the Chief Minister of the State that eligibility of the housing societies should be considered on the strength of the members enrolled as on 30.06.1984 in respect of the 1st stage of scrutiny and as on 30.6.1987 in respect of

the 2nd stage of scrutiny, irrespective of the fact whether the enrolled members had paid sital fee or not and, accordingly, decided that the appellant's case be examined by taking note of the members enrolled by it.

3.12 On 21.2.1988, the appellant entered into an agreement with M/s. Rajendra Enterprises whereby the latter promised to secure the acquisition of land on payment of the specific amount. Paragraphs 1 to 8 of the agreement, which have bearing on consideration of one of the issues arising in these appeals read as under:

"1. THIS AGREEMENT entered into on this the 21st (Twenty first) day of February 1988 between The Bangalore City Co-operative Housing Society Limited, No.2, Seethapathi Agrahara, Bangalore-560002, a Co-operative Societies Act, represented by its President and the Executive Director and hereinafter referred to as the 'FIRST PARTY', which term shall mean and include its successors, assigns in office, administrators etc. and M/s. Shri Rajendra Enterprises, No.4507, 5th Floor, High Point-IV, 4, Palace Road, Bangalore-560 001, represented by its Managing Partner M. Krishnappa, Estate Agent and Engineering Contractor, hereinafter called the Agent of the 'SECOND PARTY' which term shall mean and include its successors in interest and successors in office, assigns, administrators etc., witnesseth:-

2. WHEREAS THE FIRST PARTY has selected about 228 acres land as detailed in the schedule, in Vajarahalli village and Raghuvanahalli village, Uttarahalli Hobli, Bangalore South Taluk, more fully described in the schedule hereunder and hereinafter, referred to as the 'Schedule Land' for making house sites for the benefit of its members for the construction of dwelling houses with various amenities including road, water supply, sewerage facilities, street lighting, etc.

3. WHEREAS the Second Party has offered his services to the First Party to negotiate and complete the acquisition and development of schedule land for the said purpose to form a layout, make sites in accordance with the rules and regulations in force and hand over the said sites to the First Party.

4. WHEREAS NOW that the Managing Partner of M/s. Manasa Enterprises, First Party's earlier promoters died of an accident and as such work could not be continued and subsequently M/s. Landscape, Layout promoters agreed to take over the entire project with all its advanced to M/s. Manasa Enterprises i.e. Rs.13,50,000/- (Rupees Thirteen Lakhs Fifty Thousand only) for procuring lands from the agriculturists in favour of the First Party, at the time of the agreement. The said Agreement dated 31.12.87 was signed between the First Party and M/s. Landscape. But this Agreement was cancelled with effect from 1.2.1988 as M/s. Landscape failed to furnish the agreed Bank Guarantee of Rs.13,50,000/-.

5. NOW the Second Party, M/s. Rajendra Enterprises have come forward and agreed to take over the entire project for the formation of the proposed layout and start the work 'ab initio' with all its previous liabilities and have furnished the required Bank Guarantee No.4/88 dated 8.2.1988 from Syndicate Bank, Vijaynagar Branch, Bangalore-560 040 of Rs.13,50,000/- (Rupees Thirteen Lakhs Fifty Thousand only) already advanced to previous promoters M/s. Manasa Enterprises (for procuring lands from the agriculturists).

6. WHEREAS the Second Party has agreed to provide all the required services towards the acquisition of scheduled land for the First Party, obtain all necessary approvals for forming the layout, roads, water lines, electric lines, drainage, sewerage connection, etc., and to carry out on the said land the items of work such as laying of roads with

culverts, drainages, etc., provision of bore-wells, ground level and overhead tanks, water lines, etc., for the provision of water laying of electrical lines, sewerage lines, etc., and in accordance with the details approved by the respective Statutory and Government authorities on the schedule lands in consideration of the amount to be paid by the First Party as per the B.D.A. rate prevailing at the time of execution of the above specified works.

7. WHEREAS the Second Party at the behest of the First Party is taking action to move various Government and Statutory authorities towards the publication of Notification in the Official Gazette under Section 4(1) of the Land Acquisition Act, for the acquisition of the schedule lands.

8. NOW the First Party and the Second Party agree to undertake the above works as detailed below: -

SECOND PARTY	FIRST PARTY
PROCUREMENT OF LANDS	
1) To get Notification under Section 4(1) of the LAR within four months	1) At the time of execution of the Agreement of Rs. 1.5 lakhs and upto issue of 4(1) Notification Rs. 15/- per Sq. Yd. against Bank Guarantee.
2) Issue of Notification under Section 4(1) and subsequent enquiry under Section 5(1) completed within 4 months	2) Rs. 25/- per Sq. Yd. including the award amount paid to Government.
3) Issue of Notification under Section 6(1) within 3 months of the completion	3) Rs. 26/- per Sq. Yd.

of enquiry under Section 5(1)	
4) Submission of layout plan to BDA within 4 months after the issue of notification under Section 6(1)	4) Rs. 5/- per Sq. Yd.
5) Sanction of layout plan within 3 months of its submission.	5) Rs. 4/- per Sq. Yd.

The Second Party has agreed to complete the above mentioned works within 18 months from the day of the agreement subject to any delay caused at the BDA and other authorities in procuring land sanctioning or issuing of layout plan."

(The amount which the appellant had agreed to pay to the Estate Agent for securing the acquisition of 228 acres land and submission and sanction of layout plan by the BDA was Rs.5,42,37,652/-).

3.13 Within five days of the execution of the aforesaid agreement, the SLCC reconsidered the appellant's case in its 20th meeting held on 26.2.1988 and declared that it is eligible for the acquisition of 208 acres 18 guntas land. The relevant portion of the minutes of that meeting are reproduced below:

"7) BANGALORE CITY HBCS:

The Society is eligible for acquisition of 208 acres 18 guntas in stage I/III. As against this they have given survey number-wise details for 250 acres. They should therefore be given time upto 15th March, 1988 to select the specific lands to be acquired on their behalf to the extent of 208 acres."

3.14 In furtherance of the recommendations made by the

SLCC, the State Government sent letter dated 21.5.1988 to Deputy Commissioner, Bangalore and directed him to initiate proceedings for the acquisition of 207 acres 29 guntas land in Vajarahalli and Raghuvanahalli for the appellant by issuing notification under Section 4(1) of the 1894 Act. The contents of that letter are reproduced below:

"The Deputy Commissioner,

Bangalore.

Sub: Acquisition of land in Vajarahalli and Raghuvanahalli villages of Uttarahalli hobli, Bangalore South Taluk in favour of the Bangalore City Co-operative, Housing Society Ltd., Bangalore.

I am directed to state that the State Level Coordination Committee has recommended for acquisition of 208 acres 18 guntas of land in Ist/IIIrd stage in favour of Bangalore City Cooperative Housing Soceity. As against this the society has furnished S.No. wise details for 207 acres 29 guntas (list enclosed) which is within the extent recommended by State Level Coordination Committee. Hence you are directed to initiate acquisition proceedings by issue of notification under Section 4(1) for an extent of 207 acres 29 guntas of land as recommended by S.L.C.C. in the village of Vajarahalli and Raghuvanahalli in favour of Bangalore City House Building Cooperative Society Ltd., Bangalore subject to the following conditions:

i) The extent involved (if any) under Section 79(A) and B may be excluded while issue of 4(1) notification for the present, which can be notified after the pending proceedings under the said Act are finalised.

(ii) Move the Spl. Deputy Commissioner, ULC to finalise

the proceedings pending under ULC Act before 31.5.1988.

Yours faithfully,
(MAHDI HUSSAINA)
Under Secretary to Government
Revenue Department."

3.15 On 7.8.1988, the Executive Director of the appellant entered into an agreement with the State Government, the relevant portions of which are extracted hereunder:

" AGREEMENT

An Agreement made on this Eighth day of July, One Thousand Nine Hundred Eighty Eight between the Executive Director, The Bangalore City Co-operative Housing Society Limited, No.2, Seethapathi Agrahara, Bangalore-560002 (hereinafter called the Society which expression shall unless excluded by or repugnant to the context, be deemed to include its successors and assigns) of the ONF PART and the GOVERNOR OF KARNATAKA on the OTHER PART.

AND WHEREAS the Society has applied the Government of Karnataka (hereinafter referred to as "THE GOVERNMENT") that certain land more particularly described in the schedule hereto annexed and hereinafter referred to as "THE SAID LAND" should be acquired under the provisions of LAND ACQUISITION ACT, 1894 (I of 1894) hereinafter referred to as "THE SAID ACT", for the following purpose namely :-

Formation of Sites and Construction of Houses to the members of the Bangalore City Co-operative Housing Society Ltd., No.2, Seethapatha Agrahara, Bangalore-560002.

AND WHEREAS The Government, having caused an enquiry be made in conformity with the provisions of the SAID ACT and being satisfied as a result of such inquiry

that the acquisition of the SAID LAND is needed for the purpose referred to above, has consented to the provisions of the SAID ACT, being put in force in order to acquire the SAID LAND for the benefit of the Society Members, to enter into an agreement hereinafter contained with the GOVERNMENT. How, these presents witness and it is hereby agreed that GOVERNMENT shall put in force the provisions of the said Act, in order to acquire the SAID LAND for the benefit of the Society Members on the following conditions namely:

1. The Society shall pay to the GOVERNMENT the entire costs as determined by the GOVERNMENT of the acquisition of the SAID LAND including all compensation damages, costs, charges and other expenses whatsoever, which have been OR may be paid OR incurred in respect of OR on account of such acquisition OR in connection with any litigation arising put of such acquisition either in the original or APPELLATE COURTS, and including costs on account of any establishment and salary of any Officer OR officers of the GOVERNOR who the GOVERNMENT may think it necessary to employ OR deputation Special duty for the purpose of such acquisition and also including the percentage charges on the total amount of compensation awarded as prescribed by GOVERNMENT. The monies which shall be payable by the Society under this clause shall be paid to the Special Deputy Commissioner of Bangalore (hereinafter called the "SPECIAL DEPUTY COMMISSIONER") within fourteen days after demand by the SPECIAL DEPUTY COMMISSIONER in writing of such amount or amounts as the SPECIAL DEPUTY COMMISSIONER shall from time to time estimate to be required for the purpose of paying OR disbursing any compensation, damages, costs, charges, OR expenses herein before referred to, for which the COMPANY has made provision in their finance.

2. On payment of the entire cost of the acquisition of the SAID LAND as hereinabove referred to the whole of the said land shall as soon as conveniently may be transferred to the SOCIETY as to vest in the COMPANY subject to the provision of the Karnataka Land Revenue Act (hereinafter called the SAID ACT) and the rules made thereunder subject also to the provisions of this agreement as to the terms on which the land shall be held by the Society.

3. The SAID LAND when so transferred to and vested in the SOCIETY shall be held by the SOCIETY if its property to be used only in furtherance of the and for purpose for which it is acquired, subject nevertheless to the payment or agricultural, non-agricultural OR other assessment if and so far as the said land is OR may from time to time be liable to such assessment under the provisions of the SAID ACT and the rules made thereunder, and the local fund cess, as the case may be, THE SOCIETY shall :-

(i) not use the SAID LAND for any purpose other than that for what it is acquired.

(ii) Undertake the work of construction of the building within three years from the date on which possession of the land handed to the Society and complete the same within three years from the aforesaid date;

(iii) AT ALL TIMES, KEEP AND MAINTAIN the said land and the building OR buildings effected thereon in good order and condition, maintain all records of the SOCIETY properly to the satisfaction of the DEPUTY COMMISSIONER and supply to the GOVERNMENT punctually such.

(iv) Returns and other information as may from time to time be required by the GOVERNMENT.

(v) Not use the SAID LAND or any building that may be

erected upon it for any purpose which in the opinion of GOVERNMENT is objectionable.

5. The Society shall from time to time and at all times permit the GOVERNMENT or any officer or officers authorised by the GOVERNMENT in that behalf to inspect the SAID LAND any works of the SOCIETY upon the SAID LAND whether in the course of construction or otherwise and shall furnish to the Government from time to time on demand correct statements of the monies spend by SOCIETY upon its said land.

6. In case the SAID LAND is not used for the purpose which it is acquired as herein refers recited or is used for any other purpose 01 in case the SOCIETY commits a breach of any of conditions thereof, the SAID LAND together with the buildings, if any erected thereon shall be liable to resumption by the Government subject however to the conditions that the amount spent by the SOCIETY for the acquisition of the SAID LAND or its value as undeveloped land at the time of resumption, whichever is less (but excluding the cost of value of any improvements made by the SOCIETY to the SAID LAND or on any structure standing on the SAID LAND shall be paid as compensation to the SOCIETY.

Provided that the SAID LAND and the buildings, if any, erected thereon shall not be so resumed unless due notice of the breaches complained of the been given to the Company and the Society has failed to make good the break or to comply with any directions issued by the GOVERNMENT in this behalf, within the time specified in the said notice for compliance therewith.

7. If at any time or times, the whole or any part of the SAID LAND is required by GOVERNMENT or for the purpose of making any new public road or for any purpose connected with public health, safety, utility or necessary the

Company on being required by the GOVERNMENT in writing shall transfer to the GOVERNMENT the whole or part of the SAID LAND as the GOVERNMENT shall specify to the necessary for any of the aforesaid purposes the SOCIETY A SUM equal to the amount of the compensation awarded under the said Act, and paid by the SOCIETY IN respect of the land to transferred including the percentages awarded under Section 23(2) of the SAID ACT, together with such amount as shall be estimated by the SOCIETY whose decision in the matter shall be final as to the cost of the development of the land so transferred which shall include the value at the date of transfer of any structures standing thereon and when part of a building is on the land so transferred and part is on an adjoining land, reasonable compensation for the injuries effected of the part of the building on the adjoining land.

8. All the cost and expenses incidental to the preparation and execution of these presents shall be paid by the SOCIETY.

9.(a) The Deputy Commissioner/Special Deputy Commissioner should make a token contribution towards the compensation framed by Assistant Commissioner/ Special Land Acquisition Officer at the rate of Rs. 100.00 in respect of each Land Acquisition Case of the Society.

(b) The Special Deputy Commissioner shall after taking over possession of the land U/s. 16(1) Land Acquisition to the Society should report to the Government the fact of having taken physical possession of the land for clearance of the Government. The Society should agree unconditional to pay the compensation as awarded or if enhanced by the Court decides in favour of land owners.

(c) The Society shall not from the layouts without getting the plan duly approved by the Town Planning Wing of Bangalore Development Authority keeping in view the

zoning regulations. In respect of places other than Bangalore, the approval of Planning Authority, Municipality as the case may shall be obtained.

(d) In case the violation of any of the conditions Government will be competent to resume the lands acquired in favour of Societies.

(e) The expenditure incurred in this behalf shall be debited to the Head of the Account - 253" + District Administration-5, Other expenditure-E. Acquisition of land on behalf of other acquiring bodies (Non-Plan)."

3.16. In furtherance of the direction given by the State Government, Deputy Commissioner, Bangalore issued notification dated 23.8.1988, which was published in the Official Gazette on 1.9.1988, under Section 4(1) of the 1894 Act for the acquisition of 201 acres 17 guntas land including the land comprised in Survey Nos. 49 and 50/1 belonging to Smt. Geetha Devi Shah, who shall hereinafter be referred to as respondent No. 3 and Survey Nos. 7/1 and 8/1 belonging to the predecessor of P. Ramaiah, Munikrishna, Keshava Murthy, Smt. Nagaveni and Smt. Chikkathayamma (respondent Nos. 3 to 7 in Civil Appeal Nos. 774-778/2005).

3.17 Respondent No. 3 filed detailed objections against the proposed acquisition of her land and pointed out that the same were garden lands; that she and her predecessor had planted 165 fruit bearing mango trees, 75 coconut plants, 15 lime plants, 15 guava trees, 100 papaya trees, 40 eucalyptus trees, 6 custard apple trees, 100 teakwood trees, 3 neem trees, one big tamarind tree, 2 gulmohar trees, 10 firewood trees and 10 banana plants. She also pointed out that there was a residential house and a pump house with electric connection and the area had been fenced by barbed wires and stone pillars. Shri P. Ramaiah also filed objections dated 6.9.1988 and claimed that the proposed acquisition was contrary to the provisions of the 1894 Act and that the lands comprised in

Survey Nos. 7/1 and 8/1 were the only source of livelihood of his family.

3.18 The objections filed by respondent No. 3 were considered by the Special Land Acquisition Officer along with the reply of the acquiring body and the following recommendation was made:

"There are AC Sheet houses and since there are good number of Malkies: Mango, etc, Government may take suitable decision".

3.19 The objections raised by Shri P. Ramaiah were also considered and the following recommendation was made:

"There are no valid ground in the objections raised, the lands may be acquired."

3.20 Thereafter, the Special Land Acquisition Officer issued declaration under Section 6(1) which was published in the Official Gazette dated 25.9.1989.

3.21 During the currency of the acquisition proceedings, Shri G.V.K. Rao, Controller of Weights and Measures and Recovery Officer was asked to conduct an inquiry into the membership of the appellant. He submitted report dated 7.11.1988 with the finding that the appellant had admitted 40 persons who were not residing within its jurisdiction and recommended that their names be removed from the rolls of the appellant and the committee of the management, which is responsible for admitting such ineligible persons should be proceeded against.

3.22 It appears that similar reports had been received by the Government in respect of other societies. After considering these reports, Joint Secretary to the Government, Housing and Urban Development Department prepared a note on the basis of the decision taken by the Executive Council in its meeting

held on 31.5.1989. The name of the appellant was shown in Annexure 3B of the note which contained the list of housing societies responsible for admitting ineligible persons as their members.

3.23 Before publication of the declaration issued under Section 6(1) of the 1894 Act, the State Government vide its letter dated 23.6.1989 informed Respondent No. 3 to remain present for spot inspection of her land. After publication of the declaration issued under Section 6(1), notices dated 6.1.1990 and 7.3.1990 were issued to Respondent No. 3 and others that the Special Deputy Commissioner would conduct spot inspection. A memo dated 11.5.1990 was issued to Respondent No. 3 that Special Deputy Commissioner would inspect Survey Nos. 49 and 50/2 on 14.5.1990. However, no one appears to have gone for inspection and to this effect letter dated 16.5.1990 was sent by Respondent No. 3.

3.24 Special Land Acquisition Officer, Bangalore passed award dated 23.6.1990 and determined market value of the acquired land. The award was approved by the State Government on 11.3.1991. However, before the possession of the acquired land could be taken, the State Government issued notification dated 3.8.1991 under Section 48(1) of the 1894 Act and withdrew the acquisition proceedings in respect of land comprised in Survey No. 50/2. Vide letter dated 9.10.1991, the Revenue Department requested Special Deputy Commissioner, Bangalore to examine the representation made by Respondent No. 3 for withdrawal of the acquisition of Survey No. 49. To the same effect letter dated 29.1.1992 was sent by the Secretary, Revenue Department to the Special Deputy Commissioner. However, no final decision appears to have been taken on these communications.

3.25 After one year and over six months of the passing of the award, the State Government issued Notification dated 7.1.1992 under Section 16(2) in respect of various parcels of

lands including Survey No. 49. The possession of 150 acres 9½ guntas of land of Vajarahalli and Raghuvanahalli is said to have been handed over by the Special Land Acquisition Officer to the Secretary of the appellant-Society. However, as will be seen hereinafter, the entire exercise showing taking over of possession of the respondents' land and transfer thereof to the appellant was only on papers and physical possession continued with them.

THE DETAILS OF THE LITIGATION BEFORE THE HIGH COURT

A. Smt. Geetha Devi Shah's case.

4.1 Respondent No. 3 challenged the acquisition of her land comprised in Survey No. 49 in Writ Petition No. 16419/1992. The appellant also filed Writ Petition No. 29603/1994 questioning the legality of notification issued under Section 48(1). By two separate orders dated 18.11.1996, the learned Single Judge dismissed both the writ petitions. The writ petition filed by respondent No. 3 was dismissed only on the ground of 2½ years' delay between the issue of the declaration under Section 6(1) of the 1894 Act and filing of the writ petition. The explanation given by Respondent No. 3 that on her representations, the Government had withdrawn the acquisition of land comprised in Survey No. 50/2 and she was awaiting the Government's decision in respect of other parcel of land, was not considered satisfactory by the learned Single Judge. The writ petition of the appellant was dismissed by the learned Single Judge by observing that the State Government has absolute power to withdraw the acquisition before the possession of the acquired land can be taken.

4.2 Respondent No. 3 challenged the order of the learned Single Judge in Writ Appeal No. 9913/1996. The Division Bench of the High Court first considered the question whether the learned Single Judge was right in dismissing the writ petition

only on the ground of delay and answered the same in negative by making the following observations:

> "After hearing the rival contentions of the appellant and contesting respondent and perusing the pleadings of both the parties, we are of the opinion that the learned Single Judge has erred in taking into consideration the delay of 2 ½ years from the date of final notification. The learned Single Judge has not considered the explanation given by the petitioner at paragraphs 12 to 15 wherein, he has explained regarding delay. The State Government has issued notice dated 6.1.1990 of inspection of lands proposed to be held at 10.30 a.m. on 16.8.1990 and the Land Acquisition Officer conducted spot inspection and satisfied that the lands could be deleted and further another notice dated 6.2.1990 of fixing the inspection of the spot on 9.2.1990 was received in pursuance of the same spot inspection was held and one more notice dated 7.3.1990, 11.5.1990 on those days inspection was not made. Thereafterwards, he submitted the petition to the Revenue Secretary. His enquiries with the Revenue Secretary revealed the proceedings bearing No. RD 294 AQB 90 dated 5.10.1991 one Mr. N. Lokraj, Under Secretary to the Government called for reports on the matter vide Notification dated 29.1.1992. Therefore, the grievance of the petitioner was pending consideration before the Government under Section 15A of the Land Acquisition Act as on 29th January, 1992. In this regard, we have perused the record produced by the Government. These facts with reference to the denotification of the acquisition in respect of the land in question along with other lands are reflected therein. Further the explanation offered by the appellant at paragraph 15 in the writ petition clearly show the bonafides on the part of the appellant in the matter of challenging the acquisition proceedings, as he had submitted the representation to the Revenue Department seeking for denotification of the land in question. In our

> opinion the delay with regard to the challenge of the proceedings has been satisfactorily explained by the appellant. Therefore, non-consideration of the explanation and rejection of the petition by the learned Single Judge solely on the ground of delay and latches cannot be sustained. Moreover relief cannot be denied to a party merely on the ground of delay. In fact, in view of the subsequent events after the final notification, it cannot be said that the appellant has approached this Court belatedly."

4.3 The Division Bench then scrutinized records relating to the acquisition of land, relied upon the judgment in H.M.T. House Building Cooperative Society v. Syed Khader and others (1995) 2 SCC 677 (hereinafter described as 'Ist HMT Case') and held:

> "It is a mandatory requirement in law, since no prior approval of the scheme has been obtained by the second respondent from the State Government first respondent herein, the acquisition by the first respondent can not be held to be for public purpose as the mandatory requirement as contemplated under Section 3(f)(VI) has not been complied with. Hence the acquisition proceedings have to be held as invalid, and on this ground the acquisition proceedings are liable to be quashed. In its counter at paragraph it has not positively stated with regard to the fact of prior approval of the scheme as required under Section 3(f)(VI) of the Act is granted by the Government. On the other hand, what is stated by the second respondent at paragraph 5 of the counter is that the said society had submitted necessary scheme to the first respondent for the purpose of initiating acquisition proceedings under Section 4(1) of the Act. The acquisition proceedings were to be initiated after fully satisfying the requirement under Section 3(f)(VI) of the Act. Therefore, the contention of the learned Counsel for the respondent that the acquisition proceedings are in accordance with law which can not be

accepted in the absence of specific, positive assertion and proof in this regard. The burden is on the first and second respondents to show that there is prior approval of the housing scheme to initiate the acquisition proceedings in respect of the land in question. The same is not established. In this view of the matter and in view of the law declared by the Apex court in H.M.T. case supra, we have no option but to hold that there is no housing scheme approved by the State Government. Hence on this ground the acquisition proceedings are liable to be quashed."

The Division Bench also opined that the Special Land Acquisition Officer had submitted report without giving opportunity of hearing to respondent No. 3 and this was sufficient to nullify the acquisition of her land.

4.4. Civil Petition No. 366/1998 filed by the appellant for review of judgment dated 16.3.1998 was dismissed by the Division Bench by observing that once the Government had issued notification under Section 48(1) nothing survives for consideration.

4.5 Writ Appeal No. 1459/1997 filed by appellant against the negation of its challenge to notification issued under Section 48(1) was dismissed by the Division Bench vide judgment dated 12.3.1998 along with other similar writ appeals and writ petition.

B. Shri P. Ramaiah and others case.

5.1 Shri P. Ramaiah and others also challenged the acquisition proceedings in Writ Petition No.10406/1991. The learned Single Judge allowed the writ petition by relying upon order dated 15.6.1998 passed by the Division Bench of the High Court in Writ Petition Nos. 3539-42/1996 wherein it was held that after the amendment of the 1894 Act by Act No. 68 of 1984, the Deputy Commissioner did not have the authority to issue notification under Section 4(1) of the 1894 Act.

5.2. The appellant challenged the order of the learned Single Judge in Writ Appeal No. 4246/1998. The State of Karnataka and the Special Land Acquisition Officer also filed Writ Appeal No. 6039/1998. The Division Bench of the High Court dismissed both the appeals by common judgment dated 6.2.2004. The Division Bench referred to the judgment of this Court in 1st H.M.T. case and held that the acquisition was vitiated due to adoption of corrupt practice by the appellant, which had engaged an agent for ensuring the acquisition of land and large amounts of money changed hands in the process.

5.3 When the learned counsel for Shri P. Ramaiah and other respondents pointed out that there were certain errors in judgment dated 6.2.2004 inasmuch as Smt. Geetha Devi Shah's case has been referred to instead of the citation of H.M.T. House Building Cooperative Society v. Syed Khader and others (supra), the Division Bench *suo motu* corrected the errors vide order dated 11.2.2004.

5.4 Review Petition Nos. 166 and 170 of 2004 filed by the appellant were dismissed by another Division Bench of the High Court which declined to entertain the appellant's plea that the issues raised by Shri P. Ramaiah and others are covered by the judgment of the High Court in *Subramani v. Union of India* ILR 1995 KAR 3139 and that in view of the dismissal of SLP(C) Nos. 12012-17/1997 filed against the order passed in Writ Appeal Nos. 7953-62/1996 - Byanna and others v. State of Karnataka, the order passed by the Division Bench was liable to be set aside. The Division Bench held that the judgment in P. Ramaiah's case does not suffer from any error apparent requiring its review.

6. Before proceeding further, we consider it appropriate to mention that in furtherance of the directions contained in judgments in Writ Appeal No. 9913/1996 filed by respondent No.3 and Writ Petition No. 10406/1991 filed by Shri P. Ramaiah and others, the State Government issued notification

under Section 48(1) dated 25.6.1999 for release of the lands comprised in Survey Nos. 49, 7/1 and 8/1. However, when the appellant filed Contempt Petition No. 946/1999, the Government vide its order dated 15.11.1999 withdrew Notification dated 25.6.1999.

The grounds of challenge and the arguments.

7.1. The appellant has challenged the impugned judgments on several grounds most of which relate to the case of respondent No. 3. Therefore, we shall first deal with those grounds. Shri Dushyant Dave and Shri P. Vishwanatha Shetty, learned senior counsel for the appellant argued that the writ petition filed by respondent No. 3 was highly belated and the Division Bench of the High Court committed serious error by interfering with the discretion exercised by the learned Single Judge not to entertain her challenge to the acquisition of land on the ground of delay of more than 2-1/2 years. In support of this argument, learned senior counsel relied upon the judgments of this Court in *Ajodhya Bhagat v. State of Bihar (1974) 2 SCC 501, State of Mysore v. V.K. Kangan* (1976) 2 SCC 895, *Pt. Girdharan Prasad Missir v. State of Bihar* (1980) 2 SCC 83, *Hari Singh v. State of U.P.* (1984) 2 SCC 624, *Municipal Corpn. of Greater Bombay v. Industrial Development Investment Co. (P) Ltd.* (1996) 11 SCC 501, *Urban Improvement Trust, Udaipur v. Bheru Lal* (2002) 7 SCC 712 and *Swaika Properties (P) Ltd. v. State of Rajasthan* (2008) 4 SCC 695.

7.2 Shri P.P. Rao, learned senior counsel appearing for the private respondents argued that respondent No. 3 was not guilty of delay and laches and the Division Bench rightly accepted the explanation given by her. Shri Rao submitted that respondent No. 3 had represented to the State Government and its functionaries to withdraw the acquisition of her land and as the State Government accepted her plea in respect of Survey No. 50/2 and issued Notification dated 3.8.1991, she

was very hopeful that the acquisition in respect of the remaining land will also be withdrawn and this was the reason why she did not approach the Court soon after the issue of declaration under Section 6(1) of the 1894 Act. Learned senior counsel pointed out that vide letters dated 5.10.1991 and 29.1.1992, the Revenue Department had asked Special Deputy Commissioner, Bangalore to submit report regarding Survey No. 49 and this gave rise to a legitimate hope that the State Government would withdraw the acquisition in respect of that parcel of land. Learned senior counsel relied upon the judgments in *Sheikhupura Transport Co. Ltd. v. Northern India Transport Insurance Company* (1971) 1 SCC 785 and *C.K. Prahalada v. State of Karnataka* (2008) 15 SCC 577 and argued that in exercise of power under Article 136 of the Constitution, this Court will not interfere with the discretion exercised by the High Court in the matter of condonation of delay.

8. We have considered the respective arguments. The framers of the Constitution have not prescribed any period of limitation for filing a petition under Article 226 of the Constitution and it is only one of the several rules of self-imposed restraint evolved by the superior Courts that the jurisdiction of the High Court under Article 226 of the Constitution, which is essentially an equity jurisdiction, should not be exercised in favour of a person who approaches the Court after long lapse of time and no cogent explanation is given for the delay. In Tilokchand Motichand v. H.B. Munshi (1969) 1 SCC 110, the Constitution Bench considered the question whether the writ petition filed under Article 32 of the Constitution for refund of the amount forfeited by the Sales Tax Officer under Section 21(4) of the Bombay Sales Tax Act, which, according to the petitioner, was *ultra vires* the powers of the State legislature should be entertained ignoring the delay of almost nine years. Sikri and Hedge, JJ. were of the view that even though the petitioner had approached the Court with considerable delay, the writ petition filed by it should be allowed

because Section 12(a)(4) of the Bombay Sales Tax Act was declared unconstitutional by the Division Bench of the High Court. Bachawat and Mitter, JJ. opined that the writ petition should be dismissed on the ground of delay. Chief Justice Hidayatullah who agreed with Bachawat and Mitter, JJ. noted that no period of limitation has been prescribed for filing a petition under Article 32 of the Constitution and proceeded to observe:

> "Therefore, the question is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit. A case may be brought within Limitation Act by reason of some article but this Court need not necessarily give the total time to the litigant to move this Court under Article 32. Similarly in a suitable case this Court may entertain such a petition even after a lapse of time. It will all depend on what the breach of the Fundamental Right and the remedy claimed are when and how the delay arose."

9. The ratio of the aforesaid decision is that even though there is no period of limitation for filing petitions under Articles 32 and 226 of the Constitution, the petitioner should approach the Court without loss of time and if there is delay, then cogent explanation should be offered for the same. However, no hard and fast rule can be laid down or a straight-jacket formula can be adopted for deciding whether or not this Court or the High Court should entertain a belated petition under filed under Article 32 or Article 226 of the Constitution and each case must be decided on its own facts.

10. In the light of the above, we shall now consider whether respondent No.3 had satisfactorily explained the delay. In paragraphs 12, 13 and 14 of the writ petition filed by her, respondent No. 3 made the following averments.

"12. ENQUIRY REGARDING DELETION

Annexure "L" dated 6.1.1990 is a notice of inspection of lands proposed to be held at 10.30a.m. on 16.8.1990. On 16.1.1990, Shri Harish Gowda, the then Land Acquisition Officer was pleased to hold an inspection and was also satisfied that the lands could be deleted since the same comprised a well-maintained orchard, though on a very uneven land also for reasons that they were situated on one extreme end of the area proposed to be acquired. Strange to say, the said officer was transferred, the petitioner is at Serial No. 5 among the addressee of the said notice.

13. ANNEXURE 'M' dated 6.2.1990 is yet another notice of inspection fixed for 10.00 AM on 2.2.1990. No inspection have been held on that day, the petitioner received ANNEXURE 'N' dated 7.5.1990 intimating that an inspection will be held at 11.30AM on 14.3.1990. The petitioner submits that nobody turned up on that day also. The petitioner once again complained to the Revenue Secretary. Thereupon the petitioner received ANNEXURE 'O' dated 11.5.1990 intimating that the inspection will be held at 11.00 AM on 14.5.1990. However, the Land Acquisition Officer did not visit the lands on 14.5.1990 or on the following day as orally stated. On the very next day, i.e., 16th May, 1990, the petitioner submitted ANNEXURE 'P' to the Special Land Acquisition Officer with a copy to the Revenue Secretary, requesting for an inspection on a fixed time and date. The petitioner submits that to this day no inspection has been held by any of the officers who had succeeded Shri Harish Gowda in pursuance of notices mentioned above at Annexures 'L', 'M', 'N', 'O' respectively. The petitioner was given to understand that she will be informed in due course. However, the petitioner has not received any such notice.

14. The plaintiff submits that recent enquiries show that the Secretariat (Revenue Department) had addressed two

communications to the Special Deputy Commissioner, Krishi Bhavan, Bangalore, bearing No. RD 294 AQB 90 dated 5.10.1991 and 22.1.1992 under the signature of Sri. M. Lokraj, Under Secretary to Government, Revenue Department calling for reports on the matter immediately. ANNEXURE 'Q' and 'R' are Xerox copies of the said communications dated 5.10.1991 and 29.1.1992. These clearly go to show that the petitioner's grievances regarding the legality and propriety of the proceedings and the question of deletion had been taken up for consideration under Section 15(A) of the Land Acquisition Act and that the enquiry was still pending even as late as 29th January, 1992, which is the date of Annexure 'R'."

11. Paragraph 15 of the writ petition in which respondent No. 3 spelt out the reasons for her seeking intervention of the High Court reads as under:

"15. However, a couple of days ago, the petitioner's son received an anonymous telephone call informing that the office of the Special Land Acquisition Officer at the instance of the 2nd respondent is about to create documents for having taken possession of the petitioner's lands on the basis of an ante-dated "Award". The petitioner submits that she immediately took legal advice and was advised that no award having been passed within 2 years of Section 6(1) declaration, the proceedings had lapsed. She was also advised that in the light of the latest decision of this Hon'ble Court reported in ILR 1991 KAR 2248, the notifications are vitiated in law and a writ petition may be filed seeking appropriate reliefs including stay of all further proceedings and injunction against unlawful dispossession. Hence this writ on the following among other grounds."

12. The aforesaid averments were not controverted by respondent Nos. 1 and 2 herein. Notwithstanding this, the learned Single Judge refused to accept the explanation given by respondent No. 3 that she was hopeful that after having

withdrawn the acquisition in respect of one parcel of land, i.e., Survey No. 50/2, the State Government will accept her prayer for withdrawal of the acquisition in respect of Survey No. 49 as well. Unfortunately, the learned Single Judge altogether ignored the fact that soon after the issue of the declaration under Section 6(1) of the 1894 Act and notices under Sections 9 and 10 of the said Act, the writ petitioner received letter dated 6.1.1990 that she should make herself available for inspection of the land and on 16.1.1990 Shri Harish Gowda, the then Land Acquisition Officer inspected the site and felt satisfied that the same could be deleted because it was an orchard and was at the end of the area proposed to be acquired. The learned Single Judge also omitted to consider the following:

(i) notices dated 6.2.1990 and 7.5.1990 were issued to respondent No.3 informing her about the proposed inspection of the site;

(ii) she made a complaint to the Revenue Secretary that no one had come for inspection;

(iii) yet another notice dated 11.5.1990 was received by respondent No.3 for inspection will be held on 14.5.1990 but the concerned officer did not turn up;

(iv) letters dated 5.10.1991 and 22.1.1992 were sent by the Revenue Department to Special Deputy Commissioner, Bangalore requiring him to submit report in the matter of withdrawal of acquisition; and

(v) in paragraph 15 of the writ petition, she had disclosed the cause for her filing the writ petition in May 1992.

In our view, non-consideration of these vital facts and documents by the learned Single Judge resulted in miscarriage of justice. The Division Bench did not commit any error by holding that respondent No.3 was not guilty of laches.

13. The judgments relied upon by learned counsel for the parties turned on their own facts and the same do not contain any binding proposition of law. However, we may briefly notice the reasons which influenced the Court in declining relief to the petitioner(s) in those cases on the ground of delay. In Ajodhya Bhagat's case, this Court noted that the writ petition had been filed after 6 years of finalization of the acquisition proceedings and held that the High Court was justified in declining relief to the petitioner on the ground that he was guilty of laches. In V.K. Kangan's case, the Court held the delay of 2 years in challenging the acquisition proceedings was unreasonable because it came to the conclusion that the respondents' primary challenge to the acquisition proceedings was legally untenable. In Pt. Girdharan Prasad Missir's case, this Court approved the view taken by the High Court that unexplained delay of 17 months in challenging the award was sufficient to non-suit the writ petitioner. In Hari Singh's case, the Court held that even though the High Court had summarily dismissed the writ petition without assigning reasons, the appellants' challenge to the acquisition proceedings cannot be entertained because co-owners had not challenged the acquisition proceedings, disputed questions of fact were involved and there was delay of 2½ years. In Municipal Corporation of Greater Bombay's case, this Court reversed the order of the Bombay High Court which had quashed the acquisition proceedings ignoring the fact that the respondent had approached the Court after substantial delay calculated with reference to the date of award and, in the meanwhile, several steps had been taken by the Corporation for implementing the scheme. In Bheru Lal's case, this Court set aside the order of the High Court which had quashed the acquisition proceedings and observed that the writ petition should have been dismissed because the respondent had not offered any explanation for the delay of two years. In Swaika Properties' case, the Court noted that the appellant had first challenged the acquisition of land situated in Rajasthan by filing a petition in the Calcutta High Court and after three years, it filed writ petition in the Rajasthan High Court and concluded

that the delay in challenging the acquisition was sufficient to deny relief to the petitioner.

14. The second ground on which judgment dated 16.3.1998 has been questioned is that the Division Bench of the High Court committed an error by nullifying the acquisition on the ground of non-compliance of Section 3(f)(vi) of the 1894 Act. Shri Dushyant Dave and Shri Vishwanatha Shetty, learned counsel for the appellant and Shri S.R. Hegde, learned counsel for the State pointed out that in the writ petition filed by her, respondent No.3 had not taken a specific plea that the acquisition was contrary to Section 3(f)(vi) of the 1894 Act and that the factual foundation having not been laid by respondent No.3, the Division Bench of the High Court did not have the jurisdiction to declare that the acquisition was not for a public purpose. Learned senior counsel relied upon the judgments in *M/s. Tulasidas Khimji v. Their Workmen* (1963) 1 SCR 675, *Third Income-tax Officer, Mangalore v. M. Damodar Bhat* (1969) 2 SCR 29, *Ram Sarup v. Land Acquisition Officer* (1973) 2 SCC 56, *Sockieting Tea Co. (P) Ltd. v. Under Secy. to the Govt. of Assam* (1973) 3 SCC 729, *Bharat Singh v. State of Haryana,* (1988) 4 SCC 534, *Umashanker Pandey v. B.K. Uppal,* (1991) 2 SCC 408, *M/s. Jindal Industries Ltd. v. State of Haryana* 1991 Supp (2) SCC 587, *D.S. Parvathamma v. A. Srinivasan* (2003) 4 SCC 705, *Shipping Corpn. of India Ltd. v. Machado Bros.* (2004) 11 SCC 168, *J.P. Srivastava & Sons (P) Ltd. v. Gwalior Sugar Co. Ltd.,* (2005) 1 SCC 172 and *Shakti Tubes Ltd. v. State of Bihar* (2009) 7 SCC 673 and submitted that the Division Bench of the High Court should not have entertained an altogether new plea raised for the first time.

15. Shri Dushyant Dave also relied upon order dated 12.4.1996 passed by the High Court in Writ Petition Nos. 28577-586/1995 - *Byanna and others v. State of Karnataka,* order dated 3.12.1996 passed by the Division Bench in Writ Appeal No. 7953/1996 and connected matters, order dated

23.7.1997 passed by this Court in SLP(C) Nos. 12012-17/1997, order dated 22.11.1995 passed by the learned Single Judge in Writ Petition No. 17603/1989 - Smt. *Sumitramma and another v. State of Karnataka and others,* order dated 1.1.1996 passed by the Division Bench of the High Court in Writ Appeal No. 5081/1995 with the same title and order dated 4.10.1996 passed in SLP (C) No. 10270/1996, *Kanaka Gruha Nirmana Sahakara Sangha v. Narayanamma* (2003) 1 SCC 228, referred to the recommendations made by SLCC in its 20th meeting held on 26.2.1988 and letter dated 21.5.1988 sent by State Government to Deputy Commissioner, Bangalore and argued that the direction given by the State Government to Deputy Commissioner, Bangalore for initiating the acquisition proceedings should be treated as approval of the housing scheme framed by the appellant.

16. Shri Vishwanatha Shetty argued that even if there was no express approval by the State Government to the acquisition of land of the appellant, the required approval will be deemed to have been granted because the State Government had contributed Rs.100 towards the acquisition of land. In support of this argument, Shri Shetty relied upon the judgments of this Court in *Smt. Somavanti and others v. The State of Punjab and others* (1963) 2 SCR 774: AIR 1963 SC 151 and *Pratibha Nema v. State of M.P.* (2003) 10 SCC 626 and agreement dated 8.7.1988 executed between the appellant and the State Government.

17. Shri P.P. Rao pointed out that in paragraph 2 of the writ petition, respondent No. 3 had specifically pleaded that the acquisition of land for carrying out any educational, housing, health or slum clearance scheme by the appellant had to be with the prior approval of the appropriate Government in terms of Section 3(f)(vi) and argued that the averments contained in that paragraph were sufficient to enable the High Court to make an inquiry whether the acquisition of the land in question was preceded by the State Government's approval to the housing scheme framed by the appellant. Learned senior counsel

submitted that the Division Bench of the High Court did not commit any error by recording a finding that the acquisition of the land belonging to respondent No. 3 cannot be treated as one made for public purpose because the appellant had not prepared any housing scheme.

18. The question whether the acquisition of the land in question can be treated as one made for public purpose as defined in Section 3(f) needs to be prefaced by making a reference to the following provisions of the 1894 Act:

"Section 3(cc) as amended by Act No.68 of 1984

3.(cc) the expression "corporation owned or controlled by the State" means any body corporate established by or under a Central, Provincial or State Act, and includes a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956), a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a State, being a society established or administered by Government and a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State, being a co-operative society in which not less than fifty-one per centum of the paid-up share capital is held by the Central Government, or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments;

Section 3(e) as amended by Act No.68 of 1984

"3.(e) the expression "Company" means-

(i) a company as defined in section 3 of the Companies Act, 1956 (1 of 1956), other than a Government company referred to in clause (cc);

(ii) a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law

for the time being in force in a State, other than a society referred to in clause (cc);

(iii) a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State, other than a co-operative society referred to in clause (cc);

Section 3(f) as amended by Act No.68 of 1984

(f) the expression "public purpose" includes-

(i) the provision of village-sites, or the extension, planned development or improvement of existing village-sites;

(ii) the provision of land for town or rural planning;

(iii) the provision of land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned;

(iv) the provision of land for a corporation owned or controlled by the State;

(v) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State;

(vi) the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such scheme, or with the prior approval of the appropriate Government, by a local authority, or a society registered under the Societies Registration Act,

1860 (21 of 1860), or under any corresponding law for the time being in force in a state, or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State;

(vii) the provision of land for any other scheme of development sponsored by Government or with the prior approval of the appropriate Government, by a local authority;

(viii) the provision of any premises or building for locating a public office, but does not include acquisition of land for Companies;

Section 39 as amended by Act No.68 of 1984

39. Previous consent of appropriate Government and execution of agreement necessary. - The provisions of sections 6 to 16 (both inclusive) and sections 18 to 37 (both inclusive) shall not be put in force in order to acquire land for any company under this Part, unless with the previous consent of the appropriate Government, not unless the Company shall have executed the agreement hereinafter mentioned.

40. Previous enquiry. - (1) Such consent shall not be given unless the appropriate Government be satisfied, either on the report of the Collector under section 5A, sub-section (2), or by an enquiry held as hereinafter provided, -

(a) that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workmen employed by the Company or for the provision of amenities directly connected therewith, or

(aa) that such acquisition is needed for the construction of some building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, or

(b) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public.

(2) Such enquiry shall be held by such officer and at such time and place as the appropriate Government shall appoint.

(3) Such officer may summon and enforce the attendance of witnesses and compel the production of documents by the same means and, as far as possible, in the same manner as is provided by the Code of Civil Procedure, 1908 (5 of 1908) in the case of Civil Court.

41. Agreement with appropriate Government. - If the appropriate Government is satisfied after considering the report, if any, of the Collector under section 5A, sub-section (2), or on the report of the officer making an inquiry under section 40 that the proposed acquisition is for any of the purposes referred to in clause (a) or clause (aa) or clause (b) of sub-section (1) of section 40, it shall require the Company to enter into an agreement with the appropriate Government, providing to the satisfaction of the appropriate Government for the following matters, namely:-

(1) the payment to the appropriate Government of the cost of the acquisition;

(2) the transfer, on such payment, of the land to the Company;

(3) the terms on which the land shall be held by the Company;

(4) where the acquisition is for the purpose of erecting dwelling houses or the provision of amenities connected therewith, the time within which, the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided;

(4A) where the acquisition is for the construction of any building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, the time within which, and the conditions on which, the building or work shall be constructed or executed; and

(5) where the acquisition is for the construction of any other work, the time within which and the conditions on which the work shall be executed and maintained and the terms on which the public shall be entitled to use the work.

42. Publication of agreement. - Every such agreement shall, as soon as may be after its execution, be published in the Official Gazette, and shall thereupon (so far as regards the terms on which the public shall be entitled to use the work) have the same effect as if it had formed part of this Act."

(3) the terms on which the land shall be held by the Company;

(4) where the acquisition is for the purpose of erecting dwelling houses or the provision of amenities connected therewith, the time within which, the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided;

(4A) where the acquisition is for the construction of any building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, the time within which, and the conditions on which, the building or work shall be constructed or executed; and

(5) where the acquisition is for the construction of any other work, the time within which and the conditions on which the work shall be executed and maintained and the terms on which the public shall be entitled to use the work.

42. Publication of agreement. - Every such agreement shall, as soon as may be after its execution, be published in the Official Gazette, and shall thereupon (so far as regards the terms on which the public shall be entitled to use the work) have the same effect as if it had formed part of this Act."

19. An analysis of the definitions noted hereinabove shows that all the cooperative societies have been classified into two categories. The first category consists of the cooperative societies in which not less than 51% of the paid-up share capital is held by the Central Government or any State Government or partly by the Central Government and partly by one or more State Governments. The second category consists of the cooperative societies other than those falling within the definition of the expression 'corporation owned or controlled by the State' [Section 3(cc)]. The definition of the term 'company' contained in Section 3(e) takes within its fold a company as defined in Section 3 of the Companies Act, 1956 other than a government company referred to in clause (cc), a society registered under the Societies Registration Act or under any corresponding law framed by the State legislature, other than a society referred to in clause (cc) and a cooperative society defined as such in any law relating to cooperative societies for the time being in force in any State, other than a cooperative society referred to in clause (cc). The definition of the expression 'public purpose' contained in Section 3(f) is inclusive. As per clause (vi) of the definition, the expression 'public purpose' includes the provision of land for carrying out any educational, housing health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such scheme, or, with the prior approval of the appropriate Government, by a Local Authority, or a society registered under the Societies Registration Act, 1860 or any corresponding law in force in a State or a cooperative society as defined in any law relating to cooperative societies for the time being in force in any State.

To put it differently, the acquisition of land for carrying out any education, housing, health or slum clearance scheme by a registered society or a cooperative society can be regarded as an acquisition for public purpose only if the scheme has been approved by the appropriate Government before initiation of the acquisition proceedings. If the acquisition of land for a cooperative society, which is covered by the definition of the term 'company' is for any purpose other than public purpose as defined in Section 3(f), then the provisions of Part VII would be attracted and mandate thereof will have to be complied with.

20. In our view, there is no merit in the argument of learned senior counsel for the appellant and learned counsel for the State that the Division Bench of the High Court committed an error by recording a finding on the issue of violation of Section 3(f)(vi) of the 1894 Act because respondent No. 3 had not raised any such plea in the writ petition. In paragraph 2 of the writ petition, respondent No. 3 made the following averments:

> "The acquisition of any land under the Act for the benefit of the 2nd respondent will not be for a public purpose and will have to be in accordance with the provisions contained in Part VII of the Act. In any case, even if the acquisition is for carrying out any educational, housing, health or slum clearance scheme of the 2nd respondent, the same shall be with the prior approval of the appropriate Government (Vide Sec. 3(f)(vi) of the Act)."

The appellant neither controverted the above-extracted averments nor produced any document before the High Court to show that it had prepared a housing scheme and the same had been approved by the State Government before the issue of notification under Section 4(1) of the 1894 Act. Therefore, the Division Bench of the High Court rightly held that the acquisition in question was not for a public purpose as defined in Section 3(f)(vi) of the 1894 Act.

21. We shall now examine whether the appellant had, in

fact, framed a housing scheme and the same had been approved by the State Government. The first of these documents is representation dated 7.12.1984 made by the Executive Director of the appellant to the Minister of Revenue, Government of Karnataka. The other two documents are letter dated 21.5.1988 sent by the State Government to Deputy Commissioner, Bangalore to issue notification under Section 4(1) of the 1894 Act and agreement dated 7.8.1988 entered into between the Executive Director of the appellant and the State Government. A close and careful reading of these documents reveals that although, in the representation made by him to the Revenue Minister, the Executive Director of the appellant did make a mention that the object of the society is to provide house sites to its members who belong to working class and other backward class people belonging to weaker class of society and the members are poor and siteless people, there was not even a whisper about any housing scheme. The direction issued by the State Government to Deputy Commissioner, Bangalore to issue the preliminary notification for an extent of 207 acres 29 guntas land also does not speak of any housing scheme. The agreement entered into between the appellant through its Executive Director and the State Government does not contain any inkling about the housing scheme framed by the appellant. It merely mentions about the proposed formation of sites and construction of houses for the members of the appellant and payment of cost for the acquired land. The agreement also speaks of an inquiry having been got made by the State Government in conformity with the provisions of the 1894 Act and the grant of consent for the acquisition of land for the benefit of society's members. The agreement then goes on to say that the appellant shall pay to the Government the entire costs of the acquisition of land and expenses. Paragraph 2 of the conditions incorporated in the agreement speaks of transfer of land to the society as to vest in the company. Clause 9(a) of the agreement did provide for token contribution of Rs.100 by the Deputy Commissioner / Special Deputy Commissioner towards the compensation to be determined by the Assistant Commissioner/Special Land Acquisition Officer, but that is not relatable to any housing scheme framed by the appellant. It is, thus, evident that the appellant had not framed any housing scheme and obtained its approval before the issue of notification under Section 4(1) of the 1894 Act.

22. The 1976 Act does provide for framing of various schemes including housing scheme. Section 15 of that Act empowers the BDA to undertake works and incur expenditure for development. In terms of Section 15(1)(a), the BDA is entitled to draw up detailed schemes for the development of the Bangalore Metropolitan Area and in terms of clause (b), the BDA can with the previous approval of the Government undertake any work for the development of the Bangalore Metropolitan Area and incur expenditure therefor and also for the framing and execution of development schemes. Sub-sections (2) and (3) empower the BDA to make and take up any new or additional development scheme either on its own or on the recommendations of the Local Authority or as per the direction of the State Government. Section 16 of the 1976 Act lays down that every development scheme shall provide for the acquisition of any land which is considered necessary for or affected by the execution of the scheme; laying and re-laying out all or any land including the construction and reconstruction of buildings and formation and alternation of scheme, drainage, water supply and electricity. Sub-section (3) of Section 16 envisages construction of houses by the BDA as part of the development scheme. Section 32 which contains a *non obstante* clause postulates forming of new extensions or layouts by private persons. Though, sub-section (1) thereof is couched in negative form, it clearly provides for formation of any extension or layout by a private person with the written sanction of the BDA and subject to the terms and conditions which it may specify. Sub-section (2) of Section 32 provides for making of written application along with plans and sections showing

various matters enumerated in clauses (a) to (d). Similar provisions are contained in Section 18 of the Karnataka Housing Board Act.

23. Although, the appellant may not have been required to frame a scheme in strict conformity with the provisions of the 1976 Act and the Housing Board Act, but it was bound to frame scheme disclosing the total number of members eligible for allotment of sites, the requirement of land including the size of the plots and broad indication of the mode and manner of development of the land as a layout. The State Government could then apply mind whether or not the housing scheme framed by the appellant should be approved. However, as mentioned above, the appellant did not produce any evidence before the High Court to show that it had framed a housing scheme and the same was approved by the State Government before the issue of notification under Section 4(1) of the 1894 Act. Even before this Court, no material has been produced to show that, in fact, such a scheme had been framed and approved by the State Government. Therefore, the Division Bench of the High Court rightly referred to Section 3(f)(vi) and held that in the absence of a housing scheme having been framed by the appellant, the acquisition of land belonging to respondent No. 3 was not for a public purpose as defined in Section 3(f)(vi).

24. In *Narayana Reddy v. State of Karnataka* ILR 1991 (3) KAR 2248, the Division Bench of the High Court considered whether the acquisition of land made on behalf of 7 house building cooperative societies including H.M.T. Employees' Cooperative Society and Vyalikaval House Building Cooperative Society was for a public purpose as defined in Section 3(f)(vi) or the same was colourable exercise of power by the State Government. A reading of the judgment shows that when the writ petitions questioning the acquisition of land were placed before the learned Single Judge, he felt that the points which were raised by the petitioners had not been considered

in the earlier judgment of the Division Bench in *Narayana Raju v. State of Karnataka* ILR 1989 KAR 376, which was confirmed by this Court in *Narayana Raju v. State of Karnataka* ILR 1989 KAR 406 and referred the matter to the Division Bench under Section 9 of the Karnataka High Court Act. The Division Bench first considered whether the acquisition of land on behalf of house building cooperative societies was for a public purpose. After noticing the relevant statutory provisions, the Division Bench referred to the judgments of this Court in *State of Gujarat v. Chaturbhai Narsibhai* AIR 1975 SC 629, *General Government Servants Cooperative Housing Society Limited v. Kedar Nath* (1981) 2 SCC 352 and *M/s. Fomento Resorts and Hotels Limited v. Gustavo Ranato Da Cruz Pinto* AIR 1985 SC 736 and held that the earlier decisions support the writ petitioners' plea that they were entitled to be heard before the Government could grant approval for the acquisition of land on behalf of cooperative societies, but their plea cannot be accepted in view of the latter judgment. The Division Bench further held that the aggrieved person can raise all points during the course of an inquiry held under Section 5A of the 1894 Act. The Division Bench then referred to the averments contained in Writ Petition Nos.7683-7699/1988 in which the acquisition of land for various House Building Cooperative Societies was challenged, the advertisement issued by the society, agreement entered into between HMT Cooperative Society and the Estate Agent who assured that he will get the acquisition approved at an early date subject to payment of the specified amount, various reports including the one prepared by G.V.K.Rao, order dated 14.1.1991 passed by the State Government and quashed the acquisition.

25. The Division Bench of the High Court held that the whole acquisition was vitiated due to malafides and manipulations done by the House Building Cooperative Societies through the Estate Agent. The Division Bench also referred to Section 23 of the Contract Act, judgment of this Court in *Rattan Chand Hira Chand v. Askar Nawaz Jung* JT

1991 (1) SC 433 and held as under:

> "Applying the ratio of the above judgment, there can be no doubt that the Agreements entered into between the six respondent-Societies and their respective agents in which one of the condition was payment of huge sums of money by the Society to the agent in consideration of which the agent had to get the Preliminary and Final Notifications issued by the Government, was for the purpose of influencing the Government and to secure approval for acquisition of the lands and therefore opposed to public policy.
>
> The question however, for our consideration is, whether the impugned Notifications are liable to be quashed. In our opinion, once it is clear that the Agreement entered into between the Societies and the agents concerned, under which the purport of one of the clauses was that the agent should influence the Government and to procure Preliminary and Final Notifications under Sections 4 and 6 of the Act respectively are opposed to public policy, the impugned Notifications being the product or fruits of such an agreement are injurious to public interest and detrimental to purity of administration and therefore cannot be allowed to stand. As seen from the findings of G.V.K. Rao Inquiry Report, in respect of five respondent-Societies and the report of the Joint Registrar in respect of Vyalikaval House Building Cooperative Society, these Societies had indulged in enrolling large number of members illegally inclusive of ineligible members and had also indulged in enrolling large number of bogus members. The only inference that is possible from this is that the office bearers of the Societies had entered into unholy alliance with the respective agents for the purpose of making money, as submitted for the petitioners. Otherwise, there is no reason as to why such an Agreement should have been brought about by the office bearers of the Society

> and the agents. Unless these persons had the intention of making huge profits as alleged by the petitioners, they would not have indulged in entering into such Agreements and would not have indulged in enrolment of ineligible and bogus members. The circumstance that without considering all these relevant materials the Government had accorded its approval, is sufficient to hold that the agents had prevailed upon the Government to take a decision to acquire the lands without going into all those relevant facts. The irresistible inference flowing from the facts and circumstances of these cases is, whereas the power conferred under the Land Acquisition Act is for acquiring lands for carrying out housing scheme by a housing society, in each of the cases the acquisition of lands is not for a bona fide Housing Scheme but is substantially for the purpose of enabling the concerned office bearers of respondent-Societies and their agents to indulge in sale of sites in the guise of allotment of sites to the Members/Associate Members of the Society and to make money as alleged by the petitioners and therefore it is a clear case of colourable exercise of power. Thus the decision of the Government to acquire the lands suffers from legal mala fides and therefore the impugned Notifications are liable to be struck down."

26. In the 1st H.M.T. Case, this Court approved the judgment of the Division Bench of the High Court. The three-Judge Bench considered questions similar to those raised in these appeals, referred to the agreement entered into between the appellant and the State Government whereby the former agreed to abide by the conditions specified in Sections 39 and 40 of Part VII of the 1894 Act and held:

> "12. There is no dispute that the society with which we are concerned shall not be covered by the expression "corporation owned or controlled by the State", because the said expression shall include a cooperative society,

being a cooperative society in which not less than 51 per centum of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments.

13. The substituted definition of the expression 'company' in Section 3(e)(iii) will certainly include the appellant-Society. The substituted definition of the expression 'company' shall include cooperative society, within the meaning of any law relating to cooperative societies other than those referred to in clause (cc) of Section 3 of the Act. Such cooperative society shall be deemed to be a company, to which provisions of Chapter VII relating to acquisition of land for company shall be applicable.

14. In view of the substituted definition of the expression "public purpose", in Section 3(f)(vi), the provision for carrying out any housing scheme sponsored by the Government or by any authority established by Government for carrying out any such scheme shall be deemed to be a "public purpose". It further says that the provision of land for carrying out any housing scheme with prior approval of the State Government by a cooperative society within the meaning of any law relating to cooperative societies for the time being in force in any State, shall be deemed to be a "public purpose". As such for any housing cooperative society lands can be acquired by the appropriate Government, treating the same as acquisition for the public purpose. But, in that event, there has to be a prior approval of such scheme by the appropriate Government. When the lands are acquired for any cooperative society with prior approval of the scheme by the State Government, there is no question of application of the provisions of Part VII of the Act. Such acquisition shall be on the mode of acquisition by the appropriate Government for any public purpose.

18. Now the question which is to be answered is as to whether in view of the definition of "public purpose" introduced by the aforesaid Amending Act 68 of 1984 in Section 3(f)(vi), is it open to the appropriate Government to acquire land for cooperative society for housing scheme without making proper enquiry about the members of the society and without putting such housing cooperative society to term in respect of nature of construction, the area to be allotted to the members and restrictions on transfer thereof?

19. According to us, in Section 3(f)(vi) the expression 'housing' has been used along with educational and health schemes. As such the housing scheme contemplated by Section 3(f)(vi) shall be such housing scheme which shall serve the maximum number of members of the society. Such housing scheme should prove to be useful to the public. That is why Parliament while introducing a new definition of "public purpose", said that any scheme submitted by any cooperative society relating to housing, must receive prior approval of the appropriate Government and then only the acquisition of the land for such scheme can be held to be for public purpose. If requirement of Section 3(f)(vi) is not strictly enforced, every housing cooperative society shall approach the appropriate Government for acquisition by applying Section 3(f)(vi) instead of pursuing the acquisition under Part VII of the Act which has become more rigorous and restrictive. In this background, it has to be held that the prior approval, required by Section 3(f)(vi), of the appropriate Government is not just a formality; it is a condition precedent to the exercise of the power of acquisition by the appropriate Government for a housing scheme of a cooperative society.

20. In the present case, a hybrid procedure appears to have been followed. Initially, the appellant-Society through M/s

S.R. Constructions purported to acquire the lands by negotiation and sale by the landholders. Then from terms of the agreement dated 17-3-1988, it appears that the procedure prescribed in Part VII was to be followed and the lands were to be acquired at the cost of the appellant-Society treating it to be a 'company'. The allegation made on behalf of the appellant-Society that the housing scheme had been approved by the appropriate Government on 7-11-1984 shall not be deemed to be a prior approval within the meaning of Section 3(f)(vi) but an order giving previous consent as required by Section 39 of Part VII of the Act. In the agreement dated 17-3-1988 it has been specifically stated:

> "And whereas the Government having caused inquiry to be made in conformity with the provisions of the said Act and being satisfied as a result of such inquiry that the acquisition of the said land is needed for the purpose referred to above has consented to the provisions of the said Act being in force in order to acquire the said land for the benefit of the society members to enter in the agreement hereinafter contained with the Government."

But, ultimately, the lands have been acquired on behalf of the appropriate Government treating the requirement of the appellant-Society as for a public purpose within the meaning of Section 3(f)(vi). It is surprising as to how respondent M/s S.R. Constructions entered into agreement with the appellant-Society assuring it that the lands, details of which were given in the agreement itself, shall be acquired by the State Government by following the procedure of Sections 4(1) and 6(1) and for this, more than one crore of rupees was paid to M/s S.R. Constructions (Respondent 11)."

27. The three Judge Bench also approved the view taken by the High Court that the acquisition of land was vitiated because the decision of the State Government was influenced by the Estate Agent with whom the appellant had entered into an agreement. Paragraphs 21 and 22 of the judgment, which contain discussion on this issue are extracted hereunder:

> "21. Mr G. Ramaswamy, learned Senior Counsel appearing on behalf of the appellant, submitted that merely because the appellant-Society had entered into an agreement with Respondent 11, M/s S.R. Constructions, in which the latter for the consideration paid to it had assured that the lands in question shall be acquired by the State Government, no adverse inference should be drawn because that may amount to a tall claim made on behalf of M/s S.R. Constructions in the agreement. He pointed out that the notifications under Sections 4(1) and 6(1) have been issued beyond the time stipulated in the agreement and as such, it should be held that the State Government has exercised its statutory power for acquisition of the lands in normal course, only after taking all facts and circumstances into consideration. There is no dispute that in terms of agreement dated 1-2-1985 payments have been made by the appellant-Society to M/s S.R. Constructions. This circumstance alone goes a long way to support the contention of the writ petitioners that their lands have not been acquired in the normal course or for any public purpose. In spite of the repeated query, the learned counsel appearing for the appellant-Society could not point out or produce any order of the State Government under Section 3(*f*)(*vi*) of the Act granting prior approval and prescribing conditions and restrictions in respect of the use of the lands which were to be acquired for a public purpose. There is no restriction or bar on the part of the appellant-Society on carving out the size of the plots or the manner of allotment or in respect of construction over the same. That is why the framers of the Act have required the

appropriate Government to grant prior approval of any housing scheme presented by any cooperative society before the lands are acquired treating such requirement and acquisition for public purpose. It is incumbent on the part of the appropriate Government while granting approval to examine different aspects of the matter so that it may serve the public interest and not the interest of few who can as well afford to acquire such lands by negotiation in open market. According to us, the State Government has not granted the prior approval in terms of Section 3(*f*)(*vi*) of the Act to the housing scheme in question. The power under Sections 4(1) and 6(1) of the Act has been exercised for extraneous consideration and at the instance of the persons who had no role in the decision-making process — whether the acquisition of the lands in question shall be for a public purpose. This itself is enough to vitiate the whole acquisition proceeding and render the same invalid.

22. In the present case there has been contravention of Section 3(*f*)(*vi*) of the Act inasmuch as there was no prior approval of the State Government as required by the said section before steps for acquisition of the lands were taken. The report of Shri G.K.V. Rao points out as to how the appellant-Society admitted large number of persons as members who cannot be held to be genuine members, the sole object being to transfer the lands acquired for "public purpose", to outsiders as part of commercial venture, undertaken by the office-bearer of the appellant-Society. We are in agreement with the finding of the High Court that the statutory notifications issued under Sections 4(1) and 6(1) of the Act have been issued due to the role played by M/s S.R. Constructions, Respondent 11. On the materials on record, the High Court was justified in coming to the conclusion that the proceedings for acquisition of the lands had not been initiated because the State Government was satisfied about the existence of the public purpose but at the instance of agent who had collected

more than a crore of rupees for getting the lands acquired by the State Government."

28. The view taken by this Court in 1st H.M.T. case was reiterated by another three Judge Bench in the case titled as *H.M.T. House Building Cooperative Society v. M. Venkataswamappa* (1995) 3 SCC 128 and by a two Judge Bench in *Vyalikawal House Building Cooperative Society v. V. Chandrappa* (2007) 9 SCC 304. In the last mentioned judgment, this Court declined to accept the argument of the appellant's counsel that the respondents have accepted the amount and observed:

> "Learned counsel for the appellant tried to persuade us that as the amount in question has been accepted by the respondents, it is not open for them now to wriggle out from that agreement. It may be that the appellant might have tried to settle out the acquisition but when the whole acquisition emanates from the aforesaid tainted notification any settlement on the basis of that notification cannot be validated. The fact remains that when the basic notification under which the present land is sought to be acquired stood vitiated then whatever money that the appellant has paid, is at its own risk. Once the notification goes no benefit could be derived by the appellant. We are satisfied that issue of notification was mala fide and it was not for public purpose, as has been observed by this Court, nothing turns on the question of delay and acquiescence."

29. As noticed earlier, in this case also no housing scheme was framed by the appellant which is *sine qua non* for treating the acquisition of land for a cooperative society as an acquisition for public purpose within the meaning of Section 3(f). Not only this, the appellant executed agreement dated 21.2.1988 for facilitating the acquisition of land in lieu of payment of a sum of rupees more than 5 crores. This agreement was similar to the agreement executed by H.M.T. Employees' House Building Society with M/s. S.R.

Constructions. The Estate Agent engaged by the appellant had promised that it will get the notifications issued under Sections 4(1) and 6(1) within four months and three months respectively. The huge amount which the appellant had agreed to pay to the Estate Agent had no co-relation with the services provided by it. Rather, the amount was charged by the Estate Agent for manipulating the State apparatus and facilitating the acquisition of land and sanction of layout etc. without any obstruction. Such an agreement is clearly violative of Section 23 of the Contract Act.

30. The stage has now reached for taking note of the orders passed by the High Court and this Court in other cases as also the judgment in *Kanaka Gruha Nirmana Sahakara Sangha v. Narayanamma* (2003) 1 SCC 228, which have been relied upon by the learned senior counsel for the appellant in support of their argument that the H.M.T.'s case has not been followed in other similar cases. We have also taken note of some other orders, copies of which have been produced by the appellant.

(i) Writ Petition Nos. 28577-86/1995 - *Byanna and others v. State of Karnataka and others* were dismissed by the learned Single Judge vide order dated 12.4.1996. The only contention raised in that case was that the acquisition was tainted by fraud. The learned Single Judge briefly adverted to the averments contained in writ petitions and the counter affidavits and negatived challenge to the acquisition proceeding. Paragraphs 3 to 6 of that order are extracted below:

> "3. The contention of the learned counsel for the petitioner is that the acquisition was made fraudulently and there were some mediators, which clearly shows that the entire acquisition proceedings are fraudulent. He, therefore, relies on the Judgment of the Supreme Court in *H.M.T. House Building Cooperative Society Vs. Syed Khader* (ILR 1995 Kar. 1962). He further submits that the petitioners being villagers, were not aware of their rights, and they did not approach this Court earlier.
>
> 4. On being issued notice, the respondents 1 and 2 have filed their statement of objections. The various dates mentioned above are furnished to the Court, stating the various steps taken during the acquisition proceedings. It was further stated, there was no middle man and that the General Power of Attorney was given only after the issuance of Notification under Section 6(1) Notification. It was, therefore, contended that there was no fraud played at any stage.
>
> 5. Based on the decision mentioned above and the facts stated in the objections, it is clear that there was no fraud in the acquisition proceedings. The purpose of acquisition being for a society has to be held to be for a public purpose.
>
> 6. The petitioners have not explained the long delay in approaching this Court. The dates mentioned above clearly show that the petitioners have approached this Court after nearly six years. The contention of the learned Counsel for the petitioners that the petitioners being villagers were unaware of their rights, cannot be accepted. No other reason is given explaining the laches. Apart from there being no merits in the case, the writ petitions are to be dismissed on the ground of long laches, which is not explained. The writ petitions are dismissed."

Writ Appeal No. 7953/1996 - *Byanna and others v. State of Karnataka and others* and batch was dismissed by the Division Bench by relying upon the observations made by the learned Single Judge that no middlemen was involved in the transaction; that the acquisition was for a public purpose within the meaning of the 1894 Act and the appellants had failed to explain inordinate delay. SLP (C) Nos. 12012-12017/1997 titled *Byanna and others v. State of Karnataka and others* were

dismissed by this Court by recording the following order:

"The SLPs are dismissed."

(ii) Writ Petition No. 35837/1994 - *Subramani and others v. the Union of India and others* and batch, in which large number of Judges of (sitting and retired) were impleaded as party respondents was disposed of by the Division Bench of the High Court - *Subramani v. Union of India* ILR 1995 KAR 3139. The Division Bench rejected the plea that the acquisition of land for Karnataka State Judicial Department Employees' House Building Cooperative Society was vitiated because the middlemen were responsible for the acquisition of land as had happened in H.M.T.'s case. The Division Bench noted that the terms of the agreement entered into between the Society and M/s. Devatha Builders was not for the acquisition of land but only for development of the acquired land. The Division Bench also noted that the agreement was entered into between the Society and the owners in 1985, whereas the Government gave approval for acquisition in 1985 and the agreement with the developer was of 1986. The Division Bench also noted that no stranger had been inducted as a member of the society. However, the acquisition which was under challenge in Writ Petition No.28707 of 1995 was declared illegal because the concerned House Building Cooperative Society has not framed any housing scheme and obtained approval thereof from the State Government. The Division Bench also expressed the view that remedy under Article 226 was discretionary and it was not inclined to nullify the acquisition made for the society because the petitioners had approached the Court after long lapse of time and there was no explanation for the delay.

(iii) Writ Appeal No. 2074/1994 - Sh. Ramchandrappa v. State of Karnataka and connected cases were dismissed by the Division Bench of the High Court mainly on the ground that award had already been passed and the appellants had participated in the award proceedings and further that the appellants had approached the Court at the instance of some

rival developers. The Division Bench further held that the disputed acquisition cannot be termed as colourable exercise of power. SLP (C) Nos.9088-9097/1997 with the same title were summarily dismissed by this Court on 1.5.1997

(iv) Writ Petition No. 15508/1998 - Bachappa v. State of Karnataka was dismissed by the learned Single Judge vide order dated 9.7.1998 by observing that the acquisition cannot be nullified by entertaining writ petitions filed after three years simply because in H.M.T.'s case the acquisition proceedings were quashed. Writ Appeal Nos. 3810-12/1998 filed against the order of the learned Single Judge were dismissed by the Division Bench vide order dated 24.8.1998 albeit without assigning reasons. SLP (C) …. CC Nos. 1764-69/1999 were dismissed by this Court on 14.5.1999 by recording the following order:

"Special Leave Petitions are dismissed.'

(v) Writ Petition Nos. 7287-7300/1993 were dismissed by the learned Single Judge on 3.1.1996 on the ground of delay of four years. Writ Appeal Nos. 920-925/1996 and batch filed against the aforesaid order was dismissed by the Division Bench vide order dated 7.7.1997 on the ground that the appellants had failed to explain the delay. SLP(C) Nos. 15337-38/1997 were dismissed by this Court by the usual one line order.

(vi) Writ Petition Nos. 30868-70/1996 were dismissed by the learned Single Judge vide order dated 29.11.1996 on the ground that in the earlier round they had failed to convince the Court on the issue of invalidity of acquisition. Writ Appeal No.146/1997 and connected matters were dismissed by the Division Bench on 2.6.1997 by recording its agreement with the learned Single Judge. SLP(C) …….CC Nos. 189-191/1998 were dismissed by this Court on 20.1.1998.

(vii) Writ Petition No. 586/1991 Muniyappa v. State of

Karnataka, in which the petitioner had challenged the acquisition on the ground that no scheme had been framed under Section 3(f)(vi) of the 1894 Act, was dismissed by the learned Single Judge on 24.11.1994 by relying upon the judgments in *Narayana Raju v. State of Karnataka* ILR 1989 KAR 376 and *Narayana Reddy v. State of Karnataka* ILR 1991 KAR 2248. Writ Appeal No. 281/1995 filed against the order of the learned Single Judge was dismissed by the Division Bench vide judgment dated 14.2.1995. The Division Bench held that framing of Rules is not a condition precedent for the acquisition of land for the purpose of a cooperative society. SLP(C)…CC No. 14581/1995 *Muniyappa v. State of Karnataka* was dismissed by this Court on 4.10.1996 by recording the following order:

> "We have heard the learned counsel for the parties. The contention that has been raised by the learned counsel for the petitioner on the basis of the decision of this Court of *HMT House Building Co-operative Society vs. Syed Khader & Ors.* (1995) 2 SCC 677, cannot be accepted in view of the fact that a scheme had been prepared in the present case and it had been approved by the State Government and there is nothing to show that the said approval is vitiated. The special leave petition is, therefore dismissed.

(viii) Writ Petition No. 41397/1995 and batch were dismissed by the learned Single Judge on 21.6.1996 by relying upon the judgment in *Subramani v. Union of India* ILR 1995 KAR 3139. The learned Single Judge held that the petitioners had approached the Court after almost seven years of finalization of the acquisition proceedings and there was no cogent explanation for the delay. Writ Appeal Nos. 7057-72/1996 *Smt. Akkayamma v. State of Karnataka* were dismissed by the Division Bench vide order dated 12.8.1996 on the ground that the appellants had already received compensation more than four years ago and they had entered into an

agreement for sale of the property. SLP(C) Nos. 18239-18254/1996 were summarily dismissed by this Court on 20.9.1996.

(ix) Writ Petition No. 17603/1989 Smt. Sumitramma v. State of Karnataka was dismissed by the learned Single Judge on 22.11.1995 by relying upon the averment contained in the counter affidavit of respondent No. 4 that it had submitted a scheme to the State Government and the acquisition was made after approval of the scheme. The learned Single Judge also relied upon the judgment in Narayana Raju's case in support of his conclusion that if the Government decides to acquire the land for a cooperative society on its being satisfied that the land was to put up houses after forming layout, etc., the approval to such a scheme can be inferred from the very fact that the Government was a party to an agreement which ensured that the lands will be utililised for implementing the purpose of the acquisition. Writ Appeal No. 5081/1995 filed against the order of the learned Single Judge was dismissed by the Division Bench on 1.1.1996 by one word order "Dismissed.". SLP(C) No. 10270/1996 was dismissed by this Court on 4.10.1996 by recording the following order:

> "Strong reliance is placed by the learned counsel for the petitioner on this Court's decision *H.M.T. House Building Cooperative Society v. Syed Khader and others* (1995) 2 SCC 677. The submission is that in the case cited above the Enquiry committee had submitted a report on the basis whereof a provision was made in the agreement dated 17.3.88 which recited that the Government having caused enquiry to be made in conformity with the provisions of the Act and being satisfied with the result of such enquiry that the acquisition of such land is needed for the purpose referred to above and the Government having consented to acquire the said land for the benefit of the society members they have entered into an agreement with the Government. While this recital indeed is found in the agreement dated 17.3.88 no separate order was made by

the Government granting approval as in the present case. In the present case a separate order dated 14.10.1985 was passed by the Government and under the signatures of the Under Secretary to the Government, Revenue Department, conveying the approval of the Government in the issuance of the Notification dated 21.1.86 under Section 4 of the Land Acquisition Act to acquire certain parcels of land in favour of L.R.D.E. Employees Housing Co-operative Society, Bangalore. Therefore, there is a separate specific order made by the Government on the basis of the recommendation of the Committee unlike in the H.M.T. case. We, therefore, do not see any merit in this petition and dismiss the same. No orders in I.A. No. 2."

(x) Writ Petition No. 38745/1995 - *A.K. Erappa v. State of Karnataka* was dismissed by the learned Single Judge mainly on the ground that the writ petitioners had participated in the award proceedings and agreed that the compensation be disbursed to his power of attorney and also approached the society for allotment of a site. Writ Appeal No. 6914/1996 filed by the appellant was dismissed by the Division Bench on 7.10.1996. SLP (C) No. 1528/1997 was summarily dismissed by this Court on 3.2.1997.

(xi) Writ Appeal Nos. 7122-34/1996 - *Smt. Hanumakka v. State of Karnataka* were dismissed by the Division Bench of the High Court vide order dated 12.9.1996 on the ground of delay and also on the ground that the appellant had not approached the Court with clean hands. SLP (C) Nos. 23256-68/1996 were summarily dismissed by this Court on 9.12.1996.

31. In Kanaka Gruha Nirmana Sahakara Sangha's case, two questions were considered by this Court. The first question was whether there was any inconsistency between the Land Acquisition (Mysore Extension and Amendment) Act, 1961 and the 1894 Act. After examining the relevant constitutional

provisions and the two enactments, this Court answered the question in negative. The second question considered by the Court was whether the Government had approved the housing scheme framed by the appellant. The Court noted that Assistant Registrar of Cooperative Societies, Three Men Committee and the State Level Committee had recommended the acquisition of land on behalf of the appellant and the Government had directed Special Deputy Commissioner, Bangalore to initiate acquisition proceedings by issuing Section 4(1) Notification and proceeded to observe:

> "Considering the fact that the State Government directed the Assistant Registrar of Cooperative Societies of Bangalore to verify the requirement of the members of the Society and also the fact that the matter was placed before the Committee of three members for scrutiny and thereafter the State Government has conveyed its approval for initiating the proceedings for acquisition of the land in question by letter dated 14-11-1985, it cannot be said that there is lapse in observing the procedure prescribed under Section 3(f)(vi). Prior approval is granted after due verification and scrutiny."

32. In our view, none of the orders and judgments referred to hereinabove can be relied upon for holding that even though the appellant had not framed any housing scheme, the acquisition in question should be deemed to have been made for a public purpose as defined in Section 3(f)(vi) simply because in the representation made by him to the Revenue Minister of the State, the Executive Director of the appellant had indicated that the land will be used for providing sites to poor and people belonging to backward class and on receipt of the recommendations of SLCC the State Government had directed Special Deputy Commissioner to issue notification under Section 4(1) of the 1894 Act and that too by ignoring the ratio of the judgments of three Judge Benches in 1st and 2nd H.M.T. cases and the judgment of two Judge Bench in *Vyalikawal*

House Building Cooperative Society's case. In majority of the cases decided by the High Court to which reference has been made hereinabove, the petitioners were non-suited on the ground of delay and laches or participation in the award proceedings. In Muniyappa's case, the judgment in 1st H.M.T. case was distinguished on the premise that a scheme had been framed and the same had been approved by the State Government and further that the petitioner had failed to show that the approval was vitiated due to intervention of the extraneous consideration. In Sumitramma's case, this Court noted that in 1st H.M.T. case, no separate order was made by the Government for grant of approval whereas in Sumitramma's case an order has been passed on 14.10.1985 conveying the Government's approval for the issuance of Notification dated 21.1.86 under Section 4 of the 1894 Act. In Kanaka Gruha's case also, this Court treated the direction contained in letter dated 14.11.1985 of the Revenue Commissioner and Secretary to Government to Special Deputy Commissioner, Bangalore to initiate the acquisition proceedings by issuing Notification under Section 4(1) as an approval within the meaning of Section 3(f)(vi). In none of the three cases, this Court was called upon to consider whether the decision taken by the Government to sanction the acquisition of land in the backdrop of an agreement executed by the society with a third party, as had happened in the H.M.T. cases and the present case whereby the Estate Agent agreed to ensure the acquisition of land within a specified time frame subject to payment of huge money and the fact that agreement entered into between the society and the Government was in the nature of an agreement contemplated by Part VII. While in 1st H.M.T.'s case, the amount paid to M/s. S. R. Constructions was rupees one crore, in the present case, the appellant had agreed to pay more than rupees five crores for facilitating issue of Notifications under Sections 4(1) and 6(1) and sanction of the layouts and plans by the BDA within a period of less than one year. Therefore, we have no hesitation to hold that the appellant's case is squarely covered by the ratio of the H.M.T. cases and the High

Court did not commit any error by relying upon the judgment in 1st H.M.T case for declaring that the acquisition was not for a public purpose.

33. Another facet of the appellant's challenge to the judgment in the case of respondent No. 3 is that even if there was no express approval by the State Government to the acquisition of land, the approval will be deemed to have been granted because the State Government had contributed Rs.100 towards the acquisition of land. Shri Vishwanatha Shetty relied upon the judgments of this Court in *Smt. Somavanti and others v. The State of Punjab and others* (1963) 2 SCR 774, *Pratibha Nema v. State of M.P.* (2003) 10 SCC 626 and agreement dated 8.7.1988 and argued that the decision of the State Government to execute an agreement with the appellant should be construed as its approval of the proposal made for the acquisition of land. In our view, this argument of the learned senior counsel lacks merit. At the cost of repetition, we consider it appropriate to mention that the agreement was signed by the Executive Director of the appellant and the State Government in compliance of Section 41, which finds place in Part VII of the 1894 Act. Therefore, a nominal contribution of Rs.100 by the Special Deputy Commissioner cannot be construed as the State Government's implicit approval of the housing scheme which had never been prepared. In Smt. Somavanti's case, the appellants had challenged the acquisition of their land by the State Government on the ground that the provisions of the 1894 Act could not be invoked for the benefit of respondent No. 6, who was interested in setting up an industry over the acquired land. The majority of the Constitution Bench held that the declaration made by the State Government that the land is required for a public purpose is conclusive and the same was not open to be challenged. The argument made on behalf of the petitioners that there could be no acquisition for a public purpose unless the Government had made a contribution for the acquisition at public expense and that the contribution of Rs.100 was insignificant was rejected

and it was held that a small quantum of contribution by the State Government cannot lead to an inference that the acquisition was made in colourable exercise of power. In Pratibha Nema's case, the challenge was to the acquisition of 73.3 hectares dry land situated at Rangwasa village of Indore district for establishment of a diamond park by *Madhya Pradesh Audyogik Kendra Vikas Nigam Ltd.* It was argued that the Nigam did not have sufficient amount for payment of compensation. While dealing with the argument, this Court observed:

> "It seems to be fairly clear, as contended by the learned counsel for the appellants, that the amount paid by the Company was utilized towards payment of a part of interim compensation amount determined by the Land Acquisition Officer on 7-6-1996 and in the absence of this amount, the Nigam was not having sufficient cash balance to make such payment. We may even go to the extent of inferring that in all probability, the Nigam would have advised or persuaded the Company to make advance payment towards lease amount as per the terms of the MOU on a rough-and-ready basis, so that the said amount could be utilized by the Nigam for making payment on account of interim compensation. Therefore, it could have been within the contemplation of both the parties that the amount paid by the Company will go towards the discharge of the obligation of the Nigam to make payment towards interim compensation. Even then, it does not in any way support the appellants' stand that the compensation amount had not come out of public revenues. Once the amount paid towards advance lease premium, maybe on a rough-and-ready basis, is credited to the account of the Nigam, obviously, it becomes the fund of the Nigam. Such fund, when utilized for the purpose of payment of compensation, wholly or in part, satisfies the requirements of the second proviso to Section 6(1) read with Explanation 2. The genesis of the fund is not the determinative factor, but its

> ownership *in praesenti* that matters."

34. Neither of the aforesaid decisions has any bearing on the issues arising in these appeals, i.e., whether the acquisition of land was for a public purpose within the meaning of Section 3(f)(vi) and whether the acquisition was vitiated due to manipulations, malafides and extraneous considerations.

35. The following are the three ancillary grounds of challenge:

i. The finding recorded by the Division Bench that respondent No. 3 had not been given opportunity of hearing under Section 5A is *ex facie* incorrect and is liable to be set aside because her son Sandip Shah had appeared before the Special Land Acquisition Officer along with Shri S.V. Ramamurthy, Advocate and he was given opportunity of personal hearing.

ii. The judgment in P. Ramaiah's case is vitiated by an error apparent because the Division Bench relied upon the judgment of this Court in 1st H.M.T. case without taking note of the fact that no evidence was produced to show that the Estate Agent had indulged in malpractices for facilitating the acquisition of land on behalf of the appellant and, in any case, such a finding could not have been recorded without impleading the Estate Agent as a party respondent and giving him opportunity to controvert the allegation.

iii. in view of the provisions contained in Sections 17, 18 and 19 of the Mysore High Court, 1884 and Sections 4, 9 and 10 of the Karnataka High Court Act, 1961, the Division Bench did not have the jurisdiction to decide the appeal by relying upon the judgment in 1st H.M.T. case because that was not the ground on which the learned Single Judge had quashed the acquisition proceedings. Shri Vishwanatha Shetty argued that if the Division Bench was of the view that the order of the learned Single Judge should be sustained on a new ground by relying upon the judgment of this Court in 1st H.M.T. case, then

it should have remitted the matter to the learned Single Judge for fresh disposal of the writ petition. Shri Shetty relied upon the judgment of the larger Bench of the Karnataka High Court in *State of Karnataka v. B. Krishna Bhat* 2001 (2) [Karnataka Law Journal 1] to show that the approach adopted by the learned Presiding Officer of the Division Bench in taking up the cases, which are required to be heard by the Single Bench was not approved by the larger Bench.

36. We shall first take up the last ground, which, in our considered view, deserves outright rejection because the Division Bench had decided the writ appeal preferred by the appellant by relying upon the judgment in 1st H.M.T. case because learned counsel appearing for the parties had agreed for that course. This is evident from the following extracts of the opening paragraph of the judgment:

> "When the appeal came up for hearing before us, all the learned counsel submitted that by virtue of the subsequent decision of the Supreme court, that the order of the learned Single Judge would no longer survive and that consequently, the writ petition itself would have to be heard on merits. *A request was conveyed to the Court that instead of remanding the case to the learned Single Judge at this late stage for a haring on merits, and depending on the view taken the matter once again coming up to the appeal court that it was far from desirable that the appeal court itself should hear the parties on merits and dispose of the writ petition."*

37. It is nobody's case that the advocate who appeared on behalf of the appellant had not made a request that instead of remanding the case to the Single Bench, the Division Bench should hear the parties on merits and dispose of the matter. Therefore, it is not open for the appellant to make a grievance that the Division Bench had acted in violation of the provisions of the Mysore High Court Act, 1884 and the Karnataka High Court Act, 1961.

38. The appellant's challenge to the finding recorded by the Division Bench that respondent No. 3 had not been given opportunity of hearing under Section 5A is well-founded. We have carefully gone through the proceedings of the Special Land Acquisition Officer and find that Shri Sandip Shah (son of respondent No. 3), had appeared along with his Advocate and after hearing him along with other objectors, the concerned officers submitted report to the State Government. However, this error in the impugned judgment of the Division Bench is not sufficient for nullifying the conclusion that the acquisition of land was not for a public purpose and that the exercise undertaken by the State Government was vitiated due to the influence of the extraneous considerations. The appellant's challenge to the judgment in P. Ramaiah's case on the ground that no evidence had been produced by the writ petitioner to show that the Estate Agent had indulged in malpractices deserves to be rejected in view of the conclusion recorded by us in relation to the case of respondent No.3.

39. Shri Vishwanatha Shetty also criticized the decision of the State Government to entertain the representation made by respondent No. 3 for withdrawal of the notification and argued that notification under Section 48 could not have been issued without hearing the beneficiary, i.e., the appellant. He supported this argument by relying upon the judgments in *Larsen & Toubro Ltd. v. State of Gujarat* (1998) 4 SCC 387 and *State Government Houseless Harijan Employees' Association v. State of Karnataka,* (2001) 1 SCC 610. This argument of the learned senior counsel appears to have substance, but we do not consider it necessary to examine the same in detail because the appellant's challenge to notification dated 3.9.1991, vide which the acquisition of land comprised in Survey No. 50/2 was withdrawn, was negatived by the learned Single Judge and the Division Bench of the High Court and the appellant is not shown to have challenged the judgment of the Division Bench and insofar as notification dated 25.6.1999 is concerned, the State Government had withdrawn

the same on 15.11.1999.

40. In the end, Shri Dave and Shri Shetty referred to the additional affidavit of Shri A.C. Dharanendraiah, filed on behalf of the appellant, to show that the appellant has already spent Rs. 18.73 crores for formation of the layouts and 1791 plots were allotted to the members, out of which, 200 have already constructed their houses. They pointed out that 50% of the land has been given to the BDA for providing civil amenities and 16154 sq. ft. has been given to Karnataka Power Transmission Corporation. Learned counsel submitted that this is a fit case for invoking the doctrine of prospective overruling so that those who have already constructed houses may not suffer incalculable harm. In support of this submission, the learned counsel relied upon the judgments in *ECIL v. B. Karunakar,* (1993) 4 SCC 727, *Abhey Ram v. Union of India,* (1997) 5 SCC 421, *Baburam v. C.C. Jacob,* (1999) 3 SCC 362, *Somaiya Organics (India) Ltd. v. State of U.P.,* (2001) 5 SCC 519, *Padma Sundara Rao v. State of T.N.,* (2002) 3 SCC 533, *Sarwan Kumar v. Madan Lal Aggarwal,* (2003) 4 SCC 147, *Girias Investment Private Limited v. State of Karnataka,* (2008) 7 SCC 53, *G. Mallikarjunappa v. Shamanur Shivashankarappa,* (2001) 4 SCC 428, *Uday Shankar Triyar v. Ram Kalewar Prasad Singh,* (2006) 1 SCC 75.

41. We have given serious thought to the submission of the learned counsel but have not felt convinced that this is a fit case for invoking the doctrine of prospective overruling, which was first invoked by the larger Bench in *I.C. Golak Nath v. State of Punjab* AIR 1967 SC 1643 : (1967) 2 SCR 762 while examining the challenge to the constitutionality of Constitution (Seventeenth Amendment) Act, 1964. That doctrine has been applied in the cases relied upon by learned counsel for the appellant but, in our opinion, the present one is not a fit case for invoking the doctrine of prospective overruling because that would result in conferring legitimacy to the influence of money power over the rule of law, which is the edifice of our

Constitution. The finding recorded by the Division Bench of the High Court in Narayana Reddy's case that money had played an important role in facilitating the acquisition of land, which was substantially approved by this Court in three cases, is an illustration of how unscrupulous elements in the society use money and other extraneous factors for influencing the decision making process by the Executive. In this case also the Estate Agent, namely, M/s. Rejendra Enterprises with whom the appellant had entered into an agreement dated 21.2.1988 had played crucial role in the acquisition of land. The tenor of that agreement does not leave any manner of doubt that the Estate Agent has charged huge money from the appellant for getting the notifications issued under Sections 4(1) and 6(1) of the 1894 Act and sanction of layout plan by the BDA. The respondents could not have produced any direct evidence that the Estate Agent had paid money for facilitating the acquisition of land but it is not too difficult for any person of reasonable prudence to presume that the appellant had parted with crores of rupees knowing fully well that a substantial portion thereof will be used by the Estate Agent for manipulating the State apparatus. Therefore, we do not find any justification to invoke the doctrine of prospective overruling and legitimize what has been found by the Division Bench of the High Court to be *ex-facie* illegal.

42. Before concluding we consider it necessary to observe that in view of the law laid down in the 1st H.M.T. case (paragraphs 19, 21 and 22), which was followed in 2nd H.M.T. case and Vyalikawal House Building Cooperative Society's case, the view taken by the Division Bench of the High Court in Narayana Raju's case that the framing of scheme and approval thereof can be presumed from the direction given by the State Government to the Special Deputy Commissioner to take steps for issue of notification under Section 4(1) cannot be treated as good law and the mere fact that this Court had revoked the certificate granted by the High Court cannot be

interpreted as this Court's approval of the view expressed by the High Court on the validity of the acquisition.

43. In the result, the appeals are dismissed. However, keeping in view the fact that some of the members of the appellant may have built their houses on the sites allotted to them, we give liberty to the appellant to negotiate with the respondents for purchase of their land at the prevailing market price and hope that the landowners will, notwithstanding the judgments of the High Court and this Court, agree to accept the market price so that those who have built the houses may not suffer. At the same time, we make it clear that the appellant must return the vacant land to the respondents irrespective of the fact that it may have carved out the sites and allotted the same to its members. This must be done within a period of three months from today and during that period the appellant shall not change the present status of the vacant area/sites. The members of the appellant who may have been allotted the sites shall also not change the present status/character of the land. The parties are left to bear their own costs.

N.J. Appeals dismissed.

RAHEJA UNVIERSAL LIMITED
v.
NRC LIMITED & ORS.
(Civil Appeal No. 1920 of 2012)

FEBRUARY 07, 2012

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

Sick Industrial Companies (Special Provisions) Act, 1985:

ss. 22, 22(3), 22A, 17(3) – Sale of assets of sick company – Rehabilitation scheme – Determination of the right of purchaser – Jurisdiction of BIFR to restrain transfer of sick industrial company's property – Respondent-Company entered into memorandum of understanding and agreement for sale of its land to appellant-Company to obtain funds for financial restructuring and received part payment from the appellant-Company – Failure of appellant-Company to pay third instalment and financial position of respondent-Company not improved – Proposal by respondent-Company to the consortium of banks for Corporate Debt Restructuring (CDR) – Approval of scheme of rehabilitation – Prior to implementation of the scheme, the respondent-Company sought declaration from BIFR that it was a 'sick company' and for adoption of the rehabilitation scheme approved by creditor banks – BIFR by order u/s. 17(3) adopted rehabilitation Scheme and directed that the sale of assets including investments would require prior approval of the BIFR – Thereafter, execution of second Supplementary Agreement by respondent-Company and possession of land given to the appellant-Company, without the prior approval of the BIFR – Appeal before AAIFR – AAIFR permitted the land to be sold – High Court quashed the order of AAIFR – On appeal, held: Memorandum of understanding and agreement to sell the

land was signed prior to the presentation of the scheme before the BIFR – However, second supplementary agreement was executed subsequent to the presentation of the scheme before the BIFR as also after the BIFR had passed an order u/s. 17(3) – Asset of the company and/or its sale proceeds received under the agreements had been integral part of the formation and finalization of the revival scheme, and as such transaction cannot be stated to be beyond the ambit and scope of s. 22(3) whereby all these instruments to which the sick industrial company is a party, would be subject to the orders of BIFR – Further, in view of the provisions of s. 53A, even if the part performance of the agreement is accepted, yet no title is created in favour of the appellant-Company – As regards the issue of jurisdiction, BIFR had the jurisdiction to issue prohibitory order which was passed clearly at the stage of the consideration of the revival scheme for the formulation of which asset was duly taken into consideration – Prohibitory orders were issued by the BIFR within the ambit and scope of ss. 22(1), 22(3) and 22A – Further, there was no jurisdictional or other error in the order of the High Court in restoring the order of the BIFR – Land being the primary asset of the respondent-Company, could not be permitted to be dissolved by sale or otherwise without the consent and approval of the BIFR – BIFR is the authority proprio vigore and required to oversee the entire affairs of a sick industrial company – Thus, order of the BIFR, which merged into the order of the High Court upheld – Transfer of Property Act, 1882 – ss. 53A, 54.

ss. 22 and 22A – Scope and ambit of – Held: Section 22 deals with the suspension of legal proceedings, execution and distress sale etc. against the assets of a sick company while Section 22A deals with restrictions and prohibitory orders which the BIFR can pass, all for the purposes of preparation of the scheme and proper implementation and effective management of the revival of the sick industrial company – Section 22 operates from the presentation of the scheme, its

consideration, preparation, finalization and ultimately the implementation of the said scheme and consequent rehabilitation of the sick industrial company, while Section 22A operates only during the preparation or consideration of the scheme, or upto the commencement of the proceedings for winding up before the concerned High Court, in the event the BIFR recommends winding up proceedings – These provisions primarily ensure that the scheme prepared by the BIFR does not get frustrated because of certain other legal proceedings and to prevent untimely and unwarranted disposal of the assets of the sick industrial company – These Sections operate at different stages and in different fields.

ss. 22 and 22A – Powers of BIFR under – Held: Sections 22 and 22A specify the complete jurisdiction and authority of the BIFR in relation to preparation, consideration, finalization and implementation of a revival scheme in relation to a sick industrial company – BIFR is vested with the power to issue directions in the interest of the company or even in public interest, to prevent the disposal of assets of the company during the period of preparation, consideration or implementation of the scheme – Also, BIFR is expected to ensure proper implementation by appropriately monitoring the scheme during the entire relevant period.

Overriding effect of the 1985 Act – Whether the provisions of the 1985 Act would prevail over the provisions of the Transfer of Property Act, 1882 – Held: Provisions of the 1985 Act would prevail over the provisions of the 1882 Act – 1882 Act is a general law controlling and operating in a very wide field, enacted for and related to transfer of immovable property in India and to decide the disputes as well as to resolve the confusion and conflict, in existence – It does not have application to a particular situation or class of persons – However, the 1985 Act is a special legislation providing for imperative functioning of specialized bodies like the BIFR and AAIFR and is intended to apply to a sick industrial company

– It has no application even to other different kinds of companies within the purview of the Companies Act – Legislature gave an overriding effect to the provisions of the 1985 Act and even the jurisdiction of the civil courts is restricted – Transfer of Property Act, 1882.

Legislative scheme and object of – Held: Is to develop the mechanism of revival and rehabilitation of sick industrial units and channelization of the complete administrative-cum-quasi judicial process within the framework of the Act –The Act empowers the quasi-judicial body-BIFR, to take appropriate measures for revival and rehabilitation of the potentially viable sick industrial companies and for liquidation of non-viable companies within the time specified – It is regulatory only to a limited extent – As regards matters covered under the Act as also matters allied to the formulation and sanction of the scheme, the jurisdiction of the civil courts is ousted and has to be decided by the BIFR itself.

Respondent-Company faced a financial crunch. The consortium of banks sanctioned loan against the current assets as well as fixed assets of the respondent-Company including the surplus land. Thereafter, the respondent-Company sought to dispose of the surplus land so as to bring in additional funds required for financial restructuring. They entered into memorandum of understanding and other agreements with appellant-Company for the sale of land and receiving payment of the sale consideration in instalments from the appellants. The appellant-Company failed to pay the third instalment and as such the respondent-Company could not attain the object of financial restructuring. The parties executed Supplementary Agreement for pre-ponement of the instalments payable in terms of the agreement as well as giving of possession of the land to the appellant-Company. The respondent-Company then submitted a proposal to the consortium of banks for Corporate Debt Restructuring (CDR). The scheme of rehabilitation in

relation to the sick industrial company was approved by the CDR. Prior to the complete implementation of the revival scheme, the respondent-Company applied to the BIFR under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 for being declared as a 'sick company' and for acceptance and adoption of the rehabilitation scheme approved by the CDR. BIFR by an order under Section 17(3) of the 1985 Act, adopted the rehabilitation Scheme, appointed an operating agency, fixed the cut-off date for financial revival and directed that the sale of assets including investments would require prior approval of the BIFR. Thereafter, the parties executed second Supplementary Agreement and possession of the land was given to the appellant-Company, without the prior approval of the BIFR. Aggrieved, appellant-Company as well as the respondent-Company filed appeal before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). AAIFR set aside the certain findings of the BIFR permitting the land though an asset of the company to be sold. The High Court quashed the order of the AAIFR holding that the order of the BIFR was within the scope of Section 22(3) of the 1985 Act; and that the order of the AAIFR permitting the sale of the land in furtherance to the agreement between the parties was not sustainable. Therefore, the appellant-Company filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1. The Sick Industrial Companies (Special Provisions) Act, 1985 basically and predominantly is remedial and ameliorative in so far as it empowers the quasi-judicial body, the BIFR, to take appropriate measures for revival and rehabilitation of the potentially viable sick industrial companies and for liquidation of non-viable companies. It is regulatory only to a limited

extent. The provisions of the Act of 1985 impose an obligation on the sick industrial companies and potentially sick industrial companies to make references to the BIFR within the time specified under the Act of 1985. Default thereof is punishable under the provisions of the Act of 1985. Largely, the proceedings before the BIFR are specific to rehabilitation or winding up of the sick company and the Act of 1985 hardly contemplates adversarial proceedings. The bodies constituted under the Act of 1985 would least exercise their jurisdiction to a *lis* between any party or upon the rival interests of the parties. With regard to the matters covered under the Act of 1985, the jurisdiction of the civil courts is ousted and the matters which are even allied to the formulation and sanction of the scheme would have to be decided by the BIFR itself. [Para 11] [420-E-H; 421-A]

1.2. The BIFR has been vested with wide powers and, being an expert body, is required to perform duties and functions of wide-ranged nature. If one looks into the legislative intent in relation to a sick industrial company, it is obvious that the BIFR has to first make an effort to provide an opportunity to the sick industrial company to make its net worth exceed the accumulated losses within a reasonable time, failing which the BIFR has to formulate a scheme for revival of the company, even by providing financial assistance in cases wherein the BIFR in its wisdom deems it necessary and finally only when both these options fail and the public interest so requires, the BIFR may recommend winding up of the sick industrial company. So long as the scheme is under consideration before the BIFR or it is being implemented after being sanctioned and is made operational from a given date, it is the legislative intent that such scheme should not be interjected by any other judicial process or frustrated by the impediments created by third parties and even by the management of the sick industrial company, in relation

to the assets of the company. In other words, the object and purpose of the Act of the 1985 is to ensure smooth sanctioning of the scheme and its due implementation. Both these stages, i.e., pre and post sanctioning of the scheme by the BIFR, are equally material stages where the provisions of Sections 22 and 22A read with Section 32 of the Act of 1985 would come into play. Such an approach would also be acceptable as otherwise the entire scheme under Chapter III of the Act of 1985 would be frustrated. Doctrine of frustration envisages that an exercise of special jurisdiction in futility, is neither the requirement of legislature nor judicial dictum. [Para 22] [434-D-H; 435-A]

1.3. The relevant provisions of the Act of 1985 clearly demonstrate that BIFR is vested with the power to issue directions in the interest of the company or even in public interest, to prevent the disposal of assets of the company during the period of preparation, consideration or implementation of the scheme. Not only this, BIFR is expected to ensure proper implementation by appropriately monitoring the scheme during the entire relevant period. Sections 22 and 22A thus, specify the complete jurisdiction and authority of the BIFR in relation to preparation, consideration, finalization and implementation of a revival scheme in relation to a sick industrial company. [Para 30] [441-E-G]

1.4. The powers of the BIFR under Section 22(3) can be segregated under two different heads. Firstly, the power to suspend simplicitor the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or any other instrument in force, to which the sick industrial company is a party or which may be applicable to the sick industrial company before the date of such order. Secondly, any rights, privileges, obligations or liabilities accruing or arising before the said date, shall be enforceable with

such adaptation and in such manner as may be specified by the BIFR. Section clearly demonstrates the intent of the framers of law, that the BIFR has the power to even make changes in such instruments, documents etc. which create rights and liabilities vis-à-vis the sick industrial company, and before permitting them to be enforced. Such an approach alone can be justified, as otherwise the expression 'shall be enforceable with such adaptation and in such manner as may be specified by the BIFR would be meaningless. It is a settled principle of interpretation of statutes that every word and expression used by the legislature has to be given its proper and effective meaning as the legislature uses no expression without purpose or meaning. The maxim *Lex Nil Frusta Jubet i.e. Law Commands nothing vainly* further elucidates this principle. Of course, the power to make this declaration is controlled by limitation of time as specified in the proviso to the Section. Lifting of such declaration by lapse of time or otherwise or in accordance with the provisions of Section 22(4) shall bring the *status quo ante* as if such declaration had never been made. Section 22A is obviously a power over and above the wide powers vested in BIFR under the provisions of Section 22 of the Act of 1985. [Paras 27 and 28] [439-B-H; 440-A]

1.5. All these provisions which fall under Chapter III of the Act of 1985 have to be read conjointly and that too, along with other relevant provisions and the scheme of the Act of 1985. It is a settled canon of interpretation of statutes that the statute should not be construed in its entirety and a sub-section or a section therein should not be read and construed in isolation. Chapter III, in fact, is the soul and essence of the Act of 1985 and it provides for the methodology that is to be adopted for the purposes of detecting, reviving or even winding up a sick industrial company. Provisions under the Act of 1985

also provide for an appeal against the orders of the BIFR before another specialised body, i.e., the AAIFR. This is a self-contained code and because of the *non obstante* provisions, contained therein, it has an overriding effect over the other laws. As per Section 32 of the Act of 1985, the Act is required to be enforced with all its vigour and in precedence to other laws. [Para 21] [433-G-H; 434-A-C]

1.6. The intent of introducing Section 22A was to empower the BIFR to issue any direction to the sick industrial company, its creditors and shareholders, in the interest of the company or even in public interest, directing the company not to dispose of any assets, except with the consent of the BIFR. The directions so issued are to remain in force during the preparation and consideration of the scheme. Section 22 is the reservoir of the statutory powers empowering the BIFR to determine a scheme, right from its presentation till its complete implementation in accordance with law, free of interjections and interference from other judicial processes. Section 22(1) deals with the execution, distress or the like proceedings against the company's properties, including appointment of a Receiver. It also specifically provides that even a winding up petition would not be instituted and no other proceedings shall lie or proceed further, except with the consent of the BIFR. In contradistinction to this power, Section 22(3) states that pending an enquiry or a scheme under the provisions of the Act of 1985 and even where the scheme is sanctioned, for the due implementation of such scheme, the BIFR may, by an order, declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force to which such sick industrial company is a party or which may be applicable

to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights or privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended and shall be enforceable with such adoption and in such a manner as may be specified by the BIFR. In other words, all those instruments to which the sick industrial company is a party, will be subject to the orders of the BIFR. Further, such proceedings can even be modified by the BIFR, of course, for the limited purpose of implementing the scheme. The declarations made by the BIFR under Section 22(3) are subject to the restrictions of time as stated under the proviso to this section. The maximum period for which such a declaration in aggregate can continue is seven years. The legislative intent of giving an over-riding effect to the declarations of the BIFR, as contemplated under Section 22(3) of the Act of 1985, is further fortified by the language of Section 22(4), which states that any declaration made under Section 22(3) shall take effect notwithstanding anything contained in the Companies Act, 1956 or any other law, the memorandum and articles of association of the company or any instrument, decree, order of a court, settlement etc. Any remedy for enforcement of a right which may be available to a third party and any such proceedings before any court or tribunal shall remain stayed or be continued subject to such declaration. Section 22(4)(b) brings *status quo ante* and in fact, makes it clear that on cessation of such a declaration, the right, privilege, obligation or liability which was suspended shall become revived and enforceable as if the declaration had never been made. The proceedings will continue from the stage at which they were stayed. It can safely be perceived that the provisions of Section 22 of the Act of 1985 are self-explanatory. They would cease to operate within their own limitations and not by force of any other law, agreement, memorandum or even

articles of association of the company. The purpose is so very clear that during the examination, finalization and implementation of the scheme, there should be no impediment caused to the smooth execution of the scheme of revival of the sick industrial company. It is only when the specified period of restrictions and declarations contemplated under the provisions of the Act of 1985 is over, that the *status quo ante* as it existed at the time of the consideration and finalization of the scheme, would become operative. This is done primarily with the object that the assets of the company are not diverted, wasted, taken away and/or disposed of in any manner, during the relevant period. [Para 26] [437-B-H; 438-A-H; 439-A-B]

1.7. Section 22A of the Act of 1985 empowers the BIFR to pass injunctive or restraint orders in the interest of the sick industrial company or even in public interest requiring the sick industrial company not to dispose of, except with the consent of the BIFR, any asset during the period of preparation or consideration of the scheme under Section 18 of the Act of 1985 and during the period beginning with the recording of opinion for winding up of the company under Section 20(1) of the Act of 1985 by the BIFR upto commencement of the proceedings relating to winding up before the High Court. These injunctive orders are to be in operation during the period of preparation or consideration of the scheme under Section 18 of the Act of 1985. Section 22A, thus, has a narrower scope than Section 22. Section 22 operates from the presentation of the scheme, its consideration, preparation, finalization and ultimately the implementation of the said scheme and consequent rehabilitation of the sick industrial company, while Section 22A operates only during the preparation or consideration of the scheme, or upto the commencement of the proceedings for winding up before the concerned High Court, in the event the BIFR recommends winding up proceedings. [Paras 20, 29] [433-E-F; 440-C-E]

1.8. Section 22 and 22A of the Act of 1985 primarily ensure that the scheme prepared by the BIFR does not get frustrated because of certain other legal proceedings and to prevent untimely and unwarranted disposal of the assets of the sick industrial company. These Sections clearly state certain restrictions which would impact upon the implementation of the scheme as well as on the assets of the company. These Sections operate at different stages and in different fields. [Para 20] [432-G-H]

1.9. Sections 22(1), (3) and 22A have to be read along with the provisions of Section 26 of the Act of 1985 which ousts the jurisdiction of the civil courts and vests exclusive jurisdiction for the specified purposes with the BIFR. Section 32 of the Act of 1985, gives an overriding effect to the provisions of the Act of 1985 over the other laws in force except the law specifically stated therein. Sections 22, 22A, 26 and 32 have to be read and construed conjointly. A common thread of legislative intent to treat this law as a special law, in contra-distinction to the other laws except the laws stated in the provisions and to ensure its effective implementation with utmost expeditiousness, runs through all these provisions. It also mandates that no injunction shall be granted by any court or authority in respect of an action taken or to be taken in pursuance of the powers conferred to or by under this Act. [Para 31] [441-B-E]

1.10. The provisions of Sections 22(1) and 22(3) of the Act are the provisions of wide connotation and would normally bring the specified proceedings, contractual and non-contractual liabilities, within the ambit and scope of the bar and restrictions contained in Sections 22(1) and 22(3) of the Act of 1985 respectively. The legislative intent is explicit that the BIFR has wide powers to impose restrictions in the form of declaration and even

prohibitory/injunctive orders right from the stage of consideration of a scheme till its successful implementation within the ambit and scope of Sections 22(3) and 22A of the Act. Section 22 of the Act of 1985 is very significant and of wide ramifications and application. More often than not, the jurisdiction of the BIFR is being invoked, necessitated by varied actions of third parties against the sick industrial company. The proceedings, taken by way of execution, distress or the like, may have the effect of destabilizing the finalization and/or implementation of the scheme of revival under consideration of the BIFR. It appears that, the Legislature intended to ensure that no impediments are created to obstruct the finalization of the scheme by the specialized body. To protect the industrial growth and to ensure revival, this preventive provision has been enacted. The provision has an overriding effect as it contains *non obstante* clauses not only vis-à-vis the Companies Act but even qua any other law, even the memorandum and articles of association of the industrial company and/or any other instrument having effect under any other Act or law. These proceedings cannot be permitted to be taken out or continued without the consent of the BIFR or the AAIFR, as the case may be. The expression 'no proceedings' that finds place in Section 22(1) is of wide spectrum but is certainly not free of exceptions. The framers of law have given a definite meaning to the expression 'proceedings' appearing under Section 22(1) of the Act of 1985. These proceedings are for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a Receiver in respect thereof. The expression 'the like' has to be read *ejusdem generis* to the term 'proceedings'. The words 'execution, distress or the like' have a definite connotation. These proceedings can have the effect of nullifying or obstructing the sanctioning or implementation of the

revival scheme, as contemplated under the provisions of the Act of 1985. This is what is required to be avoided for effective implementation of the scheme. The other facet of the same Section is that, no suit for recovery of money, or for enforcement of any security against the industrial company, or any guarantee in respect of any loan or advance granted to the industrial company shall lie, or be proceeded with further without the consent of the BIFR. Again, the intention is to protect the properties/assets of the sick industrial company, which is the subject matter of the scheme. It is difficult to state with precision the principle that would uniformly apply to all the proceedings/suits falling under Section 22(1) of the Act of 1985. Firstly, it will depend upon the facts and circumstances of a given case, it must satisfy the ingredients of Section 22(1) and fall under any of the various classes of proceedings stated thereunder. Secondly, these proceedings should have the impact of interfering with the formulation, consideration, finalization or implementation of the scheme. Once these ingredients are satisfied, normally the bar or limitation contained in Section 22(1) of the Act of 1985 would apply. [Para 35] [443-C-H; 444-A-G]

Gram Panchayat & Anr. v. *Shree Vallabh Glass Works Ltd. & Ors.* **(1990) 2 SCC 440: 1990 (1) SCR 966;** *Deputy Commercial Tax Officer & Ors.* v. *Corromandal Pharamaceuticals & Ors.* **(1997) 10 SCC 649: 1997 (2) SCR 1026;** *Jay Engineering Works Ltd.* v. *Industry Facilitation Council & Anr.* **AIR 2006 SC 3252: 2006 (6) Suppl. SCR 189;** *Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra* **(1993) 2 SCC 144: 1993 (1) SCR 340;** *Tata Davy Ltd. v. State of Orissa* **AIR 1998 SC 2928: 1997 (3) Suppl. SCR 232 – referred to.**

1.11. The land was one of the major assets of the Respondent Company and in the event the said asset

was kept outside the scope of the scheme or its sale was permitted by the BIFR, probably the company could never be revived and any effort in that direction *de hors* such asset of the company would be in futility. Besides, the fact that the statutory protection contained in Section 22(3) was available to the company, it could be stated with more emphasis that the BIFR could even adopt and permit the transaction with such adoption as it may have deemed appropriate. The imperative nature of the functions of the BIFR under the provisions of the Act of 1985 and the overriding effect of its provisions fully support such a view. [Para 36] [445-E-G]

2.1. The provisions of the Act of 1985 shall normally override the other laws except the laws which have been specifically excluded by the Legislature under Section 32 of the Act of 1985. The Act of 1985 has been held to be a special statute vis-à-vis the other laws. [Para 39] [447-E]

2.2. The Act of 1882 is a general law and controls and operates in a very wide field. It was an Act enacted for and related to transfer of immovable property in India and to decide the disputes as well as to resolve the confusion and conflict, which was in existence, as the courts were forced to decide the disputes according to their own notions of justice and fair play. The Act of 1882 does not have application to a particular situation or class of persons. On the contrary, the Act of 1985 is a special legislation providing for imperative functioning of specialized bodies like the BIFR and AAIFR and is intended to apply to a very specific situation, i.e., where a company is a sick industrial company. It has no application even to other different kinds of companies within the purview of the Companies Act, except sick industrial companies. The Legislature has undoubtedly given an overriding effect to the provisions of the Act of 1985 and even restricted the jurisdiction of the civil courts,

as is demonstrated from the language of Sections 26 and 32 of the Act of 1985. Thus, the provisions of the Act of 1985 shall prevail over the provisions of the Act of 1882. [Para 40] [448-A-D]

Tata Davy Ltd. v. State of Orissa **AIR 1998 SC 2928: 1997 (3) Suppl. SCR 232;** *Tata Motors Ltd.* **(2008) 7 SCC 619: 2008 (9) SCR 267;** *NGEF Ltd. v. Chandra Developers (P) Ltd. and Anr.* **(2005) 8 SCC 219: 2005 (3) Suppl. SCR 747- referred to.**

3.1. The submission that in view of the provisions of Sections 53A and 54 of the Act of 1882, the title in the property in question is vested in the Respondent-Company and they are entitled to transfer of the property, free from any restrictions or limitations, and as such, the order of the High Court is liable to be set aside and that of the AAIFR be restored, cannot be accepted entirely or even in part for that matter. Section 54 defines 'Sale' as a transfer of ownership in exchange for price paid or promised or part-paid and part-promised. Such a transfer of tangible immovable property of the value of Rs.100/- and upwards can be made only by a registered instrument. On a plain reading of Section 54, it is clear that an agreement for sale or an agreement to sell itself does not create any interest or charge in such property. [Paras 43 and 44] [450-E-G; 451-C]

'Transfer of Property Act' by Mulla, **9th Edn, p 181 – referred to.**

3.2. The provisions of Section 53A of the 1882 Act recognize a right of a transferee, where a transferor has given and the transferee has taken possession of the property or any part thereof. Even Section 53A does not create title of the transferee in the property in question but gives him a very limited right, that too, subject to the satisfaction of the conditions as stated in Section 53A of the Act of 1882 itself. Thus, even if the part performance

of the agreement is accepted, still no title is created in favour of the Respondent-Company. Provisions of Section 53A would also not, in any way, alter the position of the Act of 1985 having an overriding effect vis-à-vis the provisions of the Act of 1882. The provisions of Act of 1985 shall have precedence and overriding effect over the provisions of the Act of 1882. [Paras 47, 48] [456-B, F]

State of U.P. v. District Judge and Ors. **AIR 1997 SC 53: 1996 (7) Suppl. SCR 513 – referred to.**

3.3. The memorandum of understanding and agreement to sell the land belonging to the company between the appellant and the respondent-company was signed prior to the presentation of the scheme before the BIFR. However, second supplementary agreement was executed not only subsequent to the presentation of the scheme before the BIFR but even after the BIFR had passed an order under Section 17(3) of the Act of 1985. It cannot be disputed that even the sale proceeds received under the agreements have been utilized for the revival of the company to a large extent. The agreement with the workers dated 5th September, 2008 stands testimony to this fact. Once the asset of the company and/ or its sale proceeds have been integral part of the formation and finalization of the revival scheme, such transaction by any stretch of imagination cannot be stated to be beyond the ambit and scope of Section 22(3) of the Act of 1985. Thus, BIFR has the power to issue declarations in relation to contracts, agreements, settlements, awards, standing orders or even other instruments in force to which the sick industrial company is a party. The power to suspend or power to enforce the same subject to such adaptations as the BIFR may consider appropriate is a power of great magnitude and scope, the only restriction thereupon is as contemplated in the proviso to Section 22(3) of the Act of 1985. [Para 46] [454-D; 455-A, G]

3.4. The BIFR after declaring the Respondent-Company as a sick company and appointing the Punjab National Bank as the Operating Agency, had fixed the cut off date as 30th July, 2007, as indicated in the CDR Scheme. The CDR scheme had been approved, after taking into consideration the agreement to sell and the sale proceeds likely to be received therefrom. The BIFR had passed certain directions/declarations in the order passed under Section 17(3) of the Act of 1985 requiring the company to state clearly the details of the land to be sold including survey numbers as well as the remaining land with the company and confirming if the remaining land was adequate for functioning and viability of the company on long term basis. The BIFR raised the query whether all the secured creditors who had charge over the land, had approved the sale of 350 acres of land belonging to the respondent-company for a sum of Rs.166.40 crore and for entering into memorandum of understanding with the appellant company in that behalf. Besides issuing a directive that assets including investments would require prior approval of the BIFR as the company was under the purview of SICA, it also issued a clear prohibitory order requiring the secured creditors not to take any coercive steps against the company without prior permission of the BIFR. This order of the BIFR was therefore, passed clearly at the stage of the consideration of the revival scheme which had been approved by the CDR Group as well as the secured creditors. The scheme for revival of the company on long term basis, thus, was primarily dependent upon the sale proceeds of the land in question on the one hand and the utility of the remaining land for revival of the company on the other. The land was the paramount asset of the company for its revival and successful implementation of the scheme in accordance with law. The asset was duly taken into consideration in formulation of the scheme as contemplated under

Sections 17 and 18 of the Act of 1985 and appropriate directions, prohibitory orders were issued within the ambit and scope of Sections 22(1), 22(3) and 22A of the Act of 1985. In view of the clear statement of law and facts of the instant case, there is no merit in the submission of the Respondent-Company that the BIFR had no jurisdiction to pass such directives. [Para 49] [457-B-H; 458-A]

3.5. AAIFR had disturbed the order of BIFR and held that the contract between the parties could not be suspended under Section 22(3) and it was not in the interest of the Respondent-Company. It had permitted the sale to be completed without any restriction. The High Court set aside the said order and restored the order of the BIFR. There is no jurisdictional or other error in the order of the High Court in restoring the order of the BIFR. The land being the primary asset of the Respondent-Company, could not be permitted to be dissolved by sale or otherwise without the consent and approval of the BIFR. The BIFR is the *authority proprio vigore* and required to oversee the entire affairs of a sick industrial company and to ensure that the same are within the framework of the scheme formulated and approved by the Board for revival of the company in accordance with the provisions of the Act of 1985. On facts as well, neither the BIFR nor the High Court had exceeded its jurisdiction in passing the impugned orders. It is not that the Respondent-Company has been divested of its right by the BIFR. All that has been done was to suspend the final transfer of the property in its favour in accordance with the provisions of the Act and the limitations imposed therein. Once the scheme is implemented or the period specified under the provisions of Sections 22(3) and 22(4) expires, the declaration would cease to exist and the appellant would be entitled to enforce its rights in accordance with law as if no such declaration or restriction ever existed. [Para 50] [458-C-G]

3.6. The principle of law that emerges, which consistently has judicial benediction, is that a scheme for rehabilitation or restructuring of a sick industrial company undertaken by a specialized body like the BIFR/ AAIFR should, as far as legally permissible, remain obstruction free and the events should take place as pre-ordained, during consideration and successful implementation of the formulated scheme. Wide jurisdiction is vested in BIFR/AAIFR to issue directives, declarations and prohibitory orders within the rationalized scope and limitations prescribed under Section 22(1), 22(3) and 22A of the Act of 1985. [Para 51] [458-H;459-A-B]

3.7. The order of the BIFR dated 16th July, 2009 which has merged into the order of the High Court dated 29th July, 2011 is maintained while that of the AAIFR dated 28th May, 2010 is set aside. The parties are directed to appear before the BIFR which would proceed with the matter in accordance with law. [Para 54] [459-F-G]

Shree Sajjan Mills Limited & Ors. v. *Municipal Corporation, Ratlam* **(2009) 17 SCC 665;** *M/s. Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association, Madras* **AIR 1992 SC1439: 1992 (2) SCR 999;** *Rambaran Prosad vs. Ram Mohit Hazra* **AIR 1967 SC 744: 1967 SCR 293;** *Dharma Naika v. Rama Naika* **AIR 2008 SC 1276: 2008 (2) SCR 451;** *Mrs. Saradamani Kandappan vs. Rajalakshmi & Ors.* **JT 2011 (8) SC 129;** Shalini *Shyam Shetty & Anr. v. Rajendra Shankar Patil* **(2010) 8 SCC 329: 2010 (8) SCR 836**

Case Law Reference:

1990 (1) SCR 966	**Referred to**	**Para 11, 13, 17, 23, 32**
1997 (2) SCR 1026	**Referred to**	**Para 12, 23, 33**

2006 (6) Suppl. SCR 189	**Referred to**	**Para 14, 16, 23, 34, 37**
(2009) 17 SCC 665	**Referred to**	**Para 15**
1993 (1) SCR 340	**Referred to**	**Para 32**
1997 (3) Suppl. SCR 232	**Referred to**	**Para 32, 37**
1992 (2) SCR 999	**Referred to**	**Para 35**
2008 (9) SCR 267	**Referred to**	**Para 37**
2005 (3) Suppl. SCR 747	**Referred to**	**Para 38**
1967 SCR 293	**Referred to**	**Para 44**
1996 (7) Suppl. SCR 513	**Referred to**	**Para 45**
2008 (2) SCR 451	**Referred to**	**Para 45**
JT 2011 (8) SC 129	**Referred to**	**Para 45**
2010 (8) SCR 836	**Referred to**	**Para 53**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1920 of 2012.

From the Judgment & Order dated 29.07.2011 of the High Court of Judicature at Bombay in Civil Writ Petition No. 6450 of 2010.

With

C.A. Nos. 1921, 1922 & 1923 of 2012.

H.N. Salve, Gopal Subramaniam, Mukul Rohotagi, S. Ganesh Shyam Divan, Colin Gonsalves, Mahesh Agarwal, Rishi Agarwal, Bharat Zaveri, Gaurav Goel, E.C. Agrawala, U.A. Rana, Devina Sehgal, Saurabh Sinha, S. Kumar, Rohit Singh, Anuradha, Jayshree, Jyoti Mendiratta for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. "Leave granted all cases."

1. An interesting question of law as to the ambit and scope of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, the 'Act of 1985') and its overriding application over the provisions of Transfer of Property Act, 1882 (for short, the 'Act of 1882'), with particular reference to Section 53A and Section 54 of the latter Act, arises for consideration in the present case.

Reference to the basic facts which give rise to this proposition of law would be necessary and are as follows:

Facts:

2. NRC Limited is a company which was originally incorporated under the name and style of 'National Rayon Corporation Limited' in the year 1946. However, subsequently, by an appropriate resolution of the Board of Directors, its name was changed to 'NRC Limited' on 4th August, 1994 (hereinafter referred to as the 'Respondent-Company'). The Respondent-Company was engaged in the manufacture of viscos filament yarn, chemicals and allied products with its factory at Mohane, Kalyan, District Thane. As per the facts on record, the Respondent-Company was declared a 'sick industrial company' in the year 1987, but as its net worth turned positive, vide order dated 10th January, 1994 passed by the Board for Industrial and Financial Restructuring (for short, the 'BIFR'), it was discharged from the purview of the Act of 1985. The Respondent-Company had arranged finances and invested nearly Rs.86 crore in the financial year 2005-06 whereafter it started incurring losses because reduction in the customs duty seriously affected its business. Because of the financial crunch faced by the Respondent-Company, a consortium of five nationalized banks comprising of Punjab National Bank, Dena Bank, Canara Bank, Indian Overseas Bank and the Bank of Baroda had sanctioned a term loan as well as a working capital loan, secured by the current assets as well as the fixed assets

of the Respondent-Company including the land in question. The total outstanding amount of loan, as on 31st March, 2006, was approximately Rs.147 crore. The Respondent-Company intensified its efforts to dispose of the surplus land so as to bring in additional funds required for financial restructuring. A Memorandum of Understanding was signed on 13th April, 2006 with 'K. Raheja Universal Limited' renamed as 'Raheja Universal Limited' (hereinafter referred to as the 'Appellant-Company') for sale of about 344 acres of land for a total consideration of Rs.166.40 crore. After obtaining 'No Objection Certificates' from the lending banks, an agreement dated 1st March, 2007 was signed between the parties and a sum of Rs.25 crore was paid by the Appellant-Company to the Respondent-Company. The balance consideration of Rs.141.40 crore was to be paid as per the terms of the agreement. In terms of the said agreement, the Appellant-Company was to pay the second instalment of Rs.25 crore, as and when required, to be utilized only to remove the first charge on the saleable land, the third instalment of Rs.48.90 crore was to be paid on receipt of 'No Objection Certificate' from the labour, Kalyan Dombivli Municipal Corporation and, on completion of fencing and the vacant possession of non-colony land and the fourth and final instalment of Rs.72.50 crore was to be paid subsequent thereto.

3. The Agreement dated 1st March, 2007 had postulated payment of the sale consideration in instalments. The parties continued further negotiations in regard to payment of the balance sale consideration. The Respondent-Company had requested the Appellant-Company to advance the payment of instalments. Thereafter, the parties came to an understanding and, in furtherance to such understanding, a supplementary deed to the agreement was signed on 29th September, 2007. As already noticed, the Appellant-Company had declined to pay the third instalment of the consideration payable, causing impediment to payments towards labour costs and other expenses of the Respondent-Company. Then, the parties, by

mutual agreement, signed a second supplementary agreement dated 17th August, 2010. This agreement referred to the principal agreement and besides advancing the payment of instalments, the possession of the property was also given to the Appellant-Company.

4. There is some dispute between the parties with regard to the manner and time in which these payments were or were not made. On failure to attain the object of restructuring, the Respondent-Company submitted a proposal to the consortium of banks for Corporate Debt Restructuring (CDR) and improving the performance and to achieve positive results during the year 2006-07. The CDR mechanism used the land sale proceeds. Upon making the proposal, the Respondent-Company discontinued its production activity in the nylon plant. The CDR Empowered Group approved the package for restructuring of debts on 21st January, 2008 but still it could not improve the financial business position of the Respondent-Company till the period ending on 30th June, 2008. On or about 24th September, 2008, the consortium banks released their interest over the property. An agreement with the recognized employees' unions was also entered into on 5th September, 2008 but then it ran into problems, as it was contended by the Labour Unions that their dues should be cleared first and on transfer of land, Appellant-Company should provide 18 acres of land for a proposed employee's colony. An early retirement scheme was also introduced and out of the total strength of 3725 employees, about 577 employees opted to take the benefit of this scheme. The Respondent-Company then negotiated with the Appellant-Company sometime in September 2008 for payment of the third instalment of Rs.48.90 crore. However, simultaneously, the Labour Unions raised the question of payment of bonus which adversely affected the revival plans. The chemical plant of the company was re-started. On 3rd December, 2008, the Respondent-Company moved an application before the BIFR in Case No. 55 of 2008 under Section 15(1) of the Act of 1985. The Appellant-Company

refused to release the third instalment and resultantly, even the dues of 577 employees, who had taken the benefit of the early retirement scheme, could not be cleared. The BIFR, vide its order dated 16th July, 2009, fixed the cut-off date as 30th July, 2007. It directed that the sale of assets, including investments, will require prior approval of the BIFR. It also appointed the Punjab National Bank as the Operating Agency under Section 17(3) of the Act of 1985.

5. As per Section 18(8) of the Act of 1985, the cut-off date is the date of coming into operation of the sanctioned scheme, or any provisions thereof. In other words, all matters relating to the company would, after this date, be within the ambit and scope of the provisions of the Act of 1985 and, as already noticed, the BIFR had declared the cut-off date to be 30th July, 2007. Vide its order dated 16th July, 2009, which was passed under Section 17(3) of the Act of 1985, the following directions were given:

> "(i) The Company shall submit a fully tied up DRS to the OA (Punjab National Bank) (PNB) within a period of three months. The sale of 350 acres of land stated to be approved by the CDR Empowered Group (EG) and the secured creditors may form part of the DRS. The details of the land to be sold including survey numbers should be clearly specified. The company shall give similar details of the remaining land and conform that it is adequate for the functioning and viability of the company on long term basis. The OA (PNB) shall convene a joint meeting of all concerned and submit a fully tied up DRs, if it emerges, along with the minutes of the joint meeting within a further period of one month.
>
> (ii) Bank of Baroda (BOB) shall submit an authenticated copy of the CDR scheme approved by consortium of banks within a period of 15 days.
>
> (iii) PNB (OA) shall confirm to the Board within a period

of 15 days under copy to the company that all the secured creditors who had charge over the land had approved sale of 350 acres of land belonging to the company at Kalyan, Thane Dist. To K. Raheja Universal Pvt. Ltd. For a sum of Rs. 166.40 crore. The secured creditors who had charge over the land shall clearly indicate whether the company had obtained their approval before entering into MOU and agreement for sale of 350 acres of land with K. Raheja Universal Ltd. under copy to the company the OA (PNB) and the Board. Secured creditors shall also similarly submit copy of their approval for sale of investments, giving details of the investments. OA shall also submit copies of the approvals given by the secured creditors for the sale of the said land along with the copies of valuation report and the details of the valuer and the procedure followed based on which the sale consideration of Rs.166.40 crores was arrived at. OA shall also submit a copy of the approvals by secured creditors for sale of investment giving details of the investments. The company shall fully co-operate with the OA in furnishing the documents/details required by them.

(iv) The company shall submit within 15 days under copy to the OA (PNB) copies of the No Objection Certificates for sale of land and release of charge issued by all the charge holder lenders and the State Government in respect of 350 acres of land for which MOU and agreement of sale are stated to be entered into in 2006 and 2007 respectively with K. Raheja Universal Pvt. Ltd. under copy to the PNB (OA). The company should also submit certified copies of the Board resolutions of the company authorizing these transactions to the OA with a copy to the Board. The company shall similarly submit full details of the investments to be sold under the CDR scheme. It is reiterated that sale of assets including investments will require the prior approval of BIFR as the company is now under the purview of SICA.

(v) The company shall submit a copy of the clearance stated to have been received from Hon'ble High Court of Bombay for sale of 350 acres of land under copy to the OA (PNB).

(vi) The secured creditors are directed u/s 22(1) of SICA not to take any coercive action against the company without prior permission of BIFR."

6. As is evident from the above-noted directions, the BIFR treated the land as an investment and has put certain restrictions thereupon, including that of sale of assets, which required the prior approval of BIFR as the Respondent-Company was under the purview of the Act of 1985. With reference to the land, it was directed that Capacity Valuation Report should be placed on record to show how the sale consideration of Rs.166.40 crore was arrived at. Aggrieved from this order, the Appellant-Company as well as the Respondent-Company, both have preferred an appeal before the Appellate Authority for Industrial and Financial Reconstruction (for short the 'AAIFR') under Section 25 of the Act of 1985. The AAIFR made major variations in the order of the BIFR. Firstly, it held that BIFR should not have fixed 30th July, 2007 as the cut-off date and secondly, that the provisions of Section 22A would not apply to an agreement for sale which had already been entered into, registered, acted upon and was in the process of completion. While dealing with the order of the BIFR, AAIFR vide its order dated 28th May, 2010, set aside certain findings of the BIFR as well as passed certain other directions. It is useful to refer to some of the findings recorded by the AAIFR in its order which are as under:

"22. ..... The BIFR has also not considered the impact of Section 22A or the transactions, contracts/agreements entered into between the company and third parties prior to the filing of reference when the company was not a sick entity. If the BIFR was of the view that the agreement for sale of land was not in the interest the company, it could

have suspended the contract under Section 22(3) of SICA as it was a pre-existing contract. Despite arguments to the contrary, the BIFR has not given any reasons to justify how Section 22A of SICA applies to a pre-existing agreement for sale entered into between the company and a third party prior to filing of the reference. In fact, the agreement for sale is a clog on the absolute ownership of the property of the appellant company and the property cannot be said to be free from encumbrance unless the registered agreement for sale is cancelled. The property under agreement cannot be sold to others during the subsistence of agreement for sale.

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24. In view of the aforesaid discussion and considering the various provisions of the MOU dated 13.4.06, agreement for sale dated 01.3.07 and supplementary agreement dated 21.9.07, we are of the view that the provisions of Section 22A will not apply to the agreement for sale already entered into, registered, and acted upon and in the process of completion. Had it been the intention of the legislature to cover the past transactions within the ambit of Section 22A, the provisions for suspension of existing contracts etc. would not have been provided under Sub-Section (3) of Section 2 of SICA under which the BIFR has not passed any order. Readiness and willingness of the parties to the sale agreement to honour the contract is also a paramount consideration."

7. AAIFR summed up its conclusion in paragraphs 41 and 42 which read as under:

"**41.** To sum up :

The sale-purchase agreement dated 30.6.2009 was signed after the reference was filed and 15 days before the BIFR passed the restraint order under section 22A;

There is no evidence to show whether various provisions of SEBI Take Over Code have been complied with;

The company has violated the amended terms and conditions of STL dated 29.6.2009 by not paying to PNB one instalment of Rs.2.78 crores before 30.6.2009;

Consequently, PNB ha not released the shares of AOL for re-pledge by ISG Traders Ltd.:

According to PNB, however, the company has shown the entire shares of AOL as sold:

There is no evidence to show that sale consideration has been paid; and

The ISG Traders Ltd. is neither a party before the BTR nor before this Authority.

In these circumstances, the BIFR was fully justified in seeking full details of the investments to be sold in the CDR scheme and to direct that the sale of investments will require the prior approval of the BIFR. We find no reasons to interfere with the aforesaid order of the BIFR regarding sale of investments.

42. We observed that the BIFR has fixed the cutoff date as 30.07.2007 on the basis of the CDR scheme while passing the order under Section 17(3). The fixation of cut off date implies that the liabilities and the dues of the creditors will be determined as on that date and the repayment obligations will commence during the year following the cut oil date. If there is a substantial gap between the cut off date fixed and the date of sanction of the scheme, the scheme will become a non starter because the sick industrial company will be unable to fulfill its repayment obligations for the period between the cut off date as stipulated in the impugned order and date of sanction of the scheme, The issue can be resolved by

determining a prospective cut off date. Section 17(4)(b) of SICA vests in the BIFR the necessary power to review and modify its orders under Section 17(3) of SICA. Therefore, in our view the cut off date fixed by the BIFR in the impugned order is required to be suitably modified by the BIFR."

8. With the above findings, the AAIFR recorded that the scheme could be approved but subject to pre-payment of the entire remaining consideration of Rs.124.64 crores, as per its directions, for setting off labour dues. In other words, it permitted the land, though an asset of the company, to be sold. The correctness and legality of this order of the AAIFR was questioned by the Appellant-Company, the Respondent-Company and the NRC Mazdoor Sangh before the High Court. These Writ Petitions, along with other connected Writ Petitions, were disposed of by the High Court by a common judgment dated 29th July, 2011. The High Court, primarily, framed two questions for discussion: firstly, whether the land covered by the agreement of sale dated 1st March, 2007 and supplementary agreement signed on 29th September, 2007, was an existing asset of the Respondent-Company and secondly, what was the scope of the powers of the BIFR under Section 22(3) of the Act of 1985. The High Court quashed the order of the AAIFR and confirmed the order passed by the BIFR holding as under:

"(8)..... The AIFR further held that prior to the filing of the reference under Section 15 of SICA, a debt restructuring scheme under the CDR mechanism on 12/12/2007 and 21/1/2008, the CDR package envisaged sale of surplus land as well as sale of investments of the appellant company. Any restraint order on the sale of land, under the agreements for sale, would not only complicate the matter but would hamper the revival process and would also lead to a prolonged litigation between the parties and this will not be in the interest of revival of the sick company. The provisions of Section 22A which are prospective in

nature would not impact pre existing contract for sale entered into by the company before it filed reference under Section 15(1) of SICA and, therefore, the directions given under Section 22A will not apply to the agreement for sale deed 1/3/2007. The restraint order passed by the BIFR would apply to any subsequent proposals for disposal of assets of the company, if any. But these agreements will be subject to interim orders and final orders to be passed by the High Court in the pending writ petition challenging the settlement dated 5/9/2008. For all these reasons, the AIFR held that the agreement for sale cannot be part of DRS under Section 18(d) of SICA as the same is under transfer and unencumbered and legally enforceable contract exists between the appellant company and respondent no.13. However, the AIFR held that the balance sale consideration in respect of the land to the tune of Rs.124.64 crores receivable by the company from respondent no.13 should form part of the means of finance in the DRS to be formulated by the BIFR for rehabilitation of the company. One payment of balance sale consideration by respondent no.13, the same shall be deposited with an interest bearing NLA with the operating agency for utilisation as per the rehabilitation scheme to be sanctioned by the BIFR. The said scheme was for workers dues including Rs.45 crores for ERS and appropriately crystallized amount for ex-employees dues as per the settlement dated 5/9/2008 with NRC Mazdoor Sangh. The AIFR further observed that if the BIFR considers it necessary to make payment to the workers as provided for in the agreement with the workers, before the sanction of the revival scheme, it could do so to alleviate the hardships of the workers."

9. After dealing with these two questions at length, the High Court was of the opinion that BIFR order dated 16th July, 2009 was within the scope of Section 22(3) of the Act of 1985. It held that the order of the AAIFR permitting the sale of the land in

furtherance to the agreement between the parties was not sustainable as it was part of the scheme and sale had been permitted subject to the final orders of the BIFR. This judgment of the High Court is impugned by the Appellant-Company before us.

Legislative Scheme of the Act of 1985 :

10. The framers of law felt that the existing institutional arrangements and procedure for revival and rehabilitation of potentially viable sick industrial companies are both inadequate and time consuming. Multiplicity of law and the regulatory agencies makes the adoption of a coordinated approach for dealing with sick industrial companies difficult. Thus, a need was felt to enact, in public interest, a legislation to provide for timely determination, by a body of experts, of the preventive, ameliorative, remedial and other measures that would be needed to be adopted with respect to such companies and for enforcement of the appropriate measures with utmost practicable despatch. The ill-effects of sickness in industrial companies, such as cessation of production, loss of employment, loss of revenue to the Central and State Governments and blocking up of investible funds of the banks and financial institutions, were of serious concern to the Government as well as the society at large. It had repercussions on the industrial growth of the country. With the passage of time the number of sick industrial units increased rapidly. Therefore, it was imperative to salvage the productive assets and release, to the extent possible, the amounts due to the banks and financial institutions from non-viable sick industrial debtor companies by liquidation of those companies or through formulation of rehabilitation schemes. With these objects, the Bill was introduced with the salient features *inter alia* of identification of sickness in the industrial companies, on the basis of symptomatic indices of cash losses for the specified periods. Wherever the Government or the Reserve Bank were satisfied that an industrial company has become sick, they were

required to make a reference to the BIFR. The BIFR consists of experts, in various relevant fields, with powers to inquire into and determine the incidences of sickness in the industrial companies and devise suitable measures through appropriate schemes to revive them. An appeal lies from the order of BIFR to an appellate authority (the AAIFR) consisting of members selected from amongst Supreme Court or High Court Judges or Secretaries to the Government of India. With this background, objects and reasons, this Bill was passed by the Indian Parliament and it received the assent of the President of India on 8th January, 1986. Thus, it became an Act of the Parliament intended to revolutionize the mechanism of revival or liquidation of sick industrial units and channelization of the complete administrative-cum-quasi judicial process within the framework of the Act of 1985.

Nature and Scope of the Act of 1985

11. Having dealt with the legislative history and object of the Act of 1985, we may now examine the very nature of this legislation. The Act of 1985 basically and predominantly is remedial and ameliorative in so far as it empowers the quasi-judicial body, the BIFR, to take appropriate measures for revival and rehabilitation of the potentially viable sick industrial companies and for liquidation of non-viable companies. It is regulatory only to a limited extent. The provisions of the Act of 1985 impose an obligation on the sick industrial companies and potentially sick industrial companies to make references to the BIFR within the time specified under the Act of 1985. Default thereof is punishable under the provisions of the Act of 1985. Largely, the proceedings before the BIFR are specific to rehabilitation or winding up of the sick company and the Act of 1985 hardly contemplates adversarial proceedings. The bodies constituted under the Act of 1985 would least exercise their jurisdiction to a *lis* between any party or upon the rival interests of the parties. With regard to the matters covered under the Act of 1985, the jurisdiction of the civil courts is

ousted and the matters which are even allied to the formulation and sanction of the scheme would have to be decided by the BIFR itself. Even this aspect has been a matter of judicial divergence. In the case of *Gram Panchayat & Anr. v. Shree Vallabh Glass Works Ltd. & Ors.* [(1990) 2 SCC 440], this Court was concerned with a company which had been declared 'sick' within the meaning and scope of clause (o) of Sub-section (1) of Section 3 of the Act of 1985. The Gram Panchayat had initiated coercive proceedings as per Section 129 of the Bombay Village Panchayat Act, 1959 to recover a sum of Rs.9,47,539/- stated to be the property tax and other amounts due from the company. This demand was challenged. The Bombay High Court quashed the demand and the recovery proceedings. This Court, while dealing with the scope of Section 22 read with Sections 16 and 17 of the Act of 1985, took the view that all proceedings for execution, distress or the like against the properties of the company would automatically be suspended and could not continue without the consent of the BIFR. This Court held as under: -

> "10. In the light of the steps taken by the Board under Sections 16 and 17 of the Act, no proceedings for execution, distress or the like proceedings against any of the properties of the company shall lie or be proceeded further except with the consent of the Board. Indeed, there would be automatic suspension of such proceedings against the company's properties. As soon as the inquiry under Section 16 is ordered by the Board, the various proceedings set out under sub-section (1) of Section 22 would be deemed to have been suspended.
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> 11. It may be against the principles of equity if the creditors are not allowed to recover their dues from the company, but such creditors may approach the Board for permission to proceed against the company for the recovery of their dues/outstandings/overdues or arrears by whatever name it is called. The Board at its discretion may accord its approval for proceeding against the company. If the approval is not granted, the remedy is not extinguished. It is only postponed. Sub-section (5) of Section 22 provides for exclusion of the period during which the remedy is suspended while computing the period of limitation for recovering the dues."

12. This Court in the case of *Deputy Commercial Tax Officer & Ors. v. Corromandal Pharamaceuticals & Ors.* [(1997) 10 SCC 649] had taken a somewhat divergent view to the view taken in *Shree Vallabh Glass Works* (supra). In this case, this Court, while examining the language of Section 22 of the Act of 1985, came to the conclusion that it was certainly a wide provision. In the totality of the circumstances, the safeguards stated under Section 22 of the Act of 1985 are only against any impediment that is likely to be caused in the implementation of the scheme. If the matter falls outside the purview of the scheme and the dues are not reckoned or included in the sanctioned scheme of rehabilitation, recovery of sales tax dues would not be covered under this provision and as such the bar of Section 22(1) of the Act of 1985 would not operate. This Court held as under: -

> ".....The language of Section 22 of the Act is certainly wide. But, in the totality of the circumstances, the safeguard is only against the impediment, that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by Section 22 of the Act. So, we are of the view that though the language of Section 22 of the Act is of wide import regarding suspension of legal proceedings from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal under Section 25 of the Act, it will be reasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues reckoned or included in the" sanctioned scheme. Such amounts like sales tax, etc.

which the sick industrial company is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act. Any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the Revenue and withhold it indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against spirit of the statutes in a business sense, should be avoided."

13. While taking the above view, this Court also noticed the judgment in *Shree Vallabh Glass Works* (supra) but distinguished the same by stating that the facts in that case were distinct.

14. The above two judgments covered the field of law in this regard for a considerable time, till the judgment of this Court was rendered in the case of *Jay Engineering Works Ltd. v. Industry Facilitation Council & Anr.* [AIR 2006 SC 3252]. In the said judgment, this Court was dealing with a question as to whether the award made under Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 was covered under Section 22 of the Act of 1985 or despite the pendency of such proceedings before the BIFR the award could be executed. This Court also discussed the issue as to which of the above two Acts would prevail. Dealing with the language of Section 22 of the Act of 1985, this Court took the view that the said Act shall prevail and though the adjudicatory process of making an award under the 1993 Act would not come under the purview of the Act of 1985, once an award is made and sought to be executed, the provisions of Section 22 of the Act of 1985 shall take over and such award would not be executable against the sick company, particularly when the party in whose favour the award was made was, as in the present case, included in the category of dormant creditors of the sick company. This Court in the said judgment held as under: -

"17. The said provision, thus, mandates that no proceeding inter alia for execution, distress or the like against any of the properties of the industrial company and no suit for recovery of money or for the enforcement of any security, shall lie or be proceeded with further, except with the consent of the Board or as the case may be, the Appellate Authority. The said statutory injunction will operate when an inquiry had been initiated under Section 16 or a scheme referred to under Section 17 is under preparation and/ or inter alia a sanctioned scheme is under implementation. It is not disputed before us that the amount awarded in favour of the Respondent by the Council finds specific mention in the sanctioned scheme which is under implementation.

18. The award of the Council being an award, deemed to have been made under the provisions of the 1996 Act, indisputably is being executed before a Civil Court. Execution of an award, beyond any cavil of doubt, would attract the provisions of Section 22 of the 1985 Act. Whereas an adjudicatory process of making an award under the 1993 Act may not come within the purview of the 1985 Act but once an award made is sought to be executed, it shall come into play. Once the awarded amount has been included in the Scheme approved by the Board, in our opinion, Section 22 of the 1985 Act would apply.

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21. The 1985 Act was enacted in public interest. It contains special provisions. The said special provisions had been made with a view to secure the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts for preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so

determined and for matters connected therewith or incidental thereto."

15. Furthermore, in a recent judgment of this Court in the case of *Shree Sajjan Mills Limited & Ors. v. Municipal Corporation, Ratlam* [(2009) 17 SCC 665], this Court was dealing with a company which had approached the BIFR for being registered as a sick company and was so declared on 21st November, 1989. The BIFR had recommended the winding up of the sick company but the AAIFR had taken the view that the company could be rehabilitated and, therefore, framed the scheme for its revival. For the purpose of revival, an Assets Sales Committee was constituted for selling, via tender process, the surplus land belonging to the appellant-company. The issue under consideration was that when the 20 per cent of the purchase price deposited by the tenderer as earnest money as per the terms and conditions of the sale was forfeited, whether the same could be challenged only before the BIFR or the civil courts could determine the dispute and whether the bar contained under Section 26 of the Act of 1985 would operate. This Court took the view as under: -

"12. We agree with the view expressed by the High Court that the forfeiture of the earnest money by the Assets Sale Committee could not have been the subject-matter of a dispute within the meaning of Section 26 which either BIFR or AAIFR has the jurisdiction to determine. Accordingly, we see no reason to interfere with the judgment and order of the High Court impugned in this appeal."

16. We may notice that though the Bench had noticed the view taken in the case of *Jay Engineering* (supra), no detailed reasoning was recorded for rejecting the said view.

17. In order to affirmatively answer whether the view of this Court expressed in *Shree Vallabh Glass Works* (supra) is the correct and acceptable exposition of law, it is but necessary for this Court to examine the scheme of the Act of 1985 and

some of its relevant provisions. As already noticed, the Act of 1985 was enacted by the Legislature, primarily with the object of establishing a specialized body for revival, rehabilitation and even winding up of sick industrial companies and wherever necessary, providing them with financial assistance. The provisions contained in Chapter III of the Act of 1985, which deals with References, Inquiries and Schemes, are the relevant provisions which can throw some light on the matter and issues before us. Section 15 of the Act of 1985 places an obligation upon an industrial company, which has become sick in terms of that provision, to make a reference to the BIFR established under Section 4 of the Act of 1985 within the period of limitation prescribed. While under Section 15(2) where the Central Government or Reserve Bank of India or a State Government or a Public Financial Institution has sufficient reasons to believe that any industrial company has become, for the purpose of the Act of 1985, a sick industrial company, would also make a reference of such company to the Board for determination of the measures which may be adopted with regard to such company. Section 16 of the Act of 1985 deals with the conduct of an inquiry by the BIFR and the manner in which the BIFR is expected to deal with the matter upon receipt of a reference under Section 15 of the Act of 1985. Section 16 vests the BIFR with very wide powers of inquiry and passing appropriate orders. Section 16(2) empowers the BIFR to pass an order, in its discretion, directing any operating agency to inquire into and to make a report with regard to the matters as may be specified in the order. Such operating agency is expected to complete the inquiry expeditiously and preferably within 60 days from the date of commencement of inquiry. The BIFR is vested with powers such as appointing special directors for the sick company and issuing directions to the special directors in relation to discharge of their duties and to improve the performance of any or all of the functions postulated under Section 16(6) of the Act of 1985. After the inquiry by the BIFR or by the operating agency is completed, BIFR if satisfied that the company has become sick and upon considering all

relevant facts and circumstances of the case in exercise of its powers under Section 17 of the Act of 1985, may pass orders requiring the company to make its net worth exceed the accumulated losses within a reasonable time and for that purpose it may impose such restrictions or conditions as may specified in the order in terms of Section 17(2) of the Act of 1985. Further, where the BIFR decides that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time and that it is otherwise necessary or expedient in public interest to adopt all or any of the measures specified in Section 18 of the Act of 1985 in relation to the said company, it may, having regard to the guidelines, as may be specified, pass an order formulating a scheme providing for such measures in relation to the sick industrial company. In the event of non-compliance of the restrictions or conditions specified in the order of the BIFR or where the company fails to revive itself in pursuance to the order, the BIFR can pass any of the directions/orders as required under Section 17(4) of the Act of 1985. Section 18 of the Act of 1985 again is a remedial provision which contains specified guidelines for the preparation and sanction of the schemes for the revival of the sick industrial company. Where an order is made under Section 17(3) in relation to a sick industrial company, the operating agency is required to prepare, as expeditiously as possible, ordinarily within 90 days from the date of such order, a scheme with respect to such company providing for any one or more of the measures stated under sub-clauses (a) to (f) of Section 18(1) of the Act of 1985. The scheme so framed may provide for any one or more of the measures stated under clauses (a) to (m) of Section 18(2) of the Act of 1985. The scheme which has been prepared in consonance with the provisions of Section 18(1) and 18(2) then has to be examined by the BIFR in terms of Section 18(3) of the Act of 1985 and if the BIFR makes any modifications to the scheme, the same draft scheme, in brief, shall be published or caused to be published in such daily newspapers as the BIFR may consider necessary, for receipt of suggestions and

objections, if any. In light of the suggestions and objections received in response to such publication, the BIFR may still make further modifications. Also, where the scheme relates to amalgamation of the companies, the procedures specified therein shall be followed. In such cases, the shareholders of the company, other than the sick industrial company, are expected to pass a resolution of approval of the scheme. The scheme thereafter shall be sanctioned by the BIFR and shall come into force on such date as the BIFR may specify in this behalf and in exercise of the powers vested in it under Section 18(4) of the Act of 1985. This scheme does not attain finality which is unalterable. Once the scheme is sanctioned and comes into force even then, on the recommendation of the operating agency, the BIFR can consider further modifications or even prepare a fresh scheme providing for such measures as the operating agency may consider it necessary and recommended in terms of Section 18(5) of the Act of 1985.

18. Section 18(7) of the Act of 1985 is an important provision which provides that the sanction accorded by the BIFR shall be conclusive evidence that all the requirements of the scheme relating to reconstruction or amalgamation or any measure specified therein have been complied with and a copy of the sanctioned scheme certified in writing by an officer of the BIFR to be a true copy thereof shall be admissible as evidence in all legal proceedings. To resolve the difficulties that may arise in giving effect to the provisions to the sanctioned scheme, the BIFR may, on the recommendation of the operating agency or otherwise, by order do anything, not inconsistent with such provisions, which appears to it to be necessary or expedient for the purpose of removing difficulty in terms of Section 18(9) of the Act of 1985. The role of the BIFR does not end here and it may even periodically monitor the implementation of the scheme. Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or

guarantees from the Government or financial institutions. Before any financial institution is called upon to proceed to release the financial assistance to the sick industrial company in fulfilment of the requirements in that regard, the procedure contemplated under the provisions of Section 19 of the Act of 1985 has to be followed. Where the BIFR, after making inquiry under Section 16 of the Act of 1985, considering all relevant facts and circumstances and giving an opportunity of being heard to all concerned parties, is of the opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court as per the provisions of Section 20 of the Act of 1985 whereafter the company shall be wound up in accordance with the provisions of the Companies Act, 1956. The High Court may even appoint any officer of the operating agency as the liquidator of the sick industrial company. Section 21 of the Act of 1985 requires the operating agency to prepare an inventory, if so directed by the BIFR.

19. Sections 22 and 22A have a significant bearing upon the controversy that arises for consideration of the Court in the present case and it will be useful to refer to those provisions at this stage itself:

> **"22. Suspension of legal proceedings, contracts, *etc.*-** **(1)** Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under sections 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association

> of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.
>
> **(2)** Where the management of the sick industrial company is taken over or changed, in pursuance of any scheme sanctioned under section 18, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law -
>
> **(a)** it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;
>
> **(b)** no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.
>
> **(3)** Where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party

or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adoptions and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly, -

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect -

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with, subject to the provisions

of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

22A. Direction not to dispose of assets - The Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets -

(a) during the period of preparation or consideration of the scheme under section 18; and

(b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court.

20. A bare reading of the above provision shows that Section 22 of the Act of 1985 is concerned with the suspension of legal proceedings, execution and distress sale etc. against the assets of a sick company while Section 22A deals with power of the Board to issue directions restraining the disposal of assets of such companies. These two provisions primarily ensure that the scheme prepared by the BIFR does not get frustrated because of certain other legal proceedings and to prevent untimely and unwarranted disposal of the assets of the sick industrial company. These sections clearly state certain restrictions which will impact upon the implementation of the scheme as well as on the assets of the company. These sections operate at different stages and in different fields.

Section 22(3) of the Act of 1985 contemplates that where an inquiry under Section 16 is pending or any scheme referred to in Section 17 is under preparation or during the period of consideration of any scheme under Section 18 or where any such scheme is sanctioned thereunder for due implementation of the scheme, the BIFR may, by order, declare that with respect to the sick industrial company concerned, the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations or liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adoptions and in such manner as may be specified by the BIFR. This power of the BIFR is subject to the proviso which states that the declaration made under this provision shall not be for a period exceeding two years and which may be extended by one year at a time, but the total period shall not exceed seven years in aggregate. Section 22A of the Act of 1985 empowers the BIFR to pass orders in the interest of the sick industrial company or even in public interest requiring the sick industrial company not to dispose of, except with the consent of the BIFR, any asset during the period of preparation or consideration of the scheme under Section 18 of the Act of 1985 and during the period beginning with the recording of opinion for winding up of the company under Section 20(1) of the Act of 1985 by the BIFR upto commencement of the proceedings relating to winding up before the High Court.

21. All these provisions which fall under Chapter III of the Act of 1985 have to be read conjointly and that too, along with other relevant provisions and the scheme of the Act of 1985. It is a settled canon of interpretation of statutes that the statute should not be construed in its entirety and a sub-section or a section therein should not be read and construed in isolation.

Chapter III, in fact, is the soul and essence of the Act of 1985 and it provides for the methodology that is to be adopted for the purposes of detecting, reviving or even winding up a sick industrial company. Provisions under the Act of 1985 also provide for an appeal against the orders of the BIFR before another specialised body, i.e., the AAIFR. To put it simply, this is a self-contained code and because of the *non obstante* provisions, contained therein, it has an overriding effect over the other laws. As per Section 32 of the Act of 1985, the Act is required to be enforced with all its vigour and in precedence to other laws.

22. The BIFR has been vested with wide powers and, being an expert body, is required to perform duties and functions of wide-ranged nature. If one looks into the legislative intent in relation to a sick industrial company, it is obvious that the BIFR has to first make an effort to provide an opportunity to the sick industrial company to make its net worth exceed the accumulated losses within a reasonable time, failing which the BIFR has to formulate a scheme for revival of the company, even by providing financial assistance in cases wherein the BIFR in its wisdom deems it necessary and finally only when both these options fail and the public interest so requires, the BIFR may recommend winding up of the sick industrial company. So long as the scheme is under consideration before the BIFR or it is being implemented after being sanctioned and is made operational from a given date, it is the legislative intent that such scheme should not be interjected by any other judicial process or frustrated by the impediments created by third parties and even by the management of the sick industrial company, in relation to the assets of the company. In other words, the object and purpose of the Act of the 1985 is to ensure smooth sanctioning of the scheme and its due implementation. Both these stages, i.e., pre and post sanctioning of the scheme by the BIFR, are equally material stages where the provisions of Sections 22 and 22A read with Section 32 of the Act of 1985 would come into play. Such an approach would also be

acceptable as otherwise the entire scheme under Chapter III of the Act of 1985 would be frustrated. Doctrine of frustration envisages that an exercise of special jurisdiction in futility, is neither the requirement of legislature nor judicial dictum.

23. In *Shree Vallabh Glass Works* (supra), this Court had taken a general view that in the light of Sections 16 and 19 of the Act of 1985, no proceedings for execution, distress or the like against any of the property of the company shall be allowed to be proceeded further except with the consent of the BIFR. Reference in this regard was made to the provisions of the Section 22(1) of the Act of 1985. Despite *non-obstante* language of Section 22(1) and the prohibition contained therein, there is no absolute bar for institution and continuation of legal proceedings against a sick industrial company or its assets. The same can continue only after obtaining the consent of the BIFR or the AAIFR, as the case may be. Once permission is granted, the proceedings can continue and decree can be executed. In the case of *Corromandal Pharmaceuticals & Ors.* (supra), the scope of Section 22 of the Act of 1985 was sought to be restricted only to the items which have been reckoned or included in the scheme for rehabilitation failing which the recovery or proceedings in relation to that particular liability would continue despite the provisions of the Act of 1985. In that case the Court was concerned with the recovery of sales tax dues, which the sick industrial company was enabled to collect after the date of sanction of the scheme. The revenue was due to the department and the recovery of such amount was held to be beyond the purview of the Act of 1985.

24. In *Jay Engineering* (supra), the dictum of this Court was that the Act of 1985 is a complete code in itself and the provisions of Section 22 of the Act of 1985 would apply to an award made under the Interest on Delayed Payments to Small Scale and Ancillary Industries Undertaking Act, 1993, which would be governed by the provisions of the Arbitration and Conciliation Act, 1996. This Court also stated the principle that

the Act of 1985 would have an overriding effect over other statutes, i.e. the 1993 Act in that case. However, the question whether the BIFR, while implementing the scheme, could reduce the quantum of liability of the creditors was left open.

25. Firstly, the facts of these cases are different and distinct and, therefore, conclusions of the Court have to be read with reference to the facts of the respective cases only and not *de hors* thereof. Once the dictum of this Court is read with reference to the facts of the respective cases, it would be evident that there is no conflict of views within the ambit of *ratio decidendi* of the respective judgments to make both of them legal and binding precedents. Despite these judgments and with an intention to clarify the law, we would state that the matters which are connected with the sanctioning and implementation of the scheme right from the date on which it is presented or the date from which the scheme is made effective, whichever is earlier, would be the matters which squarely fall within the ambit and scope of Section 22 of the Act of 1989 subject to their satisfying the ingredients stated under that provision. This would include the proceedings before the civil court, revenue authorities and/or any other competent forum in the form of execution or distress in relation to recovery of amount by sale or otherwise of the assets of the sick industrial company. It is difficult for us to hold that merely because a demand by a creditor had not been made a part of the scheme, pre or post-sanctioning of the same for that reason alone, it would fall outside the ambit of protection of Section 22 of the Act of 1985. The BIFR, being a specialised body which is required to act as per the legislative intent indicated above, has jurisdiction to examine the matter and grant or refuse its consent for institution, continuation and recovery of dues payable to a particular creditor, whatever the nature of such dues may be. If such an interpretation is not given, the very purpose of the Act of 1985 may stand defeated. For instance, a scheme is sanctioned by the BIFR and is at the stage of successful completion, where demand from the Revenue with

regard to the sick industrial company is allowed, this can render the scheme ineffective and impossible to be executed, if permitted to be enforced against such company without approval/consent of the specialised body like the BIFR.

26. Section 22A was introduced by the Amending Act 12 of 1994. The obvious intent of introducing the said provision was to empower the BIFR to issue any direction to the sick industrial company, its creditors and shareholders, in the interest of the company or even in public interest, directing the company not to dispose of any assets, except with the consent of the BIFR. The directions so issued are to remain in force during the preparation and consideration of the scheme. BIFR is also vested with similar powers where it recommends to the High Court for winding up of a company. The directive issued by BIFR would remain in force upto the commencement of the proceedings for winding up before the High Court. Section 22 is the reservoir of the statutory powers empowering the BIFR to determine a scheme, right from its presentation till its complete implementation in accordance with law, free of interjections and interference from other judicial processes. Section 22(1) deals with the execution, distress or the like proceedings against the company's properties, including appointment of a Receiver. It also specifically provides that even a winding up petition would not be instituted and no other proceedings shall lie or proceed further, except with the consent of the BIFR. In contradistinction to this power, Section 22(3) states that pending an enquiry or a scheme under the provisions of the Act of 1985 and even where the scheme is sanctioned, for the due implementation of such scheme, the BIFR may, by an order, declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that

all or any of the rights or privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended and shall be enforceable with such adoption and in such a manner as may be specified by the BIFR. In other words, all those instruments to which the sick industrial company is a party, will be subject to the orders of the BIFR. Further, such proceedings can even be modified by the BIFR, of course, for the limited purpose of implementing the scheme. The declarations made by the BIFR under Section 22(3) are subject to the restrictions of time as stated under the proviso to this section. The maximum period for which such a declaration in aggregate can continue is seven years. The legislative intent of giving an over-riding effect to the declarations of the BIFR, as contemplated under Section 22(3) of the Act of 1985, is further fortified by the language of Section 22(4), which states that any declaration made under Section 22(3) shall take effect notwithstanding anything contained in the Companies Act, 1956 or any other law, the memorandum and articles of association of the company or any instrument, decree, order of a court, settlement etc. Any remedy for enforcement of a right which may be available to a third party and any such proceedings before any court or tribunal shall remain stayed or be continued subject to such declaration. Section 22(4)(b) brings *status quo ante* and in fact, makes it clear that on cessation of such a declaration, the right, privilege, obligation or liability which was suspended shall become revived and enforceable as if the declaration had never been made. The proceedings will continue from the stage at which they were stayed. It can safely be perceived that the provisions of Section 22 of the Act of 1985 are self-explanatory. They would cease to operate within their own limitations and not by force of any other law, agreement, memorandum or even articles of association of the company. The purpose is so very clear that during the examination, finalization and implementation of the scheme, there should be no impediment caused to the smooth execution of the scheme of revival of the sick industrial company. It is only when the specified period of restrictions and

declarations contemplated under the provisions of the Act of 1985 is over, that the *status quo ante* as it existed at the time of the consideration and finalization of the scheme, would become operative. This is done primarily with the object that the assets of the company are not diverted, wasted, taken away and/or disposed of in any manner, during the relevant period.

27. The powers of the BIFR under Section 22(3) can be segregated under two different heads. Firstly, the power to suspend simplicitor the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or any other instrument in force, to which the sick industrial company is a party or which may be applicable to the sick industrial company before the date of such order. Secondly, any rights, privileges, obligations or liabilities accruing or arising before the said date, shall be enforceable with such adaptation and in such manner as may be specified by the BIFR.

28. This dissection clearly demonstrates the intent of the framers of law, that the BIFR has the power to even make changes in such instruments, documents etc. which create rights and liabilities vis-à-vis the sick industrial company, and before permitting them to be enforced. Such an approach alone can be justified, as otherwise the expression 'shall be enforceable with such adaptation and in such manner as may be specified by the BIFR would be meaningless. It is a settled principle of interpretation of statutes that every word and expression used by the legislature has to be given its proper and effective meaning as the legislature uses no expression without purpose or meaning. The maxim *Lex Nil Frusta Jubet i.e. Law Commands nothing vainly* further elucidates this principle. Of course, the power to make this declaration as already noticed is controlled by limitation of time as specified in the proviso to the Section. Lifting of such declaration by lapse of time or otherwise or in accordance with the provisions of Section 22(4) shall bring the *status quo ante* as if such declaration had never been made. Section 22A is obviously a power over and above

the wide powers vested in BIFR under the provisions of Section 22 of the Act of 1985. Section 22 is the reservoir of the statutory powers empowering the BIFR to deal with the scheme, right from its presentation till its complete implementation in accordance with law, free of interjections and interference from other judicial processes.

29. Section 22A of the Act of 1985 empowers the BIFR to pass injunctive or restraint orders in relation to the assets of the sick industrial company. These injunctive orders are to be in operation during the period of preparation or consideration of the scheme under Section 18 of the Act of 1985. Section 22A, thus, has a narrower scope than Section 22. Section 22 operates from the presentation of the scheme, its consideration, preparation, finalization and ultimately the implementation of the said scheme and consequent rehabilitation of the sick industrial company, while Section 22A operates only during the preparation or consideration of the scheme, or upto the commencement of the proceedings for winding up before the concerned High Court, in the event the BIFR recommends winding up proceedings.

30. The relevant provisions of the Act of 1985 clearly demonstrate that BIFR is vested with the power to issue directions in the interest of the company or even in public interest, to prevent the disposal of assets of the company during the period of preparation, consideration or implementation of the scheme. Not only this, BIFR is expected to ensure proper implementation by appropriately monitoring the scheme during the entire relevant period. Sections 22 and 22A thus specify the complete jurisdiction and authority of the BIFR in relation to preparation, consideration, finalization and implementation of a revival scheme in relation to a sick industrial company.

31. Where Section 22(1) deals with the restrictions and limitations *vis-à-vis* the court proceedings while Section 22(3) of the Act of 1985 deals with the agreement, intents or other obligations as stated in that provision and declarations which

will be made by the BIFR for the purposes of finalization and effective implementation of the scheme. There, Section 22A deals with restrictions and prohibitory orders which the BIFR can pass, all for the purposes of preparation of the scheme and proper implementation and effective management of the revival of the sick industrial company. These provisions have to be read along with the provisions of Section 26 of the Act of 1985 which ousts the jurisdiction of the civil courts and vests exclusive jurisdiction for the specified purposes with the BIFR. Another relevant provision in this regard is Section 32 of the Act of 1985, which gives an overriding effect to the provisions of the Act of 1985 over the other laws in force except the law specifically stated therein. Sections 22, 22A, 26 and 32 have to be read and construed conjointly. A common thread of legislative intent to treat this law as a special law, in contradistinction to the other laws except the laws stated in the provisions and to ensure its effective implementation with utmost expeditiousness, runs through all these provisions. It also mandates that no injunction shall be granted by any court or authority in respect of an action taken or to be taken in pursuance of the powers conferred to or by under this Act.

CASE LAW

32. In the case of *Shree Vallabh Glass Works Ltd.* (supra), as already noticed, this Court had taken a very wide view and given liberal constructions to the provisions of Section 22 and held that no proceedings for execution or distress or like proceedings against any of the properties of the company shall lie or be proceeded, except with the consent of the BIFR. The Court also held that the BIFR, at its discretion, may accord its approval for proceeding against the company. This view of wide interpretation was accepted by another Bench of this Court in the case of *Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra* [(1993) 2 SCC 144], wherein this Court took the view that the word 'proceedings' under Section 22(1) cannot be given a narrower or restricted meaning to limit the same to a legal proceeding and even the

proceedings invoked by a financial institution under the State Financial Corporation Act were held to be covered within the ambit of Section 22(1) of the Act of 1985. A similar view was also taken in the case of *Tata Davy Ltd. v. State of Orissa* [AIR 1998 SC 2928]. Answering the question that steps to recover the sales tax under Section 13A of the said Act were in the nature of proceedings by way of execution, distress or the like contemplated by Section 22(1) of the Act, this Court followed its earlier view and held that even the proceedings for recovery of tax under the State Act were covered within the scope of Section 22(1) of the Act of 1985, and thus, could not be given effect to without approval/consent of the BIFR.

33. As already noticed above, in the case of *Corromandal Pharmaceuticals (supra)*, this Court had taken the view that the bar or embargo envisaged in Section 22(1) can apply only to such of those cases where it is reckoned or included in the sub-judice schemes. Amounts like the sales tax which the sick industry is enabled to collect after the date of the sanction of the scheme, had to be recovered in the normal course, by the Revenue and protection of Section 22(1) was not available.

34. This view, however, was not clearly adopted by this Court in subsequent judgments of *Jay Engineering* (supra), where this Court accepted the wider connotation of the words 'proceedings' appearing in Section 22(1) where an award passed under the Interest on Delayed Payments to Small Scale and Ancillary Industries Undertaking Act, 1993 was being executed, the Court took the view that the award could not be executed against the sick industry without the leave of the BIFR as the Act of 1985 would override the provisions of the 1993 Act and approval of the BIFR was essential. Still in another case, *Morgan Securities and Credit Pvt. Ltd.* (supra), this Court had held that the Act of 1985 has an overriding effect and Section 22(3) of the Act even covers the execution of non-contractual liabilities like enforcement of an arbitral award. The Court further held that the imperative character of an enquiry

at the hands of the BIFR is inherent in the scheme of the Act. The Court also expressed doubt as to whether the courts of limited jurisdiction, vested with the power of passing interim orders, could pass interim orders in exercise of its incidental power for sale of assets where the matter was pending before the BIFR.

35. On the analytical analysis of the above-stated dictum of this Court and the legislative purpose and object of the Act, it has to be held that on its plain reading the provisions of Sections 22(1) and 22(3) of the Act are the provisions of wide connotation and would normally bring the specified proceedings, contractual and non-contractual liabilities, within the ambit and scope of the bar and restrictions contained in Sections 22(1) and 22(3) of the Act of 1985 respectively. The legislative intent is explicit that the BIFR has wide powers to impose restrictions in the form of declaration and even prohibitory/injunctive orders right from the stage of consideration of a scheme till its successful implementation within the ambit and scope of Sections 22(3) and 22A of the Act. Section 22 of the Act of 1985 is very significant and of wide ramifications and application. More often than not, the jurisdiction of the BIFR is being invoked, necessitated by varied actions of third parties against the sick industrial company. The proceedings, taken by way of execution, distress or the like, may have the effect of destabilizing the finalization and/or implementation of the scheme of revival under consideration of the BIFR. It appears that, the Legislature intended to ensure that no impediments are created to obstruct the finalization of the scheme by the specialized body. To protect the industrial growth and to ensure revival, this preventive provision has been enacted. The provision has an overriding effect as it contains *non obstante* clauses not only vis-à-vis the Companies Act but even qua any other law, even the memorandum and articles of association of the industrial company and/or any other instrument having effect under any other Act or law. These proceedings cannot be permitted to be taken out or continued

without the consent of the BIFR or the AAIFR, as the case may be. The expression 'no proceedings' that finds place in Section 22(1) is of wide spectrum but is certainly not free of exceptions. The framers of law have given a definite meaning to the expression 'proceedings' appearing under Section 22(1) of the Act of 1985. These proceedings are for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a Receiver in respect thereof. The expression 'the like' has to be read *ejusdem generis* to the term 'proceedings'. The words 'execution, distress or the like' have a definite connotation. These proceedings can have the effect of nullifying or obstructing the sanctioning or implementation of the revival scheme, as contemplated under the provisions of the Act of 1985. This is what is required to be avoided for effective implementation of the scheme. The other facet of the same Section is that, no suit for recovery of money, or for enforcement of any security against the industrial company, or any guarantee in respect of any loan or advance granted to the industrial company shall lie, or be proceeded with further without the consent of the BIFR. In other words, a suit for recovery and/or for the stated kind of reliefs cannot lie or be proceeded further without the leave of the BIFR. Again, the intention is to protect the properties/assets of the sick industrial company, which is the subject matter of the scheme. It is difficult to state with precision the principle that would uniformly apply to all the proceedings/suits falling under Section 22(1) of the Act of 1985. Firstly, it will depend upon the facts and circumstances of a given case, it must satisfy the ingredients of Section 22(1) and fall under any of the various classes of proceedings stated thereunder. Secondly, these proceedings should have the impact of interfering with the formulation, consideration, finalization or implementation of the scheme. Once these ingredients are satisfied, normally the bar or limitation contained in Section 22(1) of the Act of 1985 would apply. For instance, execution of a decree against the assets of a company, if permitted, is bound to result in disturbing the scheme, which

has or may be framed by the BIFR. The sale of an asset during such execution or even withdrawing the money from the bank account of the company would certainly defeat the very purpose of the protection sought to be created by the Legislature under Section 22(1) of the Act of 1985. On the other hand, a proceeding taken out for possession of the tenanted premises, under the provisions of Karnataka Rent Control Act, have been held to be proceedings not falling within the ambit and scope of Section 22(1) of the Act of 1985. This was for the reason that the contractual tenancy between the company and the owner had been terminated and the company only had an interest as a statutory tenant. Such interest was neither assignable nor transferable. This Court held that it could not be regarded as 'property' of the sick company for the purposes of the provisions of Section 22(1) and as such, these provisions were not attracted. (*M/s. Shree Chamundi Mopeds Ltd.* v. *Church of South India Trust Association, Madras* [AIR 1992 SC1439]).

36. Referring to the facts of the present case, the land was one of the major assets of the Respondent Company and in the event the said asset was kept outside the scope of the scheme or its sale was permitted by the BIFR, probably the company could never be revived and any effort in that direction *de hors* such asset of the company would be in futility. Besides, the fact that the statutory protection contained in Section 22(3) was available to the company, it could be stated with more emphasis that the BIFR could even adopt and permit the transaction with such adoption as it may have deemed appropriate. The imperative nature of the functions of the BIFR under the provisions of the Act of 1985 and the overriding effect of its provisions fully support such a view.

Overriding effect of the Act of 1985 :-

37. This Court has taken the view in *Tata Motors Ltd.* [(2008) 7 SCC 619] that the Act of 1985 has been enacted to secure the principles specified in Article 359 of the Constitution

of India. It seeks to give effect to the larger public interest. It should be given primacy because of its higher public purpose. As the Act of 1985 is a special law and on the principle that a special law will prevail over a general law, it is permissible to contend that even if the provisions contained in Section 22(1) read with Section 32 of the Act, giving overriding effect *vis-à-vis* the other laws, other than the Foreign Exchange Regulation Act, 1973 and the Urban Land Ceiling and Regulation Act, 1976 had not been there, the provisions of the general law like the Companies Act, for regulation, incorporation, winding-up etc. of the companies would have still been overridden to the extent of inconsistency. We have already seen that this Court had, in the case of *Jay Engineering* (supra), taken the view that the Interest on Delayed Payments to Small Scale and Ancillary Industries Undertaking Act, 1993 shall have to give way for enforcement of the provisions of the Act of 1985. In the case of *Tata Davy* (supra) also, the Court took the view that the State Sales Tax Act would have to be read and construed in comity to the provisions of the Act of 1985 which shall have the overriding effect. In the case of *Tata Motors Ltd. v. Pharmaceuticals Product of India Ltd.* (supra), this Court was concerned with the provisions of mismanagement and oppression contained in Sections 391 and 394 of the Companies Act and whether the Company Court will have the jurisdiction to pass orders in preference to the proceedings pending before the Court under the Act of 1985. The Court while holding the primacy of the Act of 1985 held as under: -

> "SICA furthermore was enacted to secure the principles specified in Article 39 of the Constitution of India. It seeks to give effect to the larger public interest. It should be given primacy because of its higher public purpose. Section 26 of SICA bars the jurisdiction of the civil Courts.
>
> What scheme should be prepared by the operating agency for revival and rehabilitation of the sick industrial company is within the domain of BIFR. Section 26 not only covers orders passed under SICA but also any matter which BIFR

is empowered to determine.

23. The jurisdiction of civil court is, thus, barred in respect of any matter for which the appellate authority or the Board is empowered. The High Court may not be a civil court but its jurisdiction in a case of this nature is limited."

38. Even in the case of *NGEF Ltd. v. Chandra Developers (P) Ltd. and Anr.* [(2005) 8 SCC 219], this Court specifically reiterated and with emphasis the principle that the provisions of the Act of 1985 contained *non-obstante* clauses, it is a special statute which is a complete code in itself and that the jurisdiction of the Company Court in such matters would arise only when AAIFR and BIFR have exercised their jurisdiction under Section 20 and 25 respectively of the Act of 1985. The provisions of SICA would prevail over the provisions of the Companies Act.

39. From the above judgments of this Court, the unambiguous principle of law that emerges is that the provisions of the Act of 1985 shall normally override the other laws except the laws which have been specifically excluded by the Legislature under Section 32 of the Act of 1985. The Act of 1985 has been held to be a special statute vis-à-vis the other laws, most of which have been indicated above. In the present case, we are concerned with the provisions of the Act of 1882. It is the case of the respondent-company before us that they have got an interest in the immovable property by virtue of the Memorandum of Understanding, Agreements dated 1st March, 2007 and 17th August, 2010 and by part performance, as they had been given possession of the land in question. It was contended that as their interests were duly protected under the provisions of the Act of 1882, the BIFR/AAIFR, in exercise of its powers under Sections 22(1), 22(3) and 22A of the Act of 1985, cannot place any restriction upon their title or interest in the immovable property. In other words, the contention is that vis-à-vis the Act of 1985, the provisions of the Act of 1882 shall prevail.

40. The Act of 1882 is a general law and controls and operates in a very wide field. It was an Act enacted for and related to transfer of immovable property in India and to decide the disputes as well as to resolve the confusion and conflict, which was in existence, as the courts were forced to decide the disputes according to their own notions of justice and fair play. The Act of 1882 does not have application to a particular situation or class of persons. On the contrary, the Act of 1985 is a special legislation providing for imperative functioning of specialized bodies like the BIFR and AAIFR and is intended to apply to a very specific situation, i.e., where a company is a sick industrial company. It has no application even to other different kinds of companies within the purview of the Companies Act, except sick industrial companies. The Legislature has undoubtedly given an overriding effect to the provisions of the Act of 1985 and even restricted the jurisdiction of the civil courts, as is demonstrated from the language of Sections 26 and 32 of the Act of 1985. Thus, we have no hesitation in holding that the provisions of the Act of 1985 shall prevail over the provisions of the Act of 1882.

Discussion on Merits with reference to Factual Matrix of the Case

41. Having dealt with the basic legal questions arising for consideration of this Court in the facts of the present case, now we will now proceed to examine the issues of facts and law with reference to the present case. The Respondent-Company, upon some negotiations had executed a Memorandum of Understanding with the appellant-company on 13th April, 2006. A land admeasuring about 344 acres, situated in the revenue estate of villages Ambivali, Mohone, Wadavli, Atalee and Galegaon in taluk Kalyan, District Thane was agreed to be sold on the conditions which were stated therein and it had also postulated the execution of a proper Agreement to Sell. Principal Agreement of Sale was executed on 1st March, 2007 between the parties. As certain amounts were found to have

been incorrectly stated in the Principal Agreement and parties intended to pre-pone the payment of instalments as per the terms of that agreement, they executed First Supplementary Agreement dated 29th September, 2007. It may be noticed here that the Respondent Company, in the meanwhile, had financial crisis and was not able to pay off its debt of nearly Rs.147 crore as on 31st March, 2006. The company itself had approached the BIFR for declaring the company as a 'sick industrial company' and to examine the possibility of its revival through a scheme, in accordance with the provisions of the Act of 1985.

42. The scheme of rehabilitation in relation to the sick industrial company was presented before the Corporate Debt Restructuring (CDR) Empowered Group which was appointed by the consortium of the banks to whom large sums were due from the said company on 13th June, 2007. The scheme was approved by the CDR on 12th December, 2007 which resulted in issuance of a letter of approval dated 21st January, 2008. Prior to the complete implementation of the revival scheme, the Respondent Company applied to the BIFR under Section 15 of the Act of 1985 for being declared as a 'sick company' on 3rd December, 2008. During the consideration of this application, the rehabilitation scheme approved by the CDR was placed before the BIFR for its acceptance and adoption. Vide its order dated 16th July, 2009, passed under Section 17(3) of the Act of 1985, the Scheme was adopted and for the purposes of implementation of the Scheme, the cut-off date was declared as 30th July, 2007 by the BIFR. As already noticed, the parties had entered into a Memorandum of Understanding dated 13th April, 2006 and the Agreement to Sell dated 1st March, 2007 for sale of the land belonging to the company. The BIFR, while approving the scheme, had taken into consideration these events in relation to the sale of the land. Thereafter, the parties executed Supplementary Agreements dated 29th September, 2007 and 17th August, 2010. The Agreements provided for pre-ponement of the instalments payable in terms

of the Agreements as well as giving of possession of the land to the Appellant Company. The Agreement dated 29th September, 2007 was executed when the rehabilitation scheme was pending consideration before the BIFR, while the Agreement dated 17th August, 2010 was executed subsequent to the adoption of the Scheme by the BIFR. It appears from the record that the Second Supplementary Agreement dated 17th August, 2010 was not executed between the parties with prior approval of the BIFR. The BIFR, vide its order dated 16th July, 2009, had placed certain restrictions and had not permitted the transfer of the land without its prior approval. It had also raised certain other queries including valuation, etc. This order was set aside by the AAIFR, which had permitted the sale of the land in favour of the Appellant Company, even during the consideration and implementation of the revival scheme. This order of the AAIFR dated 28th May, 2010 was disturbed by the High Court vide its order dated 29th July, 2011. The High Court practically restored the order of BIFR, giving rise to the present appeal.

43. The contention raised before us is that in view of the provisions of Sections 53A and 54 of the Act of 1882, the title in the property in question is vested in the Respondent-Company and they are entitled to transfer of the property, free from any restrictions or limitations. As such, the order of the High Court is liable to be set aside and that of the AAIFR be restored. In view of our afore-stated discussion and the reasons to follow, we are unable to accept this contention entirely or even in part for that matter. Firstly, we may examine whether an agreement to sell in relation to an immovable property transfers or creates any right or title in the immovable property itself in favour of the purchaser. Section 54 defines 'Sale' as a transfer of ownership in exchange for price paid or promised or part-paid and part-promised. Such a transfer of tangible immovable property of the value of Rs.100/- and upwards can be made only by a registered instrument. The 'contract for sale' has been explained under this very provision

as follows: -

"**Contract for sale:-** A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

44. Thus, on a plain reading of the statutory provisions, it is clear that an agreement for sale or an agreement to sell itself does not create any interest or charge in such property. Mulla on 'Transfer of Property Act', 9th Edition, page 181, clearly states that Section 54 enacts that an agreement for the sale of land does not itself create an interest in land. There was a considerable conflict of decisions as to the application of the rule against perpetuity to such agreements. This conflict has been resolved by judgment of this Court in the case of *Rambaran Prosad vs. Ram Mohit Hazra* [AIR 1967 SC 744] where this Court held that a mere contract for sale of immovable property does not create any interest in the immovable property. In this case, this Court held as under:-

"10. In the case of an agreement for sale entered into prior to the passing of the Transfer of Property Act, it was the accepted doctrine in India that the agreement created an interest in the land itself in favour of the purchaser. For instance, in *Fati Chand Sahu v. Lilambar Sing Das* (1871) 9 B.L.R. 433 a suit for specific performance of a contract for sale was dismissed on the ground that the agreement, which was held to create an interest in the land, was not registered under s. 17, clause(2) of the Indian Registration Act of 1866. Following this principle, Markby J. in Tripoota Soonduree v. Juggur Nath Dutt (1875) 24 W.R. 321 expressed the opinion that a covenant for pre-emption contained in a deed of partition, which was unlimited in point of time, was not enforceable in law. The same view was taken by Baker J. in *Allibhai Mahomed Akuji v. Dada*

Alli Isap A.L.R. 1931 Bom. 578 where the option of purchase was contained in a contract entered into before the passing of the Transfer of Property Act. The decision of the Judicial Committee in *Maharaj Bahadur Singh v. Bal Chanad* 48 I.A. 376 was also a decision relating to a contract of the year 1872. In that case, the proprietor of a hill entered into an agreement with a society of Jains that, if the latter would require a site thereon for the erection of a temple, he and his heirs would grant the site free of cost. The proprietor afterwards alienated the hill. The society, through their representatives, sued the alienees for possession of a site defined by boundaries, alleging notice to the proprietor requiring that site and that they had taken possession, but been dispossessed. It was held by the Judicial Committee that the suit must fail. The Judicial Committee was of the opinion that the agreement conferred on the society no present estate or interest in the site, and was unenforceable as a covenant, since it did not run with the land, and infringed the rule against perpetuity. Lord Buckmaster who pronounced the opinion of the Judicial Committee observes as follows:

"Further, if the case be regarded in another light - namely, an agreement to grant in the future whatever land might be selected as a site for a temple - as the only interest created would be one to take effect by entry at a later date, and as this date is uncertain, the provision is obviously bad as offending the rule against perpetuities, for the interest would not then vest in present, but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

(11) But there has been a change in the legal position in India since the passing of the Transfer of Property Act. Section 54 of the Act states that a contract for sale of immovable property "does not, of itself, create any interest

in or charge on such property". Section 40 of the Act is also important and reads as follows:

> "40. Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or
>
> Where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands."

The second paragraph of s. 40 taken with the illustration establishes two propositions: (1) that a contract for sale does not create any interest in the land, but is annexed to the ownership of the land and (2) that the obligation can be enforced against a subsequent gratuitous transferee from the vendor or a transferee for value but with notice. Section 14 of the Act states as follows:

> "14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong."

Reading S. 14 along with S. 54 of the Transfer of Property

Act its manifest that a mere contract for sale of immovable property does not create any interest in the immovable property and it therefore follows that the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time limit within which the option has to be exercised. It is true that the second paragraph of s. 40 of the Transfer of Property Act make a substantial departure from the English law, for an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who takes from the promisor either gratuitously or takes for value but with notice. A contract of this nature does not stand on the same footing as a mere personal contract, for it can be enforced against an assignee with notice. There is a superficial kind of resemblance between the personal obligation created by the contract of sale described under s. 40 of the Act which arises out of the contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon and the equitable interest of the person purchasing under the English Law, in that both these rights are liable to be defeated by a purchaser for value without notice. But the analogy cannot be carried further and the rule against perpetuity which applies to equitable estates in English law cannot be applied to a covenant of pre-emption because s. 40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest in the land."

45. This very view was reiterated by this Court in the cases of *State of U.P. v. District Judge and Ors.* [AIR 1997 SC 53[; *Dharma Naika v. Rama Naika* [AIR 2008 SC 1276] and *Mrs. Saradamani Kandappan vs. Rajalakshmi & Ors.* [JT 2011 (8) SC 129].

46. Heavy reliance was placed by the learned counsel appearing for the Respondent-Company, upon the provisions

of Section 53A of the Act of 1882 to substantiate his argument that in part performance of the contract, possession of the property having been given, the execution of the title documents and transfer of the property in its favour could not be hampered or controlled by the BIFR in exercise of its powers under Section 22(3) of the Act of 1985. We are not called upon in this case to adjudicate upon the merits or otherwise the rights and liabilities of the parties arising out of the agreement dated 1st March, 2007 or the agreements entered into subsequent thereto. We would also not like to venture upon and decide whether the second supplementary agreement dated 17th August, 2010 vide which the payment of intallments was pre-poned and the possession of the land in question is alleged to have been given to the Appellant-Company is a valid, enforceable and its consequences in law. Suffices it to note that memorandum of understanding and agreement to sell the land belonging to the company between the appellant and the respondent-company was signed prior to the presentation of the scheme before the BIFR. However, second supplementary agreement was executed not only subsequent to the presentation of the scheme before the BIFR but even after the BIFR had passed an order under Section 17(3) of the Act of 1985. It cannot be disputed that even the sale proceeds received under the agreements have been utilized for the revival of the company to a large extent. The agreement with the workers dated 5th September, 2008 stands testimony to this fact. Once the asset of the company and/or its sale proceeds have been integral part of the formation and finalization of the revival scheme, such transaction by any stretch of imagination cannot be stated to be beyond the ambit and scope of Section 22(3) of the Act of 1985. Thus BIFR has the power to issue declarations in relation to contracts, agreements, settlements, awards, standing orders or even other instruments in force to which the sick industrial company is a party. The power to suspend or power to enforce the same subject to such adaptations as the BIFR may consider appropriate is a power of great magnitude and scope, the only restriction thereupon

is as contemplated in the proviso to Section 22(3) of the Act of 1985.

47. The provisions of Section 53A of 1882 Act recognize a right of a transferee, where a transferor has given and the transferee has taken possession of the property or any part thereof. Even this provision does not create title of the transferee in the property in question but gives him a very limited right, that too, subject to the satisfaction of the conditions as stated in Section 53A of the Act of 1882 itself. In the case of *State of U.P. v. District Judge* (supra), this Court, while deliberating upon the rights emerging from Section 53A of the Act of 1882, held as under:

> "… That protection is available as a shield only against the transferor, the proposed vendor, and would disentitle him from disturbing the possession of the proposed transferees who are put in possession pursuant to such an agreement. But that has nothing to do with the ownership of the proposed transferor who remains full owner of the said land till they are legally conveyed by Sale Deed to the proposed transferees."

48. Thus, even if the part performance of the agreement is accepted, still no title is created in favour of the Respondent-Company. Provisions of Section 53A would also not, in any way, alter the position of the Act of 1985 having an overriding effect vis-à-vis the provisions of the Act of 1882. We have already held that the provisions of Act of 1985 shall have precedence and overriding effect over the provisions of the Act of 1882.

49. This brings us to the last and final question arising for consideration of this Court in the present case, that is, whether in the facts and circumstances of the case, the BIFR had the jurisdiction to issue a direction or make a declaration in relation to the agreement in question in exercise of the powers vested in it under Section 22(3) of the Act of 1985 and, if answer to

the above is in the affirmative, whether the order dated 16th July, 2009 of the BIFR and that of the High Court dated 29th July, 2011 are unsustainable on facts? The BIFR vide its order dated 16th July, 2009, after declaring the Respondent-Company as a sick company and appointing the Punjab National Bank as the Operating Agency, had fixed the cut off date as 30th July, 2007, as indicated in the CDR Scheme. The CDR scheme had been approved, after taking into consideration the agreement to sell and the sale proceeds likely to be received therefrom. The BIFR had passed certain directions/declarations in the order passed under Section 17(3) of the Act of 1985 requiring the company to state clearly the details of the land to be sold including survey numbers as well as the remaining land with the company and confirming if the remaining land was adequate for functioning and viability of the company on long term basis. The BIFR raised the query whether all the secured creditors who had charge over the land, had approved the sale of 350 acres of land belonging to the respondent-company at Kalyan, Thane for a sum of Rs.166.40 crore and for entering into memorandum of understanding with the appellant company in that behalf. Besides issuing a directive that assets including investments will require prior approval of the BIFR as the company was under the purview of SICA, it also issued a clear prohibitory order requiring the secured creditors not to take any coercive steps against the company without prior permission of the BIFR. This order of the BIFR was therefore passed clearly at the stage of the consideration of the revival scheme which had been approved by the CDR Group as well as the secured creditors. The scheme for revival of the company on long term basis, thus, was primarily dependent upon the sale proceeds of the land in question on the one hand and the utility of the remaining land for revival of the company on the other. To put it simply, the land was the paramount asset of the company for its revival and successful implementation of the scheme in accordance with law. The asset was duly taken into consideration in formulation of the scheme as contemplated under Sections 17 and 18 of the Act of 1985 and

appropriate directions, prohibitory orders were issued within the ambit and scope of Sections 22(1), 22(3) and 22A of the Act of 1985. In view of the clear statement of law, as afore-recorded, and facts of the present case, we are unable to find any merit in the submission of the Respondent-Company that the BIFR had no jurisdiction to pass such directives.

50. AAIFR had disturbed the above order and held that the contract between the parties could not be suspended under Section 22(3) and it was not in the interest of the Respondent-Company. In other words, it had permitted the sale to be completed without any restriction. This order was set aside and the order of the BIFR was restored by the High Court. We find no jurisdictional or other error in the order of the High Court in restoring the order of the BIFR. The land being the primary asset of the Respondent-Company, could not be permitted to be dissolved by sale or otherwise without the consent and approval of the BIFR. The BIFR is the *authority proprio vigore* and required to oversee the entire affairs of a sick industrial company and to ensure that the same are within the framework of the scheme formulated and approved by the Board for revival of the company in accordance with the provisions of the Act of 1985. On facts as well, neither the BIFR nor the High Court had exceeded its jurisdiction in passing the impugned orders. It is not that the Respondent-Company has been divested of its right by the BIFR. All that has been done is to suspend the final transfer of the property in its favour in accordance with the provisions of the Act and the limitations imposed therein. Once the scheme is implemented or the period specified under the provisions of Sections 22(3) and 22(4) expires, the declaration would cease to exist and the appellant would be entitled to enforce its rights in accordance with law as if no such declaration or restriction ever existed.

51. The principle of law that emerges from the afore-referred discussion, which consistently has judicial benediction, is that a scheme for rehabilitation or restructuring of a sick

industrial company undertaken by a specialized body like the BIFR/AAIFR should, as far as legally permissible, remain obstruction free and the events should take place as pre-ordained, during consideration and successful implementation of the formulated scheme. Wide jurisdiction is vested in BIFR/AAIFR to issue directives, declarations and prohibitory orders within the rationalized scope and limitations prescribed under Section 22(1), 22(3) and 22A of the Act of 1985.

52. An objection to the maintainability of a composite petition, taken before the High Court, has been reiterated before this Court, of course, half-heartedly. Argument is that Article 227 vests the High Court with supervisory powers while Article 226 is the reservoir of extra-ordinary jurisdiction of the High Courts to issue prerogative writs and orders and, as such, a joint petition under both these Articles could not be maintainable.

53. Reliance has been placed in this regard to the case of *Shalini Shyam Shetty & Anr. v. Rajendra Shankar Patil* [(2010) 8 SCC 329]. This objection was neither pressed before us during the course of arguments nor do we consider it necessary to decide this issue in view of the facts and circumstances of the present case and the fact that we have decided the entire matter on merits.

54. For the reasons afore-recorded, the present appeals are dismissed. The order of the BIFR dated 16th July, 2009 which has merged into the order of the High Court dated 29th July, 2011 is maintained while that of the AAIFR dated 28th May, 2010 is set aside. The parties are directed to appear before the BIFR which shall proceed with the matter in accordance with law. However, we express a poised hope that the BIFR would deal with and dispose of the matter expeditiously.

N.J. Appeals dismissed.

T.N. GODAVARMAN THIRUMULPAD

v.

UNION OF INDIA & OTHERS

I. A. Nos. 1433 and 1477 of 2005

IN

(Writ Petition (c) No. 202 of 1995)

FEBRUARY 13, 2012

[K.S. RADHAKRISHNAN AND CHANDRAMAULI KR. PRASAD, JJ.]

Wildlife (Protection) Act, 1972 – Schedule I, Part I, List 41 and ss. 8, 9, 11 and 12 – Centrally Sponsored Scheme of 2009 (CSS) titled "Integrated Development of Wildlife Habitats" – Rescue plan to save the Asiatic Wild Buffalo, an endangered specie from extinction, which is declared as a State animal by the State of Chattisgarh – Plea of State of Chattisgarh that they do not have sufficient funds to undertake various programmes for protection of wild buffalo within the national parks, sanctuaries and also at conservation reserves and community reserves – Held: Not tenable – Apart from the human-animal conflict, the most important threat to wild buffalo is inbreeding with feral and domestic buffalo, habitat loss/degradation and hunting – Diseases and parasites (transmitted by domestic livestock) and competition for food and water between wild buffalo and domestic stock are also serious threats – Habitat loss is also a major concern for species endangerment – When wild buffalos' eco-system is not maintained, they lose their home and either forced to adopt new surroundings or human habitat – State of Chhattisgarh directed i) to give full effect to the Centrally Sponsored Scheme- "the Integrated Development of Wildlife Habitats", so as to save wild buffalo from extinction; ii) to ensure that interbreeding between wild and domestic buffalos does not take place and genetic purity of the wild species is

maintained; iii) to undertake intensive research and monitor the wild buffalo population in Udanti Wildlife Sanctuary (Chattisgarh) and other areas, where the wild buffalo may still be found, including preparing their genetic profile for future reference; iv) to initiate wildlife training programmes for the officials of the State Forest Department, especially for managing the above sanctuary and other areas where the wild buffalos are found and v) to submit Annual Plan of Operations to the Central Government detailing the proposed course of action, if not already done, as per the "Integrated Development of Wildlife Habitats" scheme, within three months – State Government directed to take all effective steps to protect the Asian wild buffalo (Bubalus bubalis) – National Wildlife Action Plan (2002-2016) – National Forest Commission, 2006 – The International Union for Conservation of Nature (IUCN) – IUCN Red List of Threatened Species – Constitution of India, 1950 – Article 51A(g).

Wildlife (Protection) Act, 1972 – s.36A – New categories of Protected Areas (PAs) – Conservation Reserves and Community Reserves – Centrally Sponsored Scheme of 2009 (CSS) titled "Integrated Development of Wildlife Habitats" – Held: Conservation Reserves and Community Reserves have an important role to play in maintaining geographical integrity of the Nation – The Centrally Sponsored Scheme of 2009 (CSS) intended to bring the said two categories of PAs also under the ambit of the Scheme along with the existing National Parks and Wildlife Sanctuaries – Environment Protection.

Environment Protection – Wildlife – Human-wildlife conflict – Critical threat to survival of many endangered species – Anthropocentric bias towards man – Held: Environmental justice can be achieved only if there is a drift away from the principle of anthropocentric to ecocentric – Many principles like sustainable development, polluter-pays

principle, inter-generational equity have their roots in anthropocentric principles – Anthropocentrism is always human interest focussed while ecocentrism is life-centred, nature-centred where nature include both human and non-humans – National Wildlife Action Plan 2002-2012 and Centrally sponsored scheme (Integrated Development of Wildlife Habitats) is centred on the principle of ecocentrism.

Applications were filed before this Court seeking a direction to the Union of India and the State of Chhattisgarh to prepare a rescue plan to save the Asiatic Wild Buffalo, an endangered specie from extinction and to make available necessary funds and resources required for the said purpose and also for a direction to take immediate steps to ensure that interbreeding between the wild and domestic buffalo does not take place and the genetic purity of the wild species is maintained. Direction was also sought for to prepare a scheme in consultation with the villagers for relocation of villagers from the Udanti Wildlife Sanctuary (in Chattisgarh) to ensure the survival of the endangered wild buffalo and that all research and monitoring inputs including scientific management of the wild buffalo and its habitat be made available on long term basis by involving institutes such as the Wildlife Institute of India, the Bombay Natural History Society etc.

Disposing the applications, the Court

HELD: 1. The steps taken by the State of Chhattisgarh to preserve and conserve the wild buffalo which was declared as a State Animal is far from satisfactory. When the matter came up for final hearing, the counsel appearing for the Ministry of Environment and Forests (MoEF) made available a copy of the Centrally Sponsored Scheme of 2009 (CSS) titled "Integrated Development of Wildlife Habitats". The Scheme was formulated during the Eleventh Five Year Plan. The

Scheme has also incorporated additional components and activities for implementing the provisions of the Wildlife (Protection) Act, 1972, National Wildlife Action Plan (2002-2016), recommendations of the Tiger Task Force, 2005, and the National Forest Commission, 2006 and the necessities felt from time to time for the conservation of wildlife and biodiversity in the country. [Para 4] [471-F-H; 472-A]

2.1. Before coming into force of the Wildlife (Protection) Act, 1972, the scheme which was in force was "Assistance for the Development of National Parks and Sanctuaries" which used to support only National Parks and Wildlife Sanctuaries. However, following the amendment to the Act, in 2003, two more categories of Protected Areas (PAs) i.e. the Conservation Reserves and Community Reserves have been recognized. Conservation Reserves, which are government land, but do not require acquisition of rights, nor the curtailment of activities as envisaged in National Parks and Wildlife Sanctuaries are stated to be the most appropriate strategy for connecting protected areas, by providing corridors. Community Reserves are entirely based on efforts of the local people on privately owned lands which require financial and technical assistance for their future management. [Para 5] [472-B-D]

2.2. Section 36A of the Wildlife (Protection) Act, 1972 empowers the State Government, after consultations with the local communities, declare any area owned by the Government, particularly the areas adjacent to National Parks and sanctuaries and those areas which link one protected area with another, as a conservation reserve for protecting landscapes, seascapes, flora and fauna and their habitat. The Act also empowers the State Government, where the community or an individual has volunteered to conserve wildlife and its habitat, declare

any private or community land not comprised within a National Park, Sanctuary or a Conservation Reserve, as a Community Reserve, for protecting fauna, flora and traditional or cultural conservation values and practice. The management of Community Reserves shall primarily be done by the communities/individuals themselves. The Centrally Sponsored Scheme of 2009 (CSS), therefore, intended to bring these two categories of PAs also under the ambit of the Scheme along with the existing National Parks and Wildlife Sanctuaries. Protected Areas, i.e. Conservation Reserves and Community Reserves have an important role to play in maintaining geographical integrity of the Nation. [Paras 7, 8] [473-D-G; 474-B]

Human-wildlife conflict

3.1. Human-wildlife conflict is fast becoming a critical threat to the survival of many endangered species, like wild buffalo, elephants, tiger, lion etc. such conflicts affect not only its population but also has broadened environmental impacts on ecosystem equilibrium and biodiversity conservation. Laws are man-made, hence there is likelihood of anthropocentric bias towards man, and rights of wild animals often tend to be of secondary importance but in the universe man and animal are equally placed, but human rights approach to environmental protection in case of conflict, is often based on anthropocentricity. [Para 9] [474-F-G]

3.2. Man-animal conflict often results not because animals encroach human territories but vice-versa. Proper management practices have to be accepted, like conservation education for local population, resettlement of villages, curbing grazing by livestock and domestic animals in forest, etc., including prey-preservation for the wild animals. Provision for availability of natural water, less or no disturbance from the tourists has to be assured. State also has to take steps to remove

encroachments and, if necessary, can also cancel the *patta* already granted and initiate acquisition proceedings to preserve and protect wildlife and its corridors. Areas outside PAs is reported to have the maximum number of man-animal conflict, they fall prey to poachers easily, and often invite ire of the cultivators when they cause damage to their crops. These issues have to be scientifically managed so as to preserve and protect the endangered species, like wild buffalo and other species included in Schedule 1 Part 1 of the Wildlife Protection Act, as well as other species which face extinction. [Para 10] [474-H; 475-A-C-E]

3.3. Environmental justice could be achieved only if there is a drift away from the principle of anthropocentric to ecocentric. Many principles like sustainable development, polluter-pays principle, inter-generational equity have their roots in anthropocentric principles. Anthropocentrism is always human interest focussed and non-human has only instrumental value to humans. In other words, humans take precedence and human responsibilities to non-human based benefits to humans. Ecocentrism is nature centred where humans are part of nature and non-human has intrinsic value. In other words, human interest do not take automatic precedence and humans have obligations to non-humans independently of human interest. Ecocentrism is therefore life-centred, nature-centred where nature include both human and non-humans. National Wildlife Action Plan 2002-2012 and centrally sponsored scheme (Integrated Development of Wildlife Habitats) is centred on the principle of ecocentrism. [Para 14] [477-H; 478-A-D]

Recovery Programmes

4.1. The Centrally Sponsored Scheme also deals with Recovery programmes for saving critically endangered

species and habitats. The objective of this recovery plan of saving critically endangered species/ecosystems cannot be covered under the components of Conservation of PAs and protection of wildlife outside PAs as disjunct population across a wider landscape/ seascape. Several programmes are proposed under the recovery plan, of which one is to save the critically endangered species of Asian Wild Buffalo and grasslands and riverine forests of central and north India. Several other components were also included in the recovery plan such as Dolphin and River Systems, Nilgiri Tahr, Asiatic Lion etc. The scheme envisages that the Director, Wildlife Preservation, Government of India, in consultation with the Wildlife Institute of India or the relevant scientific institute/organization and with the approval of the Standing Committee of the National Board for Wildlife can initiate other recovery programmes or wind up the ongoing programme. The Director, Wildlife Preservation, is also authorised to undertake assessment of the effectiveness of any 'recovery programme' already undertaken or being undertaken. The Integrated Development of Wildlife Habitats scheme specifically highlighted the necessity to preserve and conserve the habitat of wild buffalo. [Para 16] [478-H; 479-A-D]

4.2. Conservation and Management of Wildlife, as per the Act, is primarily vested in the States / UTs who are in physical possession of the area. Many States/UTs have set up various regular wildlife wings within the States/UT Forest Departments and implemented a scheme as to be done in accordance with a work programme covering the 11th Plan period. The Centrally Sponsored Scheme, therefore, envisages that the State/UTs are required to submit Annual Plan of Operations (APOs) to the Central Government detailing the proposed course of action, which consists of management planning and capacity building, anti-poaching and infrastructure development,

restoration of habitats, eco-development and community oriented activities etc. so as to qualify for the financial assistance under the scheme. The concerned State/UTs have to follow certain conditions which have been enumerated in the scheme. [Para 17] [479-G-H; 480-A-B]

5. The State of Chhattisgarh, in the instant case, has pointed out that they could not effectively give effect to some of the programmes for preservation and conservation of wild buffalo due to lack of funds. The scheme envisages 100% assistance. The State of Chattisgarh has maintained the stand that they do not have sufficient funds to undertake various programmes for protection of wild buffalo within the national parks, sanctuaries and also at conservation reserves and community reserves. This stand cannot be countenanced now, especially after the introduction of the Scheme. [Para 18, 19] [480-C; 481-F-G]

6. Wild buffalo has been included as Item No. 41, Part I of Schedule I of the Act. Once it is included in Schedule I, the State Board for Wildlife has to advise the State Government in the selection and management of the areas to be declared as protected areas, in the formulation of policy for protection and conservation of the wildlife etc., as per Section 8 of the Act. Section 9 of the Act states that no person shall hunt any wild animal specified in Schedule I to IV, except as provided under Sections 11 and 12. [Para 20] [481-H; 482-A]

7. The International Union for Conservation of Nature (IUCN) has calculated the percentage of endangered species as 40% of all organisms. IUCN Red List refers to specific categories of endangered species and includes critically endangered species. IUCN Red List of Threatened Species uses the term endangered species as a specific category of imperilment, rather than as a general term. Under the IUCN Categories and Criteria,

endangered species is between critically endangered and vulnerable. Wild water buffalo is included in the category of endangered species. Apart from the human-animal conflict, the most important threat to wild buffalo is inbreeding with feral and domestic buffalo, habitat loss/ degradation and hunting. Diseases and parasites (transmitted by domestic livestock) and competition for food and water between wild buffalo and domestic stock are also serious threats. Habitat loss is also a major concern for species endangerment. When wild buffalos' eco-system is not maintained, they lose their home and either forced to adopt new surroundings or human habitat. Eminent ecologists have proposed biological corridors, biosphere reserves, ecosystem management and eco-regional planning as approaches to integrate biodiversity conservation and socio-economic development at increasingly larger spatial scales. [Para 21] [482-B-F]

8. The subjects 'forest' and 'protection of animals and birds' are in the concurrent list of the Constitution and it is the fundamental duty of every citizen of India under Article 51A(g) of the Constitution to protect and improve the natural environment including forests, lakes, rivers and wildlife. It is to achieve the above objective and also to give effect to the purpose of the object of the Act that the Central Government has sponsored "the Integrated Development of Wildlife Habitats". As per the Scheme and the Act, the State Government is empowered to notify conservation reserves and community reserves for protecting the landscape, seascapes, flora and fauna and their habitat. The Act also empowers the State Government to declare any private and community land not comprised within the national parks, sanctuaries or conservation reserves or community reserves for protecting fauna, flora and traditional or cultural conservation values and practice. [Para 22] [482-H; 483-A-B]

9. The State of Chhattisgarh is directed to give effect fully the Centrally Sponsored Scheme – "the Integrated Development of Wildlife Habitats", so as to save wild buffalo from extinction. The State also would take immediate steps to ensure that interbreeding between wild and domestic buffalos does not take place and genetic purity of the wild species is maintained. The State is also directed to take immediate steps to undertake intensive research and monitor the wild buffalo population in Udanti Wildlife Sanctuary and other areas, where the wild buffalo may still be found, including preparing them their genetic profile for future reference. The State is also directed to take appropriate steps to initiate wildlife training programmes for the officials of the State Forest Department, especially for managing the above sanctuary and other areas where the wild buffalos are found. The State is also directed to submit Annual Plan of Operations to the Central Government detailing the proposed course of action, if not already done, as per the "Integrated Development of Wildlife Habitats" scheme, within a period of three months. All effective steps should be taken by the State to protect the Asian wild buffalo (*Bubalus bubalis*), which is declared as a State animal by the State of Chattisgarh. [Para 23] [483-C-G]

CIVIL ORIGINAL JURISDICTION : I. A. Nos. 1433 and 1477.

IN

Writ Petition (Civil) No. 202 of 1995.

Under Article 32 of the Constitution of India.

P.S. Narasimha, Gaurav Agarwal, K. Parmeswar, Haris Beeran, P.K. Manohar, D.K. Sinha, Rajesh Srivastava, Atul Jha, Sandeep Jha, Dharmendra Kumar Sinha, C.D. Singh,

Tarjit Singh, Manjit Singh, Kamal Mohan Gupta, A Subhashini, Bina Madhavan for the appearing paties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Asiatic Wild Buffalo is reported to be the most impressive and magnificent animal in the world. Often it is found in the Western and Eastern Ghats of the country. Learned Amicus Curiae has moved this Court seeking a direction to the Union of India and the State of Chhattisgarh to prepare a rescue plan to save *Wild Buffalo,* an endangered specie from extinction and to make available necessary funds and resources required for the said purpose and also for a direction to take immediate steps to ensure that interbreeding between the wild and domestic buffalo does not take place and the genetic purity of the wild species is maintained. Direction was also sought for to prepare a scheme in consultation with the villagers for relocation of villagers from the Udanti Sanctuary to ensure the survival of the endangered wild buffalo. Direction was also sought for that all research and monitoring inputs including scientific management of the wild buffalo and its habitat be made available on long term basis by involving institutes such as the Wildlife Institute of India, the Bombay Natural History Society etc.

2. The State of Chhattisgarh filed its reply affidavit on 30.01.2006 explaining the steps taken to conserve and preserve the endangered species which was declared as a State Animal. Along with the affidavit, a comprehensive operational Management Plan for Udanti Wildlife Sanctuary was also enclosed stating that the execution of the said Management Plan had suffered setbacks due to acute financial shortage for its implementation. Further, it was stated that the funds allotted under Central Assistance from the Government of India, Ministry of Environment and Forests was not in tune with the budget requirement for development of the sanctuary and the conservation of the endangered species. A chart

showing shortfall in funds for the development of the sanctuary has also been annexed with the affidavit, so also a table showing the census figures of wild buffalos. The reasons for the decline of the wild buffalos have also been explained. In order to overcome those hurdles, it was stated that an MoU was entered into with the Wildlife Trust of India on 21.03.2005 which included special efforts for maintaining the genetic purity of those species and for breeding thereof. Steps taken to relocate the villagers residing within the sanctuary area has also been highlighted.

3. This Court on 08.09.2006 passed an order directing the Central Empowered Committee (CEC) to conduct an enquiry and submit a report. Affidavit filed by the State was also placed before the CEC and it had detailed discussions with the officials of the State of Chhattisgarh and MoEF. State of Chhattisgarh constituted a task force by its order dated 24.05.2007 for suggesting steps and formulating an action plan for the conservation and increasing the number of wild buffalos in the State. Proposal made by the Chief Wildlife Warden to replace the domestic buffalos reared by the villagers with cows and bullocks it was stated, was also given active consideration. CEC after consultation with the MoEF as well as the officials of the State Government submitted its report on 10.09.2008.

4. Steps taken by the State of Chhattisgarh to preserve and conserve the wild buffalo which was declared as a State Animal is far from satisfactory. When the matter came up for final hearing, the counsel appearing for the MoEF made available a copy of the Centrally Sponsored Scheme of 2009 (CSS) titled "Integrated Development of Wildlife Habitats". The Scheme was formulated during the Eleventh Five Year Plan. The Scheme has also incorporated additional components and activities for implementing the provisions of the Wildlife (Protection) Act, 1972 [for short the Act], National Wildlife Action Plan (2002-2016), recommendations of the Tiger Task Force, 2005, and the National Forest Commission, 2006 and

the necessities felt from time to time for the conservation of wildlife and biodiversity in the country.

5. Before coming into force of the Act, the scheme which was in force was "Assistance for the Development of National Parks and Sanctuaries" which used to support only National Parks and Wildlife Sanctuaries. However, following the amendment to the Act, in 2003, two more categories of Protected Areas (PAs) i.e. the *Conservation Reserves* and *Community Reserves* have been recognized. Conservation Reserves, which are government land, but do not require acquisition of rights, nor the curtailment of activities as envisaged in National Parks and Wildlife Sanctuaries are stated to be the most appropriate strategy for connecting protected areas, by providing corridors. Community Reserves are entirely based on efforts of the local people on privately owned lands which require financial and technical assistance for their future management. The Central Government before the Act came into force did not have much control over the States and the Union Territories for implementation of its various schemes and the Parliament, in order to give effect to Article 51A(g), enacted the Act for the protection of wild animals, birds and plants and for matters connected therewith, with a view to ensure the ecological and environmental security of the country. Article 48A of the Constitution of India imposes a duty on the State to protect and improve the environment and to safeguard the forest and wildlife of the country.

6. Article 51A(g) states that it is the duty of every citizen of India to protect and improve the natural environment including the wildlife and to have compassion for the living creatures. By the 42nd Amendment Act 1976 of the Constitution "Forests" was added as Entry 17A in the Concurrent List and the "protection of wild animals and birds" was added as Entry 17B. Consequently, both the Central and State Governments/UTs are mandated with the responsibility of protection and conservation of wildlife and its habitat. Chapter IV of the Act deals with the

"protected areas." Earlier headings 'Sanctuaries', 'National Parks' and 'Closed Areas', was substituted by the words "protected areas" by Act 16 of 2003. *Section 18 of the Act empowers the State Government to declare its intention to constitute any area other than an area comprised within any reserve forest or the territorial waters as a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wildlife or its environment.* Chapter IV also confers various other powers upon the State Government like acquisition, initiation of acquisition proceedings, declaration of areas as sanctuary, restriction on entry to the sanctuaries etc. It is unnecessary to refer to those provisions for the purpose of the instant case.

7. Section 36A of the Act empowers the State Government, after consultations with the local communities, declare any area owned by the Government, particularly the areas adjacent to National Parks and sanctuaries and those areas which link one protected area with another, as a *conservation reserve* for protecting landscapes, seascapes, flora and fauna and their habitat. The Act also empowers the State Government, where the community or an individual has volunteered to conserve wildlife and its habitat, declare any private or community land not comprised within a National Park, Sanctuary or a Conservation Reserve, as a *Community Reserve*, for protecting fauna, flora and traditional or cultural conservation values and practice. The management of Community Reserves shall primarily be done by the communities/individuals themselves. The Centrally Sponsored Scheme (CSS), therefore, intended to bring these two categories of PAs also under the ambit of the Scheme along with the existing National Parks and Wildlife Sanctuaries.

8. The State of Forest Report 2005 states that the forest and tree cover in the country is around 23.39%, of which forests constitute around 20.64%. However, the PA network covers

only 4.8% of the geographical area of the country with most of the PAs forming part of the forest area. At present, India has a network of 99 National Parks, 515 Wildlife Sanctuaries, 43 Conservation Reserves and 4 Community Reserves in different bio-geographic zones. *Protected Areas, i.e. Conservation Reserves and Community Reserves have an important role to play in maintaining geographical integrity of the Nation*. Fact is that many important habitats still exist outside those areas which require special attention from the point of view of conservation. Habitat of Sandalwood, red sanders, white cedar, rhododendrons, Southern Tropical Montane forests, grasslands, alpine meadows of Himalayan region, corridors connecting PAs and crucial wildlife habitats, deserts, tropical swamps, rivers, estuaries, bamboo and reed breaks, mangroves, coral reefs, deserts etc. are examples of such habitats existing outside conventional PAs. The tenurial status of such habitats ranges from government-controlled Reserved Forests to Protected Forests, revenue forests, interspersed vegetation in plantation sector, revenue lands, village forests, private forests, religious forests, territorial waters, Community Conserved Areas etc. Such habitats also act as corridors for wildlife between PAs thus ensuring connectivity in the landscape.

Human-wildlife conflict

9. Human-wildlife conflict is fast becoming a critical threat to the survival of many endangered species, like wild buffalo, elephants, tiger, lion etc. such conflicts affect not only its population but also has broadened environmental impacts on ecosystem equilibrium and biodiversity conservation. Laws are man-made, hence there is likelihood of anthropocentric bias towards man, and rights of wild animals often tend to be of secondary importance but in the universe man and animal are equally placed, but human rights approach to environmental protection in case of conflict, is often based on anthropocentricity.

10. Man-animal conflict often results not because animals

encroach human territories but vice-versa. Often, man thinks otherwise, because man's thinking is rooted in anthropocentrism. Remember, we are talking about the conflict between man and endangered species, endangered not because of natural causes alone but because man failed to preserve and protect them, the attitude was destructive, for pleasure and gain. Often, it is said such conflicts is due human population growth, land use transformation, species habitat loss, degradation and fragmentation, increase in eco-tourism, access to natural reserves, increase in livestock population, etc. Proper management practices have to be accepted, like conservation education for local population, resettlement of villages, curbing grazing by livestock and domestic animals in forest, etc., including prey-preservation for the wild animals. Provision for availability of natural water, less or no disturbance from the tourists has to be assured. State also has to take steps to remove encroachments and, if necessary, can also cancel the *patta* already granted and initiate acquisition proceedings to preserve and protect wildlife and its corridors. Areas outside PAs is reported to have the maximum number of man-animal conflict, they fall prey to poachers easily, and often invite ire of the cultivators when they cause damage to their crops. These issues have to be scientifically managed so as to preserve and protect the endangered species, like wild buffalo and other species included in Schedule 1 Part 1 of the Wildlife Protection Act, as well as other species which face extinction.

11. Management plan for Udanti Wildlife Sanctuary (2002-2003, 2011-2012) published by the Forest Department of Government of Chattisgarh, paragraph 3.6.2 of the Report reveals much more than what meets the eyes which reads as follows:-

> "Prior to declaration as sanctuary this area was part of East Raipur Division in which rules to regulate illegal poaching and hunting existed.

> Before declaration of Govt. forest it was under control of Bindrawagrah Zameendar.
>
> In those days shooting was allowed after receiving a fee of Rs.25/- at that time. Shooting of wild buffalo was prohibited after Govt. Notification no.1905-1517-4 dt. 27.08.1935 but in this zameendari one shooting licence holder was entitled to shoot one Bison, one Barasingha, Tow spotted deer and one Sambhar. Game rules of C.P. and Bear Game Act, 1935 and CP & Bear Bird game 1942 were existing in this are during past.
>
> After end of Zameendari system when these forest became Govt. forest rules were enforced to regulate hunting vide notification no.788-2319 DT.19.8.53.
>
> In these shooting rules of 1953 shooting of wild Buffalo was allowed after formal permission of Govt. But shooting of bison was prohibited. In shooting rules of 1955 different fee was decided for hunting. Shooting of Bison, wild buffalo, Barasingha, Tiger, Sambhar, Leopard, Sloth Bear and Cheetal were allowed.
>
> These hunting rules were not very effective for regulation of shooting and hunting and therefore shooting was stopped by Govt. of M.P. completely vide notification no. 6036-10(2)-71 dt. Govt. of India in this regard started 11.11.1971. Effective steps after enforcement of wildlife protection act 1972."

12. Paragraph 3.6.3.2 deals with encroachment and other illegal activity, which reads as follows :-

> **<u>Encroachment and other Illegal activity</u>**
>
> In UWLS encroachment for land hunger is not common practice. Sometime due to lack of clearcut demarcation live or boundaries, cases of encroachment have been observed. Therefore, village boundary should

be development of villages and for the betterment of villagers in the revenue villages inside and around the sanctuary. These department are revenue, ICDS, Veterinary Health Services, Medical Department, State Electricity Board etc., semi Govt. village institutions like village and Janpad Panchayat are also working for development activities.

More development activity causes more interference in forest and the privacy of wild life. These ultimately cause conflict with wildlife.

Conflict with wildlife to the abnormal behaviour of wild animals like aggressiveness of monkey, cattle lifting by carnivore, injury by bears during Mahua season etc.

Development of people is always welcome but not in the cost of negative ecological in the ecosystem.

13. Report clearly states that development activities causes more interference in forest and also the privacy of wildlife and these ultimately cause conflict with wildlife. Man-animal conflict often takes place when wild animals cause damage to agricultural crop and property, killing of livestock and human beings. Human population growth, land use transformation, species loss of habitat, eco-tourism, too much access to reserves, increase in livestock population bordering the forest, depletion of natural prey base etc., often stated to be reasons for such conflict. Central Govt. the State Governments, and the Union Territories should evolve better preservation strategies, in consultation with Wildlife Boards so that such conflicts can be avoided to a large extent. Participation of people who are staying in the Community Reserves is also of extreme importance. The necessity of implementing proper management measures for preserving the wild buffalo has also been elaborately stated in the Report.

14. Environmental justice could be achieved only if we drift

away from the principle of anthropocentric to ecocentric. Many of our principles like sustainable development, polluter-pays principle, inter-generational equity have their roots in anthropocentric principles. Anthropocentrism is always human interest focussed and non-human has only instrumental value to humans. In other words, humans take precedence and human responsibilities to non-human based benefits to humans. Ecocentrism is nature centred where humans are part of nature and non-human has intrinsic value. In other words, human interest do not take automatic precedence and humans have obligations to non-humans independently of human interest. Ecocentrism is therefore life-centred, nature-centred where nature include both human and non-humans. National Wildlife Action Plan 2002-2012 and centrally sponsored scheme (Integrated Development of Wildlife Habitats) is centred on the principle of ecocentrism.

15. The National Wildlife Action Plan (2002-2016) is intended to provide adequate protection to wildlife in multiple use areas such as Government forests outside PAs, various Community Conserved Areas like sacred groves, community and panchayat forests, identified private forests such as interspersed forests in tea, coffee and cardamom gardens and other protection landscapes, farm lands, wastelands, wetlands, coastal habitats, heronries, wintering wetlands of birds, catchment forests, turtle nesting sites, pastures for livestock and wild herbivore, deserve ecosystems etc.

Recovery Programmes

16. The Centrally Sponsored Scheme also deals with Recovery programmes for saving critically endangered species and habitats. It was noticed that, due to variety of reasons, several species and their habitats have become critically endangered. Consequently, the scheme intends to extend support to such recovery programmes for saving critically endangered species and their habitat based on the requirement felt from time to time. The objective of this recovery

plan of saving critically endangered species/ecosystems cannot be covered under the components of Conservation of PAs and protection of wildlife outside PAs as disjunct population across a wider landscape/seascape. Several programmes are proposed under the recovery plan, of which one is to save the critically endangered species of Asian Wild Buffalo and grasslands and riverine forests of central and north India. Several other components were also included in the recovery plan such as Dolphin and River Systems, Nilgiri Tahr, Asiatic Lion etc. The scheme envisages that the Director, Wildlife Preservation, Government of India, in consultation with the Wildlife Institute of India or the relevant scientific institute/ organization and with the approval of the Standing Committee of the National Board for Wildlife can initiate other recovery programmes or wind up the ongoing programme. The Director, Wildlife Preservation, is also authorised to undertake assessment of the effectiveness of any 'recovery programme' already undertaken or being undertaken. The Integrated Development of Wildlife Habitats scheme specifically highlighted the necessity to preserve and conserve the habitat of wild buffalo. The scheme states as follows:

> "Wild buffalo is one of the worst affected mammalian species in the recent times. Domestication of the species and continuous interbreeding with domestic buffalo has led to inbreeding, genetic disorders, competition and mortality due to disease. Apart from this, habitat fragmentation, degradation, and poaching are the main threats to the conservation of this globally threatened species. Urgent and concerted efforts are needed to recover this species from the brink of extinction."

17. Conservation and Management of Wildlife, as per the Act, is primarily vested in the States / UTs who are in physical possession of the area. It was noticed that many States/UTs have set up various regular wildlife wings within the States/UT Forest Departments and implemented a scheme as to be done in accordance with a work programme covering the 11th Plan

period. The Centrally Sponsored Scheme, therefore, envisages that the State/UTs are required to submit Annual Plan of Operations (APOs) to the Central Government detailing the proposed course of action, which consists of management planning and capacity building, anti-poaching and infrastructure development, restoration of habitats, eco-development and community oriented activities etc. so as to qualify for the financial assistance under the scheme. The concerned State/ UTs have to follow certain conditions which have been enumerated in the scheme.

18. The State of Chhattisgarh, in the instant case, has pointed out that they could not effectively give effect to some of the programmes for preservation and conservation of wild buffalo due to lack of funds. The scheme envisages 100% assistance. It is relevant to extract the Pattern of Funding and the same reads as follows:

> Pattern of Funding
>
> - Under the Scheme, 100% assistance is provided for non-recurring items of expenditure for National Parks, Wildlife Sanctuaries, Conservation Reserves and Community Reserves.
>
> - 50% cost of recurring expenditure is provided for National Parks, Wildlife Sanctuaries, Conservation Reserves and Community Reserves where the State Government provides for the balance 50% as the matching share.
>
> - National Parks, Wildlife Sanctuaries, Conservation Reserves and community Reserves in mountain regions, coastal zones, deserts, or those areas which support highly endangered species i.e. **Snow Leopard, Red Panda, Rhino, Sangai Deer, Phayre's leaf monkey, Musk Deer,**

Hangul, Great Indian Bustard, Great Indian Hornbill, Siberian Crane, Chinkara, Chowsingha, Black Buck, Marine Turtles, Nilgiri Tahr, Lion Tailed Macaque, Bustards, Floricans, Pelicans, Gyps Vultures, Wild Ass, Grizzled Giant Squirrel, Clouded Leopard, Wild Buffalo, Hoolock Gibbon and Lion are eligible for 100% central assistance for both recurring and non-recurring items of expenditure.

- In the case National Parks, Wildlife Sanctuaries, Conservation Reservation and Community Reserves falling in the high mountainous, snow clad regions (where working season is limited to a few months) in the States of Jammu and Kashmir, Himachal Pradesh, Uttarakhand and Sikkim, the central assistance shall be given in one instalment. For other States, the approved allocation shall be released in two instalments (80 per cent as 1st instalment and balance as 2nd instalment.)

- Similarly, subject to site-specific adjustments, as a guiding principle, a 40:40:20: proportion of financial sharing shall be ensured between Centre, State as owners of the privately held land, when such areas are involved in the case of Community Reserves.

19. State of Chattisgarh has maintained the stand that they do not have sufficient funds to undertake various programmes for protection of wild buffalo within the national parks, sanctuaries and also at conservation reserves and community reserves. This stand cannot be countenanced now, especially after the introduction of the Scheme.

20. Wild buffalo has been included as Item No. 41, Part I of Schedule I of the Act. Once it is included in Schedule I, the State Board for Wildlife has to advise the State Government in the selection and management of the areas to be declared

as protected areas, in the formulation of policy for protection and conservation of the wildlife etc., as per Section 8 of the Act. Section 9 of the Act states that no person shall hunt any wild animal specified in Schedule I to IV, except as provided under Sections 11 and 12.

21. The International Union for Conservation of Nature (IUCN) has calculated the percentage of endangered species as 40% of all organisms. IUCN Red List refers to specific categories of endangered species and includes critically endangered species. IUCN Red List of Threatened Species uses the term endangered species as a specific category of imperilment, rather than as a general term. Under the IUCN Categories and Criteria, endangered species is between critically endangered and vulnerable. *Wild water buffalo* is included in the category of endangered species. Apart from the human-animal conflict, the most important threat to wild buffalo is inbreeding with feral and domestic buffalo, habitat loss/ degradation and hunting. Diseases and parasites (transmitted by domestic livestock) and competition for food and water between wild buffalo and domestic stock are also serious threats. Habitat loss is also a major concern for species endangerment. When wild buffalos' eco-system is not maintained, they lose their home and either forced to adopt new surroundings or human habitat. Eminent ecologists have proposed biological corridors, biosphere reserves, ecosystem management and eco-regional planning as approaches to integrate biodiversity conservation and socio-economic development at increasingly larger spatial scales.

22. We have seen the subjects 'forest' and 'protection of animals and birds' are in the concurrent list of the Constitution and it is the fundamental duty of every citizen of India under Article 51A(g) of the Constitution to protect and improve the natural environment including forests, lakes, rivers and wildlife. It is to achieve the above objective and also to give effect to the purpose of the object of the Act that the Central Government

has sponsored "the Integrated Development of Wildlife Habitats". As per the Scheme and the Act, the State Government is empowered to notify conservation reserves and community reserves for protecting the landscape, seascapes, flora and fauna and their habitat. The Act also empowers the State Government to declare any private and community land not comprised within the national parks, sanctuaries or conservation reserves or community reserves for protecting fauna, flora and traditional or cultural conservation values and practice.

23. We are, therefore, inclined to dispose of this application with the direction to the State of Chhattisgarh to give effect fully the Centrally Sponsored Scheme – "the Integrated Development of Wildlife Habitats", so as to save wild buffalo from extinction. The State also would take immediate steps to ensure that interbreeding between wild and domestic buffalos does not take place and genetic purity of the wild species is maintained. The State is also directed to take immediate steps to undertake intensive research and monitor the wild buffalo population in Udanti Wildlife Sanctuary and other areas, where the wild buffalo may still be found, including preparing them their genetic profile for future reference. The State is also directed to take appropriate steps to initiate wildlife training programmes for the officials of the State Forest Department, especially for managing the above sanctuary and other areas where the wild buffalos are found. The State is also directed to submit Annual Plan of Operations to the Central Government detailing the proposed course of action, if not already done, as per the "Integrated Development of Wildlife Habitats" scheme, within a period of three months from today. All effective steps should be taken by the State to protect the Asian wild buffalo (*Bubalus bubalis*), which is declared as a State animal by the State of Chattisgarh.

24. The applications are disposed of as above.

B.B.B. Interlocutory Applications disposed of.

KRUSHNAKANT B.PARMAR
v.
UNION OF INDIA & ANR.
(Civil Appeal No. 2106 of 2012)

FEBRUARY 15, 2012

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

Service law:

Central Civil Services (Conduct) Rules, 1964 – r. 3(1)(ii) and (iii) - Employee unauthorisedly absent from duty for three consecutive periods - Held guilty of violating r. 3(1)(ii) and (iii) for failure to maintain devotion to duty and conduct unbecoming of government servant - Order of dismissal from service - Said order upheld by the appellate authority, the tribunal and the High Court - On appeal, held: In a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct - On facts, the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence willful – Disciplinary authority as also the Appellate Authority failed to appreciate the same and wrongly held the appellant guilty – Specific defence of the appellant that he was prevented from attending duty by the Controlling Officer and other evidence ignored - Thus, the order of dismissal passed by disciplinary authority, upheld by the Appellate Authority; the tribunal and High Court set aside - Employee reinstated with 50% back wages – Employee having suffered a lot since the proceedings were initiated against him, matter not remitted to the disciplinary authority.

Appellant was charged for unauthorised absence

from duty during three consecutive periods (36 days, 32 days and 234 days). The appellant alleged bias against the controlling officer who prevented him from performing the duty to sign the attendance register. The enquiry officer submitted a report and the charges were proved. The appellant was held guilty of violating Rule 3(1)(ii) and (iii) of the Central Civil Services (Conduct) Rules, 1964 for failure to maintain devotion of duty and his behavior was unbecoming of a government servant. Thereafter, the appellant was dismissed from service. The said order was upheld by the Appellate Authority, the tribunal and the High Court. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. From a bare perusal of the charge memo and the Inquiry Report it can be deduced that the Inquiry Officer proceeded on a wrong premise. [Para 10] [490-E]

1.2. The question whether 'unauthorised absence from duty' amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant. In a Departmental proceeding, if allegation of unauthorised absence from duty is made,

the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct. [Paras 16, 17, 18, 19]. [492-F-H; 493-A-B]

1.3. In the instant case, the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty. No such finding was given by the Inquiry Officer. Though the appellant took a specific defence that he was prevented from attending duty by DCIO, Palanpur who prevented him to sign the attendance register and also brought on record 11 defence exhibits in support of his defence that he was prevented to sign the attendance register, but such defence and evidence were ignored and on the basis of irrelevant fact and surmises the Inquiry Officer held the appellant guilty. DCIO, Palanpur, who was the complainant and against whom appellant alleged bias refused to appear before the Inquiry Officer in spite of service of summons. Two other witnesses made no statement against the appellant, and one of them stated that he had no knowledge about absence of the appellant. Ignoring the evidence, on the basis of surmises and conjectures, the Inquiry Officer held the charge proved. Though the Appellate Authority noticed the said facts but ignored such facts giving reference of extraneous allegations which were not the part of the charge and dismissed the appeal with the uncalled observation. [Paras 20, 22, 23 and 24] [493-C; 494-B-G]

1.4. The impugned orders of dismissal passed by disciplinary authority, affirmed by the Appellate Authority; Central Administrative Tribunal and High Court are set aside. The appellant is reinstated. Taking into

consideration the fact that the Charged Officer has suffered a lot since the proceeding was drawn in 1996 for absence from duty for a certain period, the proceeding is not remitted to the disciplinary authority for any further action. Keeping in view the fact that the appellant did not work for a long time the appellant is directed be paid 50% of the back wages but there would be no order as to costs. [Para 25] [495-A-C]

M.B. Bijlani vs. Union of India and Ors. **(2006) 5 SCC 88: 2006 (3) SCR 896 – referred to.**

Case Law Reference:

2006 (3) SCR 896 Referred to. Para 21

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2106 of 2012.

From the Judgment & Order dated 26.07.2006 of the High Court of Gujarat in Special Civil Application No. 21778 of 2005.

Nikhil Goel, A. Venayagam Balan for the Appellant.

Sushma Suri for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted.

2. The appellant, who was working as Security Assistant, was proceeded departmentally on 2nd September, 1996 for the following charge:

"While functioning as SA(G) in the office of Deputy Central Intelligence Officer, Palanpur, under Subsidiary Intelligence Bureau, Ahmedabad, unauthorisedly absented from duty between 3.10.1995 and 7.11.1995, 9.11.1995 and 10.12.1995 and from 10.12.1995 to 2.8.1996, thereby

violating Rule 3(1)(ii) 3(1)(iii) of Central Civil Services (Conduct) Rules, 1964."

3. On receipt of charge-sheet the appellant denied the allegation by his reply dated 7th October, 1996 and also alleged bias against his Controlling Officer, Mr. P. Venkateswarlu with specific stand that he was prevented by him from signing the attendance register and to attend the office. He also explained reasons of absence for certain period for which he had applied for leave.

4. During the pendency of the departmental proceedings, the appellant was transferred to another place which he challenged before the Central Administrative Tribunal alleging bias against his superior Officer. The Central Administrative Tribunal by order dated 15th November, 2000 set aside the order by holding 'the order of transfer is vitiated due to malice in law and fact' which was affirmed by the Gujarat High Court on 17th August, 2001. After about seven years Inquiry Officer submitted a report on 28th April, 2003 and held that the charge has been proved against the appellant beyond all reasonable doubt, holding him guilty of violating Rule 3(1)(ii) and 3(1)(iii) of Central Civil Services (Conduct) Rules, 1964.

5. A copy of the Inquiry Report was forwarded to the appellant who submitted a reply on 13th July, 2003 and raised following objections:

(i) Mr. Venkateswarlu, the then DCIO, Palanpur who was the complainant against the appellant about absence from duty, against whom the appellant has alleged malice and was the prime witness, refused to attend the inquiry;

(ii) the Report of the Inquiry Officer is based on statements of two prosecution witnesses, who have not proved the charges;

(iii) the Inquiry Officer failed to discuss the evidence relied on by him;

(iv) the attendance register for the relevant period was not produced and

(v) the defence taken by him that he was not allowed to attend duty has not been dealt with by the Inquiry Officer.

The Joint Deputy Director, SIB, thereafter, dismissed the appellant from service by an order dated 02.12.2003.

6. The appellant challenged the order of dismissal before Central Administrative Tribunal which by order dated 4th May, 2004 refused to entertain the application and allowed the appellant to avail alternative remedy of appeal. Accordingly, the appellant preferred an appeal on 17th May, 2004 before the Director, Intelligence Bureau highlighting lapses committed by the Inquiry Officer, and also alleged bias against the controlling officer who prevented him from performing the duty and to sign the attendance register. The Appellate Authority without discussing the aforesaid objections rejected the appeal by order dated 30th November, 2011 and observed as follows:

"……..the undersigned has come to the same conclusion that the appellant should have been discharged from service under the Temporary Service Rules when the first instance of indiscipline on his part was noticed.

…….the charge against the appellant, Shri K.B. Parmar that he remained absent unauthorisedly has been established beyond doubt…….

Now, therefore, the undersigned, being the competent Appellate Authority hereby rejects the appeal dated 17.5.2004 submitted by Shri K.B. Parmar, against the order of Disciplinary Authority dated 2.12.2003 both on account of being time-barred as well as having no merit and confirms the penalty of removal from service on the said Shri K.B. Parmar vide order dated 2.12.2003."

7. The appellant challenged the order of punishment and

the appellate order in Original Application No. 619 of 2004 before the Central Administrative Tribunal which was dismissed by order and judgment dated 28th September, 2005 and affirmed by the Gujarat High Court.

8. Learned counsel appearing on behalf of the appellant has taken us through records including report submitted by the Inquiry Officer and the order passed by the Appellate Authority and argued that the Inquiry Officer failed to consider the relevant evidence produced by the appellant and misdirected himself in arriving at the finding of guilt against him. He would further contend that no specific finding has been given with regard to the charge that he violated Rule 3(1)(ii) and Rule 3(1)(iii) of the Conduct Rules.

9. Per contra, according to the learned counsel for the respondents, departmental inquiry was conducted in accordance with law, and after providing full opportunity to the appellant, on appreciation of evidence, as the Inquiry Officer held the appellant guilty, the Appellate Authority affirmed the same.

10. We have heard learned counsel for the parties. From a bare perusal of the charge memo and the Inquiry Report it can be deduced that the Inquiry Officer proceeded on a wrong premise.

The appellant was principally charged for unauthorised absence from duty during three consecutive period: (i) 3rd October, 1995 to 7th November, 1995 (36 days); (ii) 9th November, 1995 to 10th December, 1995 (32 days); and (iii) 10th December, 1995 to 2nd August, 1995 (234 days), in violation of Rule 3(1)(ii) and Rule 3(1)(iii) of the Rule 3(1)(ii) and Rule 3(1)(iii) of Central Civil Services (Conduct) Rules, 1964.

11. The charge was sought to be proved by respondents on the basis of statement of three witnesses, namely, (i) Shri P. Venkateswarlu, DCIO, SIB, Hyderabad, (ii) Shri B.P. Jivrani,

ACIO-II, Palanpur and (iii) Shri L.N. Thakkar, JIO-I(MT), Gandhidham, and seven documentary evidence, including attendance register of the office of DCIO, Palanpur, but the complainant refused to appear in the Inquiry in support of complaint and charge.

12. The records suggest that on 11th August, 1995, the appellant requested the respondents to transfer him from Palanpur to any nearest place at Ahmedabad or Nadiad or Anand which was accepted by respondents and an order of transfer was issued by the respondents on 21st August, 1995 transferring the appellant to the office of DCIO, Nadiad with immediate effect. On 25th August, 1995, the Joint Assistant Director, SIB ordered to release the appellant from Palanpur to join duty at Nadiad with effect from 31st August, 1995. In view of such order the appellant was relieved and joined at Nadiad. However, the order of transfer was cancelled by the respondents on 4th September, 1995 and he was transferred at a distance place which was challenged by him before the Central Administrative Tribunal. After cancellation of the order of transfer the appellant sent a complaint on 18th September, 1995 before the authorities that the DCIO, Palanpur, Mr. P. Venkateswarlu was not allowing him to join duty. The order of transfer was challenged by him before the Central Administrative Tribunal, Ahmedabad alleging bias against Mr. Venkateswarlu, DCIO, Palanpur, in-charge of the office which was accepted by the Central Administrative Tribunal and the order of transfer was set aside. Thereafter appellant joined duty on 11th December, 1995 and proceeded on leave for 11 days due to illness of his father.

13. The Inquiry Officer noticed the aforesaid facts and held the appellant was unauthorisedly absent between 3rd October, 1995 and 7th November, 1995; 9th November, 1995 and 10th December, 1995; 10th December, 1995 and 2nd August, 1995. However, while coming to such contention, the authority failed to decide whether such absence amounted to misconduct. The

evidence led by the appellant in support of his claim that he was prevented to sign the attendance register and to perform duty though noticed the Inquiry Officer on presumption and surmises, held the charge proved.

14. Rule 3(1)(ii) and Rule 3(1)(iii) of Central Civil Services (Conduct) Rules, 1964, relates to all time maintaining integrity, devotion to duty and to do nothing which is unbecoming of a Government servant and reads as follows:

“Rule 3 – General.

(1) Every Government servant shall at all times—

(i) maintain absolute integrity;

(ii) maintain devotion to duty; and

(iii) do nothing which is unbecoming of a Government servant.”

15. In the case of appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion of duty and his behaviour was unbecoming of a Government servant.

16. The question whether ‘unauthorised absence from duty’ amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful.

18. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including

compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

19. In a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct.

20. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty.

21. The question relating to jurisdiction of the Court in judicial review in a Departmental proceeding fell for consideration before this Court in *M.B. Bijlani vs. Union of India and others* reported in (2006) 5 SCC 88 wherein this Court held:

> "It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures.

> He cannot enquire into the allegations with which the delinquent officer had not been charged with."

22. In the present case, the disciplinary authority failed to prove that the absence from duty was wilful, no such finding has been given by the Inquiry Officer or the Appellate Authority. Though the appellant had taken a specific defence that he was prevented from attending duty by Shri P. Venkateswarlu, DCIO, Palanpur who prevented him to sign the attendance register and also brought on record 11 defence exhibits in support of his defence that he was prevented to sign the attendance register, this includes his letter dated 3rd October, 1995 addressed to Shri K.P. Jain, JD, SIB, Ahmedabad, receipts from STD/PCO office of Telephone calls dated 29th September, 1995, etc. but such defence and evidence were ignored and on the basis of irrelevant fact and surmises the Inquiry Officer held the appellant guilty.

23. Mr. P. Venkateswarlu, DCIO, Palanpur, who was the complainant and against whom appellant alleged bias refused to appear before the Inquiry Officer in spite of service of summons. Two other witnesses, Shri Jivrani and Shri L.N. Thakkar made no statement against the appellant, and one of them stated that he had no knowledge about absence of the appellant. Ignoring the aforesaid evidence, on the basis of surmises and conjectures, the Inquiry Officer held the charge proved.

24. Though the aforesaid facts noticed by the Appellate Authority but ignoring such facts giving reference of extraneous allegations which were not the part of the charge, dismissed the appeal with following uncalled for observation:

> "The appellant even avoided the basic training required for the job and asked JAD Ahmedabad to send all the training papers for his training at IB Training School, Shivpuri (Madhya Pradesh) to his residence at Ahmedabad. 'An untrained officer is of no worth to the department'."

25. In the result, the appeal is allowed. The impugned orders of dismissal passed by disciplinary authority, affirmed by the Appellate Authority; Central Administrative Tribunal and High Court are set aside. The appellant stands reinstated. Taking into consideration the fact that the Charged Officer has suffered a lot since the proceeding was drawn in 1996 for absence from duty for a certain period, we are not remitting the proceeding to the disciplinary authority for any further action. Further, keeping in view the fact that the appellant has not worked for a long time we direct that the appellant be paid 50% of the back wages but there shall be no order as to costs.

N.J. Appeal allowed.

RATTIRAM & ORS.

v.

STATE OF M. P. THROUGH INSPECTOR OF POLICE

(Criminal Appeal No. 223 of 2008)

FEBRUARY 17, 2012

[DALVEER BHANDARI, T.S. THAKUR AND DIPAK MISRA, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

*s.193 – Effect and impact of not committing an accused in terms of s.193 in cases where charge-sheet is filed u/s.3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and cognizance is directly taken by the Special Judge under the Act – Held: Special Court as constituted under 1989 Act is a Court of Session – If cognizance is directly taken by the Special Court under the Act and an accused without assailing the same at the inception allows the trial to continue and invites a judgment of conviction, he would not be permitted in law to question the same and seek quashment of the conviction on the ground that the Special Court had no jurisdiction or authority to take cognizance without the case being committed to it – It is only when non-compliance has occasioned in 'failure of justice' or culminated in causation of prejudice to the accused that the trial is vitiated – The objection relating to non-compliance of s.193 which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Act, 1989 does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial – The decision rendered in **Bhooraji lays down the correct law – The decisions rendered in ***Moly and ****Vidyadharan did not note the decision in **Bhooraji, a binding precedent, and hence they are per incuriam.*

s.209 – Committal proceedings – Procedure of, in old Code of Criminal Procedure and new Code of 1973 – Held: Under the Code of Criminal Procedure, 1898, a full-fledged Magisterial enquiry was postulated in the committal proceeding and the prosecution was then required to examine all the witnesses at this stage itself – But, in the committal proceedings in praesenti, the Magistrate is only required to see whether the offence is exclusively triable by the Court of Session – Because of the restricted role assigned to the Magistrate at the stage of commitment under the new Code, the non-compliance of the same and raising of any objection in that regard after conviction attracts the applicability of the principle of 'failure of justice' and the convict-appellant becomes obliged in law to satisfy the appellate court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice.

Criminal jurisprudence:

Fair trial – Denial of – Held: A 'fair trial' is the heart of criminal jurisprudence – Denial of 'fair trial' is crucifixion of human rights – It is ingrained in the concept of due process of law – While emphasising the principle of 'fair trial' and the practice of the same in the course of trial, it is obligatory on the part of the Courts to see whether in an individual case or category of cases, because of non-compliance of a certain provision, reversion of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial injustice has in fact occurred.

Procedural lapse and delay in conclusion of trial – Effect of – Held: There has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused – Every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair – Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure – The right of the collective as well as the right of the victim springs to the forefront and then it becomes obligatory on the part of the accused to satisfy the court that there has been failure of justice or prejudice has been caused to him – Unless the same is established, setting aside of conviction as a natural corollary or direction for retrial as the third step of the syllogism solely on the said foundation would be an anathema to justice – One cannot also afford to treat the victim as an alien or a total stranger to the criminal trial – The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the view point of the criminal as well as the victim – A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice or failure of justice.

ADMINISTRATION OF JUSTICE: Speedy trial – Held: The entitlement of the accused to speedy trial has been recognised as an inherent and implicit aspect in the spectrum of Article 21 of the Constitution – The whole purpose of speedy trial is intended to avoid oppression and prevent delay – It is a sacrosanct obligation of all concerned with the justice dispensation system to see that the administration of criminal justice becomes effective, vibrant and meaningful – The concept of speedy trial cannot be allowed to remain a mere formality – However, speedy trial cannot be regarded as an exclusive right of the accused – In many cases the victim may suffer even more than the accused – There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence.

The questions that arose for consideration in the instant appeals were whether the Special Court as constituted under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is

a Court of Session; and whether there is any special provision in the Act enabling the said court to take cognizance; and whether non-compliance of the interdict as envisaged and engrafted under Section 193 of Code of Criminal Procedure, 1973 nullifies the final verdict after the trial and warrants its total extinction resulting in retrial, or it is incumbent on the part of the convict to exposit and satisfy that such guillotining of the interdict has occasioned in 'failure of justice' or culminated in causation of prejudice to him for the purpose of declaring that the trial was vitiated.

Answering the questions the Court

HELD: 1. Plain reading of Section 193 of Code of Criminal Procedure, 1973 would show that no Court of Session can take cognizance of any offence as a court of original jurisdiction except as otherwise expressly provided by the Code or any other law for the time being in force. In **Gangula Ashok,* **a two-Judge Bench of this Court, after taking note of Section 6 of 1973 Code and Section 14 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 came to the conclusion that the intendment of the legislature is to treat the Special Court under the Act to be a Court of Session even after specifying it as a Special Court and it would continue to be essentially a Court of Session and not get denuded of its character or power as a Court of Session. However, the demonstrable facet of the discord is that if cognizance is directly taken by the Special Judge under the Act and an accused without assailing the same at the inception allows the trial to continue and invites a judgment of conviction, would he be permitted in law to question the same and seek quashment of the conviction on the bedrock that the trial Judge had no jurisdiction or authority to take cognizance without the case being committed to it and thereby violated the mandate**

enshrined under Section 193 of the Code. [Paras 5, 7, 10] [511-D, G, H; 513-D]

M. A. Kuttappan v. *E Krishnan Nayanar and another* **(2004) 4 SCC 231 : 2004 (2) SCR 668 – Distinguished.**

Gangula Ashok and Another* v. *State of Andhra Pradesh* **AIR 2000 SC 740 : 2000 (1) SCR 468 – referred to.

2. The decision in ***Bhooraji* **was a binding precedent, and when in ignorance of it subsequent decisions are rendered, the concept of** *per incuriam* **would come into play. In** ***Bhooraji,* **the Bench referred to Section 462 to 465 of 1973 Code. Section 465 of 1973 Code laid emphasis on a 'court of competent jurisdiction' and 'error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial' and 'a failure of justice has in fact been occasioned thereby'. The legislative intendment inhered in the language employed is graphically clear that lancination or invalidation of a verdict after trial is not to be taken recourse to solely because there is an error, omission or irregularity in the proceeding. The term 'a failure of justice' has been treated as the *sine qua non* for setting aside the conviction. [Paras 24, 30, 31] [520-C-D; 522-G; 523-D-F]**

***State of M. P.* v. *Bhooraji & Ors.* **AIR 2001 SC 3372 : 2001 (2) Suppl. SCR 128 – relied on.**

3. A 'fair trial' is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity that is governed by Rule of Law. Denial of 'fair trial' is crucifixion of human rights. It is ingrained in the concept of due process of law. While emphasising the principle of 'fair trial' and the practice of the same in the course of trial, it is obligatory on the part of the Courts to see whether in an individual case or category of cases,

because of non-compliance of a certain provision, reversion of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial injustice has in fact occurred. The seminal issue is whether protection given to the accused under the law has been jeopardised as a consequence of which there has been failure of justice or causation of any prejudice. Once prejudice is caused to the accused during trial, it occasions in 'failure of justice'. [Paras 35-36] [525-C-E; 526-B]

4. Section 209 of 1973 Code deals with the commitment of case to Court of Session when an offence is triable exclusively by it. Prior to coming into force of 1973 Code, Section 207 of the Code of Criminal Procedure, 1898 dealt with committal proceedings. By the Criminal Law Amendment Act, 1955, Section 207 of the Principal Act was substituted by Sections 207 and 207A. Perusal of section 207 and 207A of the old Code would show that an exhaustive procedure was enumerated prior to commitment of the case to the Court of Session. As is evincible, earlier if a case was instituted on a police report, the magistrate was required to hold enquiry, record satisfaction about various aspects, take evidence as regards the actual commission of the offence alleged and further was vested with the discretion to record evidence of one or more witnesses. Apart from that the accused was at liberty to cross-examine the witnesses and it was incumbent on the magistrate to consider the documents and, if necessary, examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him by the prosecution and afford the accused an opportunity of being heard and if there was no ground for committing the accused person for trial, record reasons and discharge him. Thus, the accused enjoyed a substantial right prior to commitment of the case. It was indeed a vital stage. But, in the

committal proceedings *in praesenti*, the magistrate is only required to see whether the offence is exclusively triable by the Court of Session. Section 207 of the 1973 Code lays down for furnishing of certain documents to the accused free of cost. Section 209(a) clearly stipulates that providing of the documents as per Section 207 or Section 208 is the only condition precedent for commitment. After the words, namely, "it appears to the Magistrate", the words that follow are "that the offence is triable exclusively by the Court of Session". The limited jurisdiction conferred on the magistrate is only to verify the nature of the offence. Thereafter, a mandate is cast that he "shall commit". Evidently, there is a sea of difference in the proceeding for commitment to the Court of Session under the old Code and under the existing Code. There is nothing in Section 209 of the Code to even remotely suggest that any of the protections as provided under the old Code has been telescoped to the existing one. [Paras 41-43] [529-C; 530-A-B; 534-B-H; 535-A-B]

Mrs. Kalyani Baskar v. *Mrs. M. S. Sampoornam* **(2007) 2 SCC 258;** *Sidhartha Vashisht* v. *State (NCT of Delhi)* **(2010) 6 SCC 1 : 2010 (4) SCR 103;** *Gurbachan Singh* v. *State of Punjab* **AIR 1957 SC 623;** *Shamnsaheb M. Multtani* v. *State of Karnataka* **(2001) 2 SCC 577: 2001 (1) SCR 514;** *State by Police Inspector* v. *T. Venkatesh Murthy* **AIR 2004 SC 5117: 2004 (4) Suppl. SCR 279;** *Central Bureau of Investigation* v. *V. K. Sehgal* **(1999) 8 SCC 501: 1999 (3) Suppl. SCR 570;** *M. C. Sulkunte* v. *State of Mysore* **AIR 1971 SC 508 – relied on**

Town Investments Ltd. vs. Department of the Environment **(1977) 1 All ER 813 – referred to**

5. Because of the restricted role assigned to the Magistrate at the stage of commitment under the new Code, the non-compliance of the same and raising of any

objection in that regard after conviction attracts the applicability of the principle of 'failure of justice' and the convict-appellant becomes obliged in law to satisfy the appellate court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice. The concept of fair trial and the conception of miscarriage of justice are not in the realm of abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of facts and not to be deduced from procedural lapse or an interdict like commitment as enshrined under Section 193 of the 1973 Code for taking cognizance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has roots in appearance sans any reality. Tested on the aforesaid premised reasons, it is well nigh impossible to conceive of any failure of justice or causation of prejudice or miscarriage of justice on such non-compliance. It would be totally inapposite and inappropriate to hold that such non-compliance vitiates the trial. [para 45] [536-B-F]

6. The entitlement of the accused to speedy trial has been recognised as an inherent and implicit aspect in the spectrum of Article 21 of the Constitution. The whole purpose of speedy trial is intended to avoid oppression and prevent delay. It is a sacrosanct obligation of all concerned with the justice dispensation system to see that the administration of criminal justice becomes effective, vibrant and meaningful. The concept of speedy trial cannot be allowed to remain a mere formality. However, speedy trial cannot be regarded as an exclusive right of the accused. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence. [Paras 46-47] [536-G-H; 537-A-E]

Hussainara Khatoon and Ors. v. *Home Secretary, State of Bihar* **(1980) 1 SCC 81: 1979 (3) SCR 169;** *Moti Lal Saraf* v. *State of Jammu & Kashmir* **AIR 2007 SC 56: 2006 (6) Suppl. SCR 903;** *Raj Deo Sharma* v. *State of Bihar* **AIR 1998 SC 3281: 1998 (2) Suppl. SCR 130;** *Mangal Singh and Anr.* v. *Kishan Singh and ors.* **AIR 2009 SC 1535: 2008 (16) SCR 505;** *Iqbal Singh Marwah and another* v. *Meenakshi Marwah and another* **AIR 2005 SC 2119: 2005 (2) SCR 708 – relied on.**

7. The delay in conclusion of trial has a direct nexus with the collective cry of the society and the anguish and agony of an accused. Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused. Every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. In the case at hand, no objection was raised at the time of framing of charge or any other relevant time but only propounded after conviction. Under these circumstances, the right of the collective as well as the right of the victim springs to the forefront and then it becomes obligatory on the part of the accused to satisfy the court that there has been failure of justice or prejudice has been caused to him. Unless the same is established, setting aside of conviction as a natural corollary or direction for retrial as the third step of the syllogism solely on the said foundation would be an anathema to justice. One cannot also afford to treat the victim as an alien or a total stranger to the criminal trial. The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the view point of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due

regard and respect in certain countries. In respect of certain offences in our existing criminal jurisprudence, the testimony of the victim is given paramount importance. Sometimes, it is perceived that it is the duty of the court to see that the victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice or failure of justice. [Paras 49, 50] [538-A-H]

8. If the failure of justice is not bestowed its due signification in a case of the present nature, every procedural lapse or interdict would be given a privileged place on the pulpit. It would, with unnecessary interpretative dynamism, have the effect potentiality to cause a dent in the criminal justice delivery system and eventually, justice would become illusory like a mirage. It is to be borne in mind that the Legislature deliberately obliterated certain rights conferred on the accused at the committal stage under the new Code. The intendment of the Legislature in the plainest sense is that every stage is not to be treated as vital and it is to be interpreted to subserve the substantive objects of the criminal trial. [Para 51] [539-A-C]

9. The objection relating to non-compliance of Section 193 of the 1973 Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial and, therefore, the decision rendered in *****Bhooraji* lays down the correct law inasmuch as there is no failure of justice or no prejudice is caused to the accused. The decisions rendered in ******Moly*** and *******Vidyadharan*** have not noted the decision in *****Bhooraji***, a binding precedent, and hence they are *per incuriam* and**

further, the law laid down therein, whereby the conviction is set aside or matter is remanded after setting aside the conviction for fresh trial, does not expound the correct proposition of law and, accordingly, they are hereby, to that extent, overruled. [Para 52] [539-D-G]

***State of M. P.* v. *Bhooraji & Ors.* **AIR 2001 SC 3372 : 2001 (2) Suppl. SCR 128 – relied on.**

****Moly and Another* v. *State of Kerala* **AIR 2004 SC 1890 : 2004 (3) SCR 346;** *****Vidyadharan* v. *State of Kerala* **(2004) 1 SCC 215 : 2003 (5) Suppl. SCR 524 – per incuriam**

Jabalpur Bus Operators Association and Another v. *State of Madhya Pradesh and Another* **2003 (1) MPJR 158;** *A. R. Antulay* v. *Ramdas Sriniwas Nayak and another* **(1984) 2 SCC 500 : 1984 (2) SCR 914;** *Directorate of Enforcement* v. *Deepak Mahajan and another* **(1994) 3 SCC 440 : 1994 (1) SCR 445;** *Gangula Ashok* v. *State of A.P.* **(2000) 2 SCC 504 : 2000 SCC (Cri) 488 : 2000 (1) SCR 468;** *Union of India and Another* v. *Raghubir Singh (dead) by L. Rs. And Others* **(1989) 2 SCC 754 : 1989 (3) SCR 316;** *Indian Oil Corporation Ltd.,* v. *Municipal Corporation and Another* **AIR 1995 SC 1480 : 1995 (3) SCR 246;** *Municipal Corporation, Indore* v. *Smt. Ratna Prabha & Ors.* **AIR 1977 SC 308 : 1977 (1) SCR 1017;** *Dewan Daulat Rai Kapoor* v. *New Delhi Municipal Committee* **AIR 1980 SC 541 : 1980 (2) SCR 607;** *Dr. Balbir Singh* v. *Municipal Corporation Delhi* **AIR 1985 SC 339 : 1985 (2) SCR 439;** *Chandra Prakash and Others* v. *State of U.P. and Another* **(2003) SCC (L & S) 827;** *Punjab Land Development & Reclamation Corporation Ltd.* v. *Presiding Officer, Labour Court, Chandigarh & Ors.* **(1990) 3 SCC 682 : 1990 (3) SCR 111;** *State of U. P. And Another* v. *Synthetics and Chemicals Ltd. And Another* **(1991) 4 SCC 139;** *Siddharam Satlingappa Mhetre* v. *State of Maharashtra and Ors.* **AIR 2011 SC 312 : (2011) 1 SCC 694 : 2010 (15) SCR 201 – referred to.**

Case Law Reference:

2004 (3) SCR 346	**per incuriam**	**Para 1,3,8, 17,20,28,31**
2003 (5) Suppl. SCR 524	**per incuriam**	**Para 1,3,8,17, 18,19,28**
2001 (2) Suppl. SCR 128	**relied on**	**Para 1,3,8,13, 16,17,20,23, 30,36,38**
2000 (1) SCR 468	**referred to**	**Para 3,7,11, 13,14,18**
2003 (1) MPJR 158	**referred to**	**Para 3**
1984 (2) SCR 914	**referred to**	**Para 7,24**
1994 (1) SCR 445	**referred to**	**Para 7**
2004 (2) SCR 668	**Distinguished**	**Para 8,18**
1989 (3) SCR 316	**referred to**	**Para 21,23**
1995 (3) SCR 246	**referred to**	**Para 22**
1977 (1) SCR 1017	**referred to**	**Para 22**
1980 (2) SCR 607	**referred to**	**Para 22**
1985 (2) SCR 439	**referred to**	**Para 22,23**
(2003) SCC (L & S) 827	**referred to**	**Para 23**
1990 (3) SCR 111	**referred to**	**Para 25**
(1991) 4 SCC 139	**referred to**	**Para 26**
2010 (15) SCR 201	**referred to**	**Para 27**
(2007) 2 SCC 258	**relied on**	**Para 33**
2010 (4) SCR 103	**relied on**	**Para 34**

AIR 1957 SC 623	**relied on**	**Para 35**
2001 (1) SCR 514	**relied on**	**Para 36**
(1977) 1 All ER 813	**referred to**	**Para 36**
2004 (4) Suppl. SCR 279	**relied on**	**Para 37**
2001 (2) Suppl. SCR 128	**referred to**	**Para 38**
1999 (3) Suppl. SCR 570	**relied on**	**Para 39**
AIR 1971 SC 508	**relied on**	**Para 40**
1979 (3) SCR 169	**relied on**	**Para 46**
2006 (6) Suppl. SCR 903	**relied on**	**Para 46**
1998 (2) Suppl. SCR 130	**relied on**	**Para 46**
2008 (16) SCR 505	**relied on**	**Para 47**
2005 (2) SCR 708	**relied on**	**Para 48**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 223 of 2008.

From the Judgment & Order dated 12.03.2007 of the High Court of Judicature, Madhy Pradesh at Jabalpur in Criminal Appeal No. 1568 of 1996.

WITH

Crl. A. No. 458 of 2008.

Fakhruddin, Bharat Bhushan, Raj Kishore Choudhary, Samant Ahuja, Abdul Karim Ansari, Gulshan Johari, Anis Ahmed Khan, Shoaib Ahmed Khan, M.Z. Chaudhary, Aftab Ali Khan for the Appellants.

Vibha Datta Makhija, Rohan Chhabra for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Perceiving divergent and contradictory views as regards the effect and impact of not committing an accused in terms of Section 193 of the Code of Criminal Procedure (for short 'the Code') in cases where charge-sheet is filed under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for brevity 'the Act') and cognizance is directly taken by the Special Judge under the Act, a two-Judge Bench thought it apposite to refer the matter to a larger Bench and on the basis of the said reference, the matter has been placed before us. At this juncture, it is requisite to clarify that the real conflict or discord is manifest in *Moly and Another v. State of Kerala*[1] and *Vidyadharan v. State of Kerala*[2] on one hand wherein it has been held that the conviction by the Special Court is not sustainable if it has *suo motu* entertained and taken cognizance of the complaint directly without the case being committed to it and, therefore, there should be retrial or total setting aside of the conviction, as the case may be, and the other in *State of M. P. v. Bhooraji & Ors.*[3] wherein, taking aid of Section 465 (1) of the Code, it has been opined that when a trial has been conducted by the court of competent jurisdiction and a conviction has been recorded on proper appreciation of evidence, the same cannot be erased or effaced merely on the ground that there had been no committal proceeding and cognizance was taken by the Special Court inasmuch as the same does not give rise to failure of justice.

2. The necessitous facts required to be adumbrated for the purpose of answering the present reference are that the appellants were charge sheeted under Section 3 (1) (x) of the Act but eventually, charges were framed under Sections 147, 148 and 302 read with Section 149 of the Indian Penal Code (for short, 'the IPC'). The learned Trial Judge vide judgment dated 31.08.1996 in Sessions Trial No. 97 of 1995 convicted

1. AIR 2004 SC 1890.
2. (2004) 1 SCC 215.
3. AIR 2001 SC 3372.

all the accused persons barring Mohan for the offences under Section 302 read with Section 149 IPC and sentenced them to imprisonment for life with a fine of Rs. 1000/-, in default of payment of fine, to suffer further rigorous imprisonment for three months and sentenced to one month rigorous imprisonment under Section 147 of the IPC. The accused Mohan was convicted for the offence under Sections 148 and 302 of the IPC and was sentenced to undergo one month rigorous imprisonment on the first score and to further life imprisonment and pay a fine of Rupees 1000/-, in default of payment of fine, to suffer further R.I. for three months on the second count.

3. Being dissatisfied with the judgment of conviction and the order of sentence, the appellants along with others preferred Criminal Appeal No. 1568 of 1996 before the High Court of Judicature of Madhya Pradesh at Jabalpur. Apart from raising various contentions on merits, it was pressed that the entire trial was vitiated as it had commenced and concluded without committal of the case to the Court of Session as provided under Section 193 of the Code. Heavy reliance was placed on *Gangula Ashok and Another v. State of Andhra Pradesh*[4] and *Moly and Another* (supra) and *Vidyadharan* (supra) but the Division Bench placed reliance on *Bhooraji* (supra) wherein *Gangula Ashok* (supra) was distinguished keeping in view the stage of the case and regard being had to the provision contained in Section 465 of the Code and treated the same to be a binding precedent in view of the special Bench decision of the High Court of Madhya Pradesh rendered in *Jabalpur Bus Operators Association* and *Another v. State of Madhya Pradesh and Another*[5] and repelled the contention accordingly. Thereafter, as the impugned judgment would reveal, the Bench proceeded to deal with the matter on merits and eventually sustained the conviction and affirmed the sentence as has been indicated hereinbefore.

4. AIR 2000 SC 740.
5. 2003 (1) MPJR 158.

4. We have heard Mr. Fakhrudin, learned senior counsel and Mr. Anis Ahmed Khan for the appellants in both the appeals and Ms. Vibha Datta Makhija, learned counsel for the respondent-State.

5. At the very outset, we shall advert to the jurisdiction or authority of the Special Court to take cognizance of the offence under the Act regardless of the interdict stipulated in Section 193 of the Code. Section 193 of the Code reads as follows:

> "**193. Cognizance of offence by Court of Session-** Except as otherwise expressly provided by this Code or by any other law for the time being in force, no court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this code."

On a plain reading of the aforesaid provision, it is clear as noon day that no Court of Session can take cognizance of any offence as a court of original jurisdiction except as otherwise expressly provided by the Code or any other law for the time being in force.

6. The questions that emanate, as a natural corollary, for consideration are whether the Special Court as constituted under the Act is a Court of Session; and whether there is any special provision in the Act enabling the said court to take cognizance.

7. In *Gangula Ashok* (supra), a two-Judge Bench of this Court, after taking note of Section 6 of the Code and Section 14 of the Act, came to the conclusion that the intendment of the legislature is to treat the Special Court under the Act to be a Court of Session even after specifying it as a Special Court and it would continue to be essentially a Court of Session and not get denuded of its character or power as a Court of Session. The Court scanned the anatomy of the Act and

analysed the postulates contained in Sections 4 and 5 of the Code and thereafter, referring to the Constitution Bench decisions in *A. R. Antulay v. Ramdas Sriniwas Nayak and another*[6] and in *Directorate of Enforcement v. Deepak Mahajan and another*[7], expressed thus:

> **"16.** Hence we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straight away be laid down before the Special Court under the Act.

8. In *Vidyadharan* (supra), the Court delved into the said issue and eventually proceeded to state as follows:

> "23. Hence, we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straight away be laid down before the Special Court under the Act. We are reiterating the view taken by this Court in *Gangula Ashok v. State of A.P.* [(2000) 2 SCC 504 : 2000 SCC (Cri) 488] in the above terms with which we are in respectful agreement. The Sessions Court in the case at hand, undisputedly, has acted as one of original jurisdiction, and the requirements of Section 193 of the Code were not met."

The aforesaid view was reiterated in *Moly* (supra). In *M. A. Kuttappan v. E Krishnan Nayanar and another*[8], another two-Judge Bench ruled that the Special Judge under the Act cannot entertain a complaint filed before it and issue process

6. (1984) 2 SCC 500.
7. (1994) 3 SCC 440.
8. (2004) 4 SCC 231.

after taking cognizance without the case being committed to it for trial by the competent Magistrate. It is apt to mention here that similar view has been spelt out in *Bhooraji* (supra).

9. After careful perusal of the aforesaid decisions, we have no scintilla of doubt that the view expressed which has a base of commonality is absolutely correct and there is no necessity to dwell upon the same more so when there is no cavil or conflict in this regard and there has been no reference on the said score. Additionally, no doubt has been expressed relating to the exposition of the said view, and irrefragably correctly so.

10. The demonstrable facet of the discord is that if cognizance is directly taken by the Special Judge under the Act and an accused without assailing the same at the inception allows the trial to continue and invites a judgment of conviction, would he be permitted in law to question the same and seek quashment of the conviction on the bedrock that the trial Judge had no jurisdiction or authority to take cognizance without the case being committed to it and thereby violated the mandate enshrined under Section 193 of the Code.

11. To make the maze clear, it is profitable to note that in *Gangula Ashok* (supra), the appellants had called in question the legal substantiality of the order passed by the Single Judge of the High Court of Andhra Pradesh who, after expressing the view that the Special Judge had no jurisdiction to take cognizance of the offence under the Act without the case being committed to it, set aside the proceedings of the Special Court and further directed the charge-sheet and the connected papers to be returned to the police officer concerned who, in turn, was required to present the same before the Judicial Magistrate of Ist Class for the purpose of committal to the Special Court. That apart, the Single Judge further directed that on such committal, the Special Court shall frame appropriate charges in the light of the observation made in the order.

12. The two-judge Bench accepted the view as far as it

pertained to setting aside of the impugned order but did not approve the direction issued for the steps to be taken by the Special Judge for framing of charges as it was of the view that no direction could have been issued to the Special Court as it was open to the appellants therein to raise all their contentions at the stage of framing of charge if they wished to advance a plea for discharge. Thus, it is evident that the accused-appellants had challenged the order of framing of charge and sought quashing of the same before the High Court. They did not wait for the trial to commence and the judgment of conviction to visit them.

13. After the dictum in *Gangula Ashok* (supra), the High Court of Madhya Pradesh was dealing with an appeal, *Bhooraji* (supra), wherein the appellants were convicted under Sections 148, 323, 302/149 IPC and sentenced to various punishments including imprisonment for life. It is worth noting that they were tried by the Special Judge under the Act as charge-sheet was filed under Section 3 (2) of the Act along with other offences of the IPC. When the matter came up before the Division Bench of the High Court, the learned Judges commenced the judgment with the prelude that the case had sluggished for more than nine years and the end was not in sight as direction for retrial seemed inevitable because of the decision rendered by this Court in *Gangula Ashok* (supra).

14. Be it noted, cognizance was taken directly by the Special Judge in the said case also. The anguish and the helplessness expressed by the High Court was taken note of when the State of Madhya Pradesh approached this Court. This Court laid emphasis on the fact that it was a case where the accused neither raised any objection when they were heard at the time of framing of the charge nor did they raise such a plea at any stage either before or after the evidence was recorded by the trial Court but, a significant one, proponed such a contention only after the conviction was recorded and that too after the decision in *Gangula Ashok* (supra) was rendered.

15. As is perceptible, the Bench posed the question whether the High Court necessarily should have quashed the trial proceedings to be repeated only on account of the declaration of the legal position made by this Court concerning the procedural aspect about the cases involving the offences under the Act. The Bench referred to the provisions contained in Sections 462 and 465 of the Code and adverted to the concept of "a failure of justice" and held thus:

> "15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.
>
> xxx xxx xxx xxx xxx
>
> 17. It is an uphill task for the accused in this case to show that failure of justice had in fact occasioned merely because the specified Sessions Court took cognizance of the offences without the case being committed to it. The normal and correct procedure, of course, is that the case should have been committed to the Special Court because that court being essentially a Court of Session can take cognizance of any offence only then. But if a specified Sessions Court, on the basis of the legal position then felt to be correct on account of a decision adopted by the High Court, had chosen to take cognizance without a committal order, what is the disadvantage of the accused in following the said course?
>
> 18. It is apposite to remember that during the period prior to the Code of Criminal Procedure 1973, the committal court, in police charge-sheeted cases, could examine material witnesses, and such records also had to be sent over to the Court of Session along with the committal order. But after 1973, the committal court, in police charge-sheeted cases, cannot examine any witness at all. The Magistrate in such cases has only to commit the cases involving offences exclusively triable by the Court of Session. Perhaps it would have been possible for an accused to raise a contention before 1973 that skipping committal proceedings had deprived him of the opportunity to cross-examine witnesses in the committal court and that had caused prejudice to his defence. But even that is not available to an accused after 1973 in cases charge-sheeted by the police. We repeatedly asked the learned counsel for the accused to tell us what advantage the accused would secure if the case is sent back to the Magistrate's Court merely for the purpose of retransmission of the records to the Sessions Court through a committal order. We did not get any satisfactory answer to the above query put to the counsel."

16. After so stating, the Court proceeded to deal with the stance whether the Special Judge as a Court of Session would remain incompetent to try the case until the case is committed and, after critical ratiocination, declined to accept the said stand and opined that the expression "a Court of competent jurisdiction" as envisaged in Section 465 of the Code is to denote a validly constituted court conferred with the jurisdiction to try the offence or offences and such a court could not get denuded of its competence to try the case on account of any procedural lapse and the competence would remain unaffected by the non-compliance with the procedural requirement. The Bench further proceeded to lay down that the inability to take cognizance of an offence without a committal order does not mean that a duly constituted court becomes an incompetent court for all purposes. It was also ruled that had an objection been raised at the earlier stage, the Special Judge could have

sent the record to the Magistrate for adopting committal proceeding or return the police report to the Public Prosecutor or the police for presentation before the Magistrate. In essentiality, it has been laid down that the bar against taking cognizance of certain offences or by certain courts cannot govern the question whether the Court concerned is a "Court of competent jurisdiction" and further the condition precedent for taking cognizance is not the standard to determine whether the Court concerned is "a Court of competent jurisdiction". In the ultimate eventuate, *Bhooraji* (supra) ruled that when the trial had been conducted by a Court of competent jurisdiction, the same cannot be annulled by such a lapse and, accordingly, remitted the matter to the High Court for disposal of the appeal afresh on the basis of evidence already on record. It needs no special emphasis to highlight that in *Bhooraji* (supra), the controversy had emerged on the similar set of facts and the legal issues had emanated on the common platform and were dealt with. Therefore, unquestionably, it was a precedent operating in the field.

17. It is seemly to note that the decision in *Bhooraji* (supra) was possibly not brought to the notice of their Lordships who have decided the cases in *Moly* (supra) and *Vidyadharan* (supra). In *Moly* (supra), later two-Judge Bench set aside the judgment of conviction and remitted the matter as cognizance was directly taken by the Special Court. In *Vidyadharan* (supra), the Bench held thus:-

> "24. The inevitable conclusion is that the learned Sessions Judge, as the undisputed factual position goes to show, could not have convicted the appellant for the offence relatable to Section 3(1)(*xi*) of the Act in the background of the legal position noted supra. That is, accordingly, set aside. However, for the offence under Sections 354 and 448 IPC, custodial sentence for the period already undergone, which as the records reveal is about three months, would meet the ends of justice considering the background facts and the special features of the case."

As is perceivable, in one case, the matter was remitted and in the other, the conviction under Section 3 (1)(xi) was set aside and no retrial was directed.

18. At this stage, we may proceed to x-ray the ratio of *M. A. Kuttappan* (supra). In the said case, the challenge was to the order passed by the High Court under Section 482 of the Code wherein the learned Judge had quashed the order of the Special Judge taking cognizance of the offence under Section 3 (1)(x) of the Act. The two-Judge Bench referred to the authorities in *Gangula Ashok* (supra) and *Vidyadharan* (supra) and gave the stamp of approval to the order passed by the High Court and eventually, while dismissing the appeal, observed as follows:-

> "However, it will be open to the appellant, if so advised, to file a complaint before a competent Magistrate who shall consider the complaint on its merit and then proceed in accordance with law. The learned Special Court as well as the High Court have made certain observations touching on the merit of the controversy. We make it clear that in case a complaint is filed by the appellant before a competent Magistrate, he shall proceed to consider the matter in accordance with law uninfluenced by any observation made either by the learned Special Judge or by the High Court. Nothing said in this judgment also shall be construed as expression of opinion on the merit of the case."

19. It is apposite to note that in the said case, the assail was different and the Bench was not considering the effect of non-committal under Section 193 of the Code after conviction was recorded. Though it referred to the authority in *Vidyadharan* (supra), yet that was to a limited extent. Hence, the said pronouncement cannot be regarded or treated to be one in line with *Vidyadharan* (supra) and is, therefore, kept out of the purview of conflict of opinion that has emerged in the two streams of authorities.

20. Before we advert whether *Bhooraji* (supra) was correctly decided or *Moly* (supra) and *Vidyadharan* (supra) laid down the law appositely, it is appropriate to dwell upon whether *Bhooraji* (supra) was a binding precedent and, what would be the consequent effect of the later decisions which have been rendered without noticing it.

21. In *Union of India and Another v. Raghubir Singh (dead) by L. Rs. And Others*[9], the Constitution Bench, speaking through R. S. Pathak, CJ, has held thus:-

> "We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court"

22. In *Indian Oil Corporation Ltd., v. Municipal Corporation and Another*[10], the Division Bench of the High Court had come to the conclusion that the decision in *Municipal Corporation, Indore v. Smt. Ratna Prabha & Ors.*[11] was not a binding precedent in view of the later decisions of the co-equal Bench of this Court in *Dewan Daulat Rai Kapoor v. New Delhi Municipal Committee*[12] and *Dr. Balbir Singh v. Municipal Corporation Delhi*[13]. It is worth noting that the Division Bench of the High Court proceeded that the decision in *Ratna Prabha* (supra) was no longer good law and binding on it. The matter was referred to the Full Bench which overruled the decision passed by the Division Bench. When the matter travelled to this Court, it observed thus:-

9. (1989) 2 SCC 754.
10. AIR 1995 SC 1480.
11. AIR 1977 SC 308.
12. AIR 1980 SC 541.
13. AIR 1985 SC 339.

> "The Division Bench of the High Court in 1989 MPLJ 20 was clearly in error in taking the view that the decision of this Court in *Ratna Prabha* (AIR 1977 SC 308) (supra) was not binding on it. In doing so, the Division Bench of the High Court did something which even a later co-equal Bench of this Court did not and could not do."

23. In *Chandra Prakash and Others v. State of U.P. and Another*[14], a subsequent Constitution Bench reiterated the view that had already been stated in *Raghubir Singh* (supra).

24. Thus viewed, the decision in *Bhooraji* (supra) was a binding precedent, and when in ignorance of it subsequent decisions have been rendered, the concept of *per incuriam* would come into play. In this context, it is useful to refer to a passage from *A.R. Antulay* (supra), wherein, Sabyasachi Mukharji, J (as his Lordship then was), while dealing with the concept of *per incuriam,* had observed thus:-

> ""*Per incuriam*" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

Again, in the said decision, at a later stage, the Court observed:-

> "It is a settled rule that if a decision has been given *per incuriam* the court can ignore it."

25. In *Punjab Land Development & Reclamation Corporation Ltd. v. Presiding Officer, Labour Court, Chandigarh & Ors.*[15], another Constitution Bench, while dealing with the issue of *per incuriam,* opined as under:-

14. (2003) SCC (L & S) 827.
15. (1990) 3 SCC 682.

"The Latin expression *per incuriam* means through inadvertence. A decision can be said generally to be given *per incuriam* when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court."

26. In *State of U. P. And Another v. Synthetics and Chemicals Ltd. And Another*[16], a two-Judge Bench adverted in detail to the aspect of *per incuriam* and proceeded to highlight as follows:-

"'Incuria' literally means 'carelessness'. In practice *per incuriam* appears to mean *per ignoratium.* English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, '*in ignoratium* of a statute or other binding authority'. (*Young v. Bristol Aeroplane Co. Ltd*.[17]). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

27. Recently, in *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.*[18], while addressing the issue of *per incuriam*, a two-Judge Bench, speaking through one of us (Bhandari, J.), after referring to the dictum in *Bristol Aeroplane Co. Ltd.* (supra) and certain passages from *Halsbury's Laws of England* and *Raghubir Singh* (supra), has stated thus:-

"149. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of Judges of co-equal strength. In the instant case, judgments mentioned in paragraphs 135 and

16. (1991) 4 SCC 139.

17. (1944) 1 KB 718 : (1944) 2 ALL ER 293.

18. AIR 2011 SC 312 : (2011) 1 SCC 694.

136 are by two or three judges of this Court. These judgments have clearly ignored a Constitution Bench judgment of this Court in Sibbia's case (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 of Code of Criminal Procedure Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are per incuriam.

150. In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength."

28. The sequitur of the above discussion is that the decisions rendered in *Moly* (supra) and *Vidyadharan* (supra) are certainly *per incuriam*.

29. Presently, we shall proceed to address which view should be accepted as just and flawless. The centripodal issue, as we understand, is whether non-compliance of the interdict as envisaged and engrafted under Section 193 of the Code nullifies the final verdict after the trial and warrants its total extinction resulting in retrial, or it is incumbent on the part of the convict to exposit and satisfy that such guillotining of the interdict has occasioned in 'failure of justice' or culminated in causation of prejudice to him for the purpose of declaring that the trial was vitiated.

30. In *Bhooraji* (supra), the Bench has referred to Sections 462 and 465 of the Code which occur in Chapter 35 of the Code. Section 465 reads as follows:-

"**465. Finding or sentence when reversible by reason of error, omission or irregularity. -** (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be

reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution unless in the opinion of that court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

31. On a studied scrutiny of the anatomy of the said provision, it is luculent that the emphasis has been laid on a 'court of competent jurisdiction' and 'error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial' and 'a failure of justice has in fact been occasioned thereby'. The legislative intendment inhered in the language employed is graphically clear that lancination or invalidation of a verdict after trial is not to be taken recourse to solely because there is an error, omission or irregularity in the proceeding. The term 'a failure of justice' has been treated as the *sine qua non* for setting aside the conviction.

32. The submission of Mr. Fakkruddin and Mr. Anis Ahmed Khan, learned counsel for the appellants, is that it is not a mere irregularity but a substantial illegality. They have placed heavy reliance on paragraph 11 of *Moly* (supra) wherein the Bench has used the expression 'that Section 193 imposes an interdict on all courts of Session against taking cognizance of an offence as a Court of original jurisdiction' and have also drawn inspiration from paragraph 17 of the said decision which uses the words 'lack of jurisdiction'. The question posed by us

fundamentally relates to the non-compliance of such interdict. The crux of the matter is whether it is such a substantial interdict which impinges upon the fate of the trial beyond any redemption or, for that matter it is such an omission or it is such an act that defeats the basic conception of fair trial. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.

33. In *Mrs. Kalyani Baskar v. Mrs. M. S. Sampoornam*[19], it has been laid down that 'fair trial' includes fair and proper opportunities allowed by law to the accused to prove innocence and, therefore, adducing evidence in support of the defence is a valuable right and denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed and the courts should be zealous in seeing that there is no breach of them.

34. In this regard, we may fruitfully reproduce the observations from *Sidhartha Vashisht v. State (NCT of Delhi)*[20] wherein it has been so stated: -

"In the Indian Criminal jurisprudence, the accused is placed on a somewhat advantageous position than under different jurisprudence of some of the countries in the world. *The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime.* The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the

19. (2007) 2 SCC 258.

20. (2010) 6 SCC 1.

basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."

[Underlining is ours]

35. It would not be an exaggeration if it is stated that a 'fair trial' is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity that is governed by Rule of Law. Denial of 'fair trial' is crucifixion of human rights. It is ingrained in the concept of due process of law. While emphasising the principle of 'fair trial' and the practice of the same in the course of trial, it is obligatory on the part of the Courts to see whether in an individual case or category of cases, because of non-compliance of a certain provision, reversion of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial injustice has in fact occurred. The seminal issue is whether protection given to the accused under the law has been jeopardised as a consequence of which there has been failure of justice or causation of any prejudice. In this regard, it is profitable to refer to the decision in *Gurbachan Singh v. State of Punjab*[21] wherein a three-Judge Bench has opined thus:-

"This court in '*Willie (William) Slaney v. The state of Madhya Pradesh*[22] elaborately discussed the question of the applicability of Section 537 and came to the conclusion that *in judging a question of prejudice, as a guilt, courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was*

21. AIR 1957 SC 623.

22. 1956 CriLJ 291 : AIR 1956 SC 116.

given a full and fair chance to defend himself.

[Emphasis added]

36. Having dealt with regard to the concept of 'fair trial' and its significant facets, it is apt to state that once prejudice is caused to the accused during trial, it occasions in 'failure of justice'. 'Failure of justice' has its own connotation in various jurisprudences. As far as criminal jurisprudence is concerned, we may refer with profit to certain authorities. Be it noted that in *Bhooraji* (supra), the Court has referred to *Shamnsaheb M. Multtani v. State of Karnataka*[23] wherein it has been observed as follows:-

"23. We often hear about "failure of justice" and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd. vs. Department of the Environment*[24]). *The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.*"

[Emphasis supplied]

37. In *State by Police Inspector v. T. Venkatesh Murthy*[25], the High Court of Karnataka had upheld an order of discharge passed by the trial court on the ground that the sanction granted to prosecute the accused was not in order. The two-Judge Bench referred to Sections 462 and 465 of the Code and ultimately held thus:-

23. (2001) 2 SCC 577 : 2001 SCC (CRI) 358.

24. (1977) 1 ALL ER 813.

25. AIR 2004 SC 5117.

"13. In *State of M.P. v. Bhooraji and Ors*. (2001) (7) SCC 679, the true essence of the expression "failure of justice" was highlighted. Section 465 of the Code in fact deals with "finding or sentences when reversible by reason of error, omission or irregularity", in sanction.

14. In the instant case neither the Trial Court nor the High Court appears to have kept in view the requirements of sub-section (3) relating to question regarding "failure of justice". Merely because there is any omission, error or irregularity in the matter of according sanction that does not affect the validity of the proceeding unless the Court records the satisfaction that such error, omission or irregularity has resulted in failure of justice. The same logic also applies to the appellate or revisional Court. The requirement of sub-section (4) about raising the issue, at the earliest stage has not been also considered. Unfortunately the High Court by a practically non-reasoned order, confirmed the order passed by the learned trial judge. The orders are, therefore, indefensible. We set aside the said orders. It would be appropriate to require the trial Court to record findings in terms of Clause (b) of Sub-section (3) and Sub-section (4) of Section 19."

38. We have referred to the said authority only for the purpose of a failure of justice and the discernible factum that it had concurred with the view taken in *Bhooraji* (supra). That apart, the matter was remitted to adjudge the issue whether there had been failure of justice, and it was so directed as the controversy pertained to the discharge of the accused.

39. In *Central Bureau of Investigation v. V. K. Sehgal*[26], it was observed: -

"10. A court of appeal or revision is debarred from reversing a finding (or even an order of conviction and sentence) on account of any error of irregularity in the

26. (1999) 8 SCC 501

sanction for the prosecution, unless failure of justice had been occasioned on account of such error or irregularity. For determining whether want of valid sanction had in fact occasioned failure of justice the aforesaid sub-section (2) enjoins on the court a duty to consider whether the accused had raised any objection on that score at the trial stage. Even if he had raised any such objection at the early stage it is hardly sufficient to conclude that there was failure of justice. It has to be determined on the facts of each case. But an accused who did not raise it at the trial stage cannot possibly sustain such a plea made for the first time in the appellate court."

The concept of failure of justice was further elaborated as follows:-

"11. In a case where the accused failed to raise the question of valid sanction the trial would normally proceed to its logical end by making a judicial scrutiny of the entire materials. If that case ends in conviction there is no question of failure of justice on the mere premise that no valid sanction was accorded for prosecuting the public servant because the very purpose of providing such a filtering check is to safeguard public servants from frivolous of mala fide or vindictive prosecution on the allegation that they have committed offence in the discharge of their official duties. But once the judicial filtering process is over on completion of the trial the purpose of providing for the initial sanction would bog down to a surplusage. This could be the reason for providing a bridle upon the appellate and revisional forums as envisaged in Section 465 of the Code of Criminal Procedure."

40. Adverting to the factum of irregular investigation and eventual conviction, the Constitution Bench in *M. C. Sulkunte v. State of Mysore*[27] opined thus: -

27. AIR 1971 SC 508.

"It has been emphasized in a number of decisions of this Court that to set aside a conviction it must be shown that there has been miscarriage of justice as a result of an irregular investigation."

41. After adverting to the concept of failure of justice, it is obligatory to dwell upon the aspect whether there is or can be any failure of justice if a Special Judge directly takes cognizance of an offence under the Act. Section 209 of the Code deals with the commitment of case to Court of Session when an offence is triable exclusively by it. The said provision reads as follows: -

"**209. Commitment of case to Court of Session when offence is triable exclusively by it**. – When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall –

(a) Commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) Subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) Send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) Notify the Public Prosecutor of the commitment of the case to the Court of Session."

42. Prior to coming into force of the present Code, Section 207 of the Code of Criminal Procedure, 1898 dealt with committal proceedings. By the Criminal Law Amendment Act, 1955, Section 207 of the Principal Act was substituted by Sections 207 and 207A. To appreciate the inherent aspects and the conceptual differences in the previous provisions and the present one, it is imperative to reproduce Sections 207 and 207A of the old Code. They read as under:

"207. In every inquiry before a magistrate where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the magistrate, ought to be tried by such Court, the magistrate shall, -

(a) In any proceeding instituted on a police report, follow the procedure specified in section 207A; and

(b) In any other proceeding, follow the procedure specified in the other provisions of this Chapter.

207A. (1) When, in any proceeding instituted on a police report the magistrate receives the report forwarded under Section 173, he shall, for the purpose of holding an inquiry under this section, fix a date which shall be a date of the receipt of the report, unless the magistrate, for reasons to be recorded, fixes any later date.

(2) If, at any time before such date, the officer conducting the prosecution applies to the magistrate to issue a process to compel the attendance of any witness or the production of any document or thing, the magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(3) At the commencement of the inquiry, the magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in section 173 have been furnished to the accused and if he finds

that the accused has not been furnished with such documents or any of them, he shall cause the came to be so furnished.

(4) The magistrate shall then proceed to take the evidence of such persons, if any as may be produced by the prosecution as witnesses to the actual commission of the offence alleged, and if the magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also.

(5) The accused shall be at liberty to cross-examine the witnesses examined under sub-section (4), and in such case, the prosecutor may re-examine them.

(6) When the evidence referred to in sub-section (4) has been taken and the magistrate has considered all the documents referred to in section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him unless it appears to the Magistrate that such person should be tried before himself or some other magistrate, in which case he shall proceed accordingly.

(7) When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

(8) As soon as such charge has been framed, it shall be read and explained to the accused and a copy thereof shall be given to him free of cost.

(9) The accused shall be required at once to give in, orally or in writing, a list of the persons, if any, whom he wishes to be summoned to give evidence on his trial:

Provided that the magistrate may, in his discretion, allow the accused to give in his list or any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this sub-section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the State a further list of the persons whom he wishes to be summoned to give evidence on such trial.

(10) When the accused, on being required to give in a list under sub-section (9), has declined to do so, or when he has given in such list, the magistrate may make an order committing the accused for trial by the High Court or the Court of Session, as the case may be, and shall also record briefly the reasons for such commitment.

(11) When the accused has given in any list of witnesses under sub-section (9) and has been committed for trial, the magistrate shall summon the witnesses included in the list to appear before the Court to which the accused has been committed:

Provided that where the accused has been committed to the High Court, the magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the State and such witnesses may be summoned accordingly:

Provided also that if the magistrate thinks that any witness is included in the list for the purpose of vexation

of delay, or of defeating the ends of justice, the magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

(12) Witnesses for the prosecution, whose attendance before the Court of Session or High Court is necessary and who appear before the magistrate shall execute before him bonds binding themselves to be in attendance when called upon by the Court of Session or High Court to give evidence.

(13) If any witness refuses to attend before the Court of Session or High Court, or execute the bond above directed, the magistrate may detain him in custody until he executes such bond or until his attendance at the Court of Session or High Court is required, when the magistrate shall send him in custody to the Court of Session or High Court as the case may be.

(14) When the accused is committed for trial, the magistrate shall issue an order to such person as may be appointed by the State Government in this behalf, notifying the commitment, and stating the offence in the same form as the charge; and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or where the commitment is made to the High Court, to the Clerk of the State or other officer appointed in this behalf by the High Court.

(15) When the commitment is made to the High Court and any part of the record is not in English, an English

translation of such part shall be forwarded with the record.

(16) Until and during the trial, the magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant to custody."

43. On a bare perusal of the above quoted provisions, it is plain as day that an exhaustive procedure was enumerated prior to commitment of the case to the Court of Session. As is evincible, earlier if a case was instituted on a police report, the magistrate was required to hold enquiry, record satisfaction about various aspects, take evidence as regards the actual commission of the offence alleged and further was vested with the discretion to record evidence of one or more witnesses. Quite apart from the above, the accused was at liberty to cross-examine the witnesses and it was incumbent on the magistrate to consider the documents and, if necessary, examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him by the prosecution and afford the accused an opportunity of being heard and if there was no ground for committing the accused person for trial, record reasons and discharge him. Thus, the accused enjoyed a substantial right prior to commitment of the case. It was indeed a vital stage. But, in the committal proceedings *in praesenti*, the magistrate is only required to see whether the offence is exclusively triable by the Court of Session. Mr. Fakhruddin, learned senior counsel, would submit that the use of the words "it appears to the magistrate" are of immense signification and the magistrate has the discretion to form an opinion about the case and not to accept the police report. To appreciate the said submission, it is apposite to refer to Section 207 of the 1973 Code which lays down for furnishing of certain documents to the accused free of cost. Section 209(a) clearly stipulates that providing of the documents as per Section 207 or Section 208 is the only condition precedent for commitment. It is noteworthy that after the words, namely, "it appears to the Magistrate", the words that follow are "that the

offence is triable exclusively by the Court of Session". The limited jurisdiction conferred on the magistrate is only to verify the nature of the offence. It is also worth noting that thereafter, a mandate is cast that he "shall commit". Evidently, there is a sea of difference in the proceeding for commitment to the Court of Session under the old Code and under the existing Code. There is nothing in Section 209 of the Code to even remotely suggest that any of the protections as provided under the old Code has been telescoped to the existing one.

44. It is worth noting that under the Code of Criminal Procedure, 1898, a full-fledged Magisterial enquiry was postulated in the committal proceeding and the prosecution was then required to examine all the witnesses at this stage itself. In 1955, the Parliament by Act 26 of 1955 curtailed the said procedure and brought in Section 207A to the old Code. Later on, the Law Commission of India in its 41st Report, recommended thus:-

> "18.19. After a careful consideration we are of the unanimous opinion that committal proceedings are largely a waste of time and effort and do not contribute appreciably to the efficiency of the trial before the Court of Session. While they are obviously time-consuming, they do not serve any essential purpose. There can be no doubt or dispute as to the desirability of every trial, and more particularly of the trial for a grave offence, beginning as soon as practicable after the completion of investigation. Committal proceedings which only serve to delay this step, do not advance the cause of justice. The primary object of protecting the innocent accused from the ordeal of a sessions trial has not been achieved in practice; and the other main object of apprising the accused in sufficient detail of the case he has to meet at the trial could be achieved by other methods without going through a very partial and ineffective trial rehearsal before a Magistrate. We recommend that committal proceedings should be abolished."

We have reproduced the same to accentuate the change that has taken place in the existing Code. True it is, the committal proceedings have not been totally abolished but in the present incarnation, it has really been metamorphosed and the role of the Magistrate has been absolutely constricted.

45. In our considered opinion, because of the restricted role assigned to the Magistrate at the stage of commitment under the new Code, the non-compliance of the same and raising of any objection in that regard after conviction attracts the applicability of the principle of 'failure of justice' and the convict-appellant becomes obliged in law to satisfy the appellate court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice. The concept of fair trial and the conception of miscarriage of justice are not in the realm of abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of facts and not to be deduced from procedural lapse or an interdict like commitment as enshrined under Section 193 of the Code for taking cognizance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has roots in appearance sans any reality. Tested on the aforesaid premised reasons, it is well nigh impossible to conceive of any failure of justice or causation of prejudice or miscarriage of justice on such non-compliance. It would be totally inapposite and inappropriate to hold that such non-compliance vitiates the trial.

46. At this juncture, we would like to refer to two other concepts, namely, speedy trial and treatment of a victim in criminal jurisprudence based on the constitutional paradigm and principle. The entitlement of the accused to speedy trial has been repeatedly emphasized by this Court. It has been recognised as an inherent and implicit aspect in the spectrum of Article 21 of the Constitution. The whole purpose of speedy trial is intended to avoid oppression and prevent delay. It is a sacrosanct obligation of all concerned with the justice

dispensation system to see that the administration of criminal justice becomes effective, vibrant and meaningful. The concept of speedy trial cannot be allowed to remain a mere formality (see *Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar*[28], *Moti Lal Saraf v. State of Jammu & Kashmir*[29] and *Raj Deo Sharma v. State of Bihar*[30]).

47. While delineating on the facets of speedy trial, it cannot be regarded as an exclusive right of the accused. The right of a victim has been given recognition in *Mangal Singh and Anr. v. Kishan Singh and ors.*[31] wherein it has been observed thus: -

> "Any inordinate delay in conclusion of a criminal trial undoubtedly has highly deleterious effect on the society generally and particularly on the two sides of the case. *But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence*."
>
> [Emphasis supplied]

48. It is worthnoting that the Constitution Bench in *Iqbal Singh Marwah and another v. Meenakshi Marwah and another*[32], though in a different context, had also observed that delay in the prosecution of a guilty person comes to his advantage as witnesses becomes reluctant to give evidence and the evidence gets lost.

49. We have referred to the aforesaid authorities to

28. (1980) 1 SCC 81.

29. AIR 2007 SC 56.

30. AIR 1998 SC 3281.

31. AIR 2009 SC 1535.

32. AIR 2005 SC 2119.

illumine and elucidate that the delay in conclusion of trial has a direct nexus with the collective cry of the society and the anguish and agony of an accused. Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple pie order in carrying out the adjective law, would only be sound and fury signifying nothing.

50. In the case at hand, as is perceivable, no objection was raised at the time of framing of charge or any other relevant time but only propounded after conviction. Under these circumstances, the right of the collective as well as the right of the victim springs to the forefront and then it becomes obligatory on the part of the accused to satisfy the court that there has been failure of justice or prejudice has been caused to him. Unless the same is established, setting aside of conviction as a natural corollary or direction for retrial as the third step of the syllogism solely on the said foundation would be an anathema to justice. Be it noted, one cannot afford to treat the victim as an alien or a total stranger to the criminal trial. The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the view point of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. In respect of certain offences in our existing criminal jurisprudence, the testimony of the victim is given paramount importance. Sometimes it is perceived that it is the duty of the court to see that the victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice or failure of justice.

51. We may state without any fear of contradiction that if the failure of justice is not bestowed its due signification in a case of the present nature, every procedural lapse or interdict would be given a privileged place on the pulpit. It would, with unnecessary interpretative dynamism, have the effect potentiality to cause a dent in the criminal justice delivery system and eventually, justice would become illusory like a mirage. It is to be borne in mind that the Legislature deliberately obliterated certain rights conferred on the accused at the committal stage under the new Code. The intendment of the Legislature in the plainest sense is that every stage is not to be treated as vital and it is to be interpreted to subserve the substantive objects of the criminal trial.

52. Judged from these spectrums and analysed on the aforesaid premises, we come to the irresistible conclusion that the objection relating to non-compliance of Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial and, therefore, the decision rendered in *Bhooraji* (supra) lays down the correct law inasmuch as there is no failure of justice or no prejudice is caused to the accused. The decisions rendered in *Moly* (supra) and *Vidyadharan* (supra) have not noted the decision in *Bhooraji* (supra), a binding precedent, and hence they are *per incuriam* and further, the law laid down therein, whereby the conviction is set aside or matter is remanded after setting aside the conviction for fresh trial, does not expound the correct proposition of law and, accordingly, they are hereby, to that extent, overruled.

53. The appeals be placed before the appropriate Bench for hearing on merits.

D.G. Appeals Placed before appropriate Bench..

M/S DAKSHIN SHELTERS PVT. LTD.

v.

GEETA S. JOHARI

(Special Leave Petition (c) No. 33448 of 2011)

FEBRUARY 21, 2012

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

Arbitration and Conciliation Act, 1996 – s.11 – Appointment of arbitrator – Agreement between the parties – Disputes arose out of the agreement – Respondent issued notice to petitioner invoking arbitration clause in the agreement and nominated a former High Court Judge on her behalf and called upon the petitioner to nominate its arbitrator – Petitioner raised objections – Respondent filed application before High Court for appointment of arbitrator/ arbitrators – Designate Judge appointed a Sr. Advocate as arbitrator on behalf of the petitioner – This was opposed by the Petitioner – Petitioner submitted that instead, a retired High Court Judge, stationed in Hyderabad, may be appointed as arbitrator – Respondent did not agree to substitution of the arbitrator appointed by the Designate Judge on behalf of the petitioner and further submitted that opportunity was given to the petitioner to nominate its arbitrator by notice but it failed to avail of the opportunity, and thus ceased to have any right to appoint arbitrator in terms of the arbitration clause in the Agreement – Held: From the petitioner's reply to the notice, it is clear that it declined to appoint its arbitrator as according to it there was no question of appointment of arbitrator by either of the parties and there being no arbitral dispute, there was no occasion for resolution of dispute as provided in the Agreement – The stance of the petitioner amounted to failure on its part to appoint its arbitrator on receipt of the request to do so from the respondent – The petitioner's right to appoint its arbitrator in terms of the Agreement got extinguished once

it failed to appoint the arbitrator on receipt of the notice – It cannot be said that the Designate Judge committed any error in nominating a Sr. Advocate as an arbitrator on behalf of the petitioner.

A Development Agreement-cum-General Power of Attorney was executed between the parties. Certain disputes arose out of that agreement. On December 10, 2010, the respondent issued a notice to the petitioner invoking arbitration clause in the above agreement and nominated a former Judge of the High Court of Andhra Pradesh on her behalf and called upon the petitioner to nominate its arbitrator. By reply dated January 10, 2011, the petitioner raised objections to this request.

Respondent thereafter invoked Section 11 of the Arbitration and Conciliation Act, 1996 and filed application before the High Court requesting the Chief Justice or the Designate Judge to appoint arbitrator/arbitrators.

The Designate Judge appointed a Sr. Advocate as an arbitrator on behalf of the petitioner. This was opposed by the Petitioner. The petitioner submitted that instead of the senior advocate as appointed by the designate Judge, a retired High Court Judge, stationed in Hyderabad, may be appointed as arbitrator. Limited notice was issued to the respondent in this regard subject to deposit of Rs 1 lakh by the petitioner in the Registry towards costs. The respondent did not agree to substitution of the arbitrator appointed by the Designate Judge on behalf of the petitioner and further submitted that once an opportunity was given to the petitioner to nominate its arbitrator by notice dated December 10, 2010 and it failed to avail of the opportunity, it ceased to have any right to appoint the arbitrator in terms of the arbitration clause in the Development Agreement.

Dismissing the Special Leave Petition, the Court

HELD: 1. On the disputes having arisen between the parties, the notice was sent by the respondent to the petitioner on December 10, 2010. The petitioner did respond to the above notice within 30 days of its receipt by sending its reply on January 10, 2011.Various pleas were raised in that reply and ultimately, the petitioner responded by stating "it is stated that the question of appointment of Arbitrator does not raise either from your side or from our side. There is no arbitral dispute to be decided by the arbitrator." From the above response, it is clear that the petitioner declined to appoint its arbitrator as according to it there was no question of appointment of arbitrator by either of the parties and there being no arbitral dispute, there was no occasion for resolution of dispute as provided in the Development Agreement. The stance of the petitioner amounted to failure on its part to appoint its arbitrator on receipt of the request to do so from the respondent. In view of the above, it cannot be said that the Designate Judge committed any error in nominating a Sr. Advocate as an arbitrator on behalf of the petitioner. [Paras 14, 15, 16 and 17] [547-H; 548-D-G]

Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd **(2007) 7 SCC 684 : 2007 (8) SCR 993 – relied on**

National Highways Authority of India and another vs. Bumihiway DDB Ltd. (JV) and others **(2006) 10 SCC 763 : 2006 (6) Suppl. SCR 586 – held inapplicable**

2. The petitioner's right to appoint its arbitrator in terms of clause 25 of the Development Agreement got extinguished once it failed to appoint the arbitrator on receipt of the notice dated December 10, 2010. There is no merit in the submission of the petitioner that the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator. The impugned order does not suffer from any infirmity. The amount of

Rs. One lakh deposited by the petitioner in the Registry of this Court shall be paid to the respondent. [Paras 18, 19] [549-C-D]

Case Law Reference:

2007 (8) SCR 993 relied on Para 10

2006 (6) Suppl. SCR 586 held inapplicable Para 11

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 33448 of 2011.

From the Judgment & Order dated 09.09.2011 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Arbitration Application No. 41 of 2011.

Pallav Shishodia, Annam D.N. Rao, Neelam Jain , K.K. Kota for the Petitioner.

Shyam Divan, Y. Rajagopala Rao, V. Vismain Rao, Hitendra Nath Rath for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. We have heard Mr. Pallav Shishodia, learned senior counsel for the petitioner and Mr. Shyam Divan, learned senior counsel for the respondent.

2. A Development Agreement-cum-General Power of Attorney (for short "Development Agreement") was executed between the parties on February 7, 2006. Certain disputes arose out of that agreement. On December 10, 2010, the respondent issued a notice to the petitioner invoking arbitration clause in the above agreement and nominated a former Judge of the High Court of Andhra Pradesh – Justice P.L.N. Sharma -on her behalf and called upon the present petitioner to nominate its arbitrator.

3. By reply dated January 10, 2011, the petitioner communicated to the respondent that since the Development

Agreement has been cancelled by her, there was no question for resolution of disputes between the parties by the Arbitrator. The reply sent by the petitioner necessitated the invocation of Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the Act") by the respondent and an application was made before the High Court of Andhra Pradesh requesting the Chief Justice or the Designate Judge to appoint the arbitrator/ arbitrators to decide the disputes arising out of the above agreement.

4. On hearing the parties, the Designate Judge by his order dated September 9, 2011 appointed Mr. D.V. Seetharama Murthy, Sr. Advocate as an arbitrator on behalf of the petitioner (respondent therein). It was further observed in the order that the arbitrator nominated by the applicant (present respondent) and the arbitrator appointed by the Designate Judge on behalf of the petitioner (respondent therein) are required to appoint the third arbitrator before entering into reference.

5. The order dated September 9, 2011 is under challenge in this Special Leave Petition.

6. On December 16, 2011, a limited notice was issued by this Court to the respondent. The order issuing notice reads as follows:

> "Mr. Pallav Shishodia, learned senior counsel for the petitioner submits that instead of senior advocate, who has been appointed as arbitrator by the designate Judge, a retired High Court Judge, stationed in Hyderabad, may be appointed. He further submits that the petitioner is willing to bear the expenses, if limited notice is issued to the respondent.
>
> Issue notice limited to the above, returnable in five weeks subject to deposit of Rs. one lakh by the petitioner in the Registry towards costs.

In the meanwhile, further proceedings before the arbitrators shall remain stayed."

7. In compliance of the above order, the petitioner has deposited Rs. 1 lakh in the Registry of this Court towards the costs of the respondent.

8. After service, respondent has entered appearance through Mr. Y. Rajagopala Rao, advocate-on-record. Mr. Shyam Divan, learned senior counsel appearing for the respondent, at the outset, submitted that the respondent was not agreeable to the substitution of arbitrator appointed by the Designate Judge on behalf of the petitioner.

9. Mr. Pallav Shishodia, learned senior counsel for the petitioner vehemently contended that the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator. He referred to the suit filed by the petitioner against the respondent challenging the cancellation of the Development Agreement. He also submitted that the respondent made an application under Section 8 of the Act but that came to be dismissed. In backdrop of these facts, Mr. Pallav Shishodia submitted that when the petitioner received the notice dated December 10, 2012, it was communicated by the petitioner to the respondent in its reply dated January 10, 2011 that there was no question for appointment of arbitrator and the disputes between the parties could not be decided by the arbitrator. Learned senior counsel, thus, submitted that the petitioner had not failed to appoint the arbitrator as contemplated under Section 11(4) of the Act.

10. Mr. Shyam Divan, learned senior counsel for the respondent, on the other hand, submitted that once an opportunity was given to the petitioner to nominate its arbitrator by notice dated December 10, 2010 and it failed to avail of the opportunity, it ceased to have any right to appoint the arbitrator in terms of the arbitration clause in the Development Agreement. In support of his submission, Mr. Shyam Divan

relied upon the decision of this Court in *Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd.*[1].

11. Mr. Pallav Shishodia, learned senior counsel for the petitioner, in rejoinder, referred to the decision of this Court in *National Highways Authority of India and another vs. Bumihiway DDB Ltd. (JV) and others*[2]. He particularly referred to paragraphs 37 and 38 of the above decision.

12. We must immediately observe that the judgment of this Court in *National Highways Authority*[2] relied upon by Mr. Pallav Shishodia has no application to the controversy involved in the present matter. The main question in *National Highways Authority*[2] related to the process of appointment of arbitrator to be followed on resignation or termination of mandate of an arbitrator and one of the questions framed by this Court for determination was whether on resignation of one of the arbitrators, the statutory provision that comes into play was Section 15(2) or Section 11(6) of the Act. The other three questions noted in para 20 of the Report have also no bearing on the question with which we are concerned in the present matter.

13. The arbitration clause in the Development Agreement between the parties reads as follows:

"25: Arbitration:

25.1 Tribunal: Disputes relating to this Agreement or its interpretation shall be referred to the arbitration of an arbitral tribunal, consisting of three arbitrators (Tribunal), one each to be appointed by the parties hereto and the third to be appointed by the two arbitrators so appointed. The award of the Tribunal shall be final and binding on the parties. The arbitration proceedings will be held only in

1. (2007) 7 SCC 684.
2. (2006) 10 SCC 763.

Secunderabad and the courts situated in the Ranga Reddy District alone shall have the territorial jurisdiction to entertain the dispute. The provisions of Arbitration and Conciliation Act shall comply to the arbitration procedures.

25.2 Powers of Tribunal: The Tribunal shall be at liberty to (1) proceed summarily (2) avoid all rules, procedures and/or evidences that can be lawfully avoided by the mutual consent and/or directions by the parties and (3) award damages along with the final award against the party not complying with any interim award or order passed by the Tribunal. The Tribunal shall:

(a) Make the award in English and within four months from the date of appointment with the right to give extension of not more than one month at a time on emergent grounds but the total extensions shall not be more than four months.

(b) Conduct the proceedings from day-to-day and for about 5 hours per day save for initial sittings.

(c) Not grant to either of the parties any extension of time and/or adjournment except on grounds beyond their control and only for such periods as be of the abosute3 minimum.

(d) The Tribunal shall be entitled to pass interim award granting interim relief to the parties.

25.3 Mechanism and Procedure: The procedure to be followed shall be decided by the Tribunal. The directions/award of the Tribunal shall be final and binding on the parties."

14. On the disputes having arisen between the parties, the notice was sent by the respondent to the petitioner on December 10, 2010. Paragraph 4 of the said notice reads as under:

"I do hereby invoke the Arbitration Clause in the agreement bearing Doc. No. 2778 of 2006 and appoint Hon'ble Mr. Justice P.L.N. Sharma, a retired Judge of A.P. High Court, r/o Gandhi Nagar, Hyderabad as arbitrator within a week from the date of receipt of this notice to adjudicate all claims, disputes, differences, restitutions, restorations whatsoever in law and in equity, in terms of the registered Development Agreement cum GPA document registered as Doc. No. 2778 of 2006, failing which I shall be constrained to initiate appropriate legal action under Section 11 of the Arbitration Act for appointment of arbitrator on your behalf as well as you shall be solely responsible fro all costs and consequences."

15. The petitioner did respond to the above notice within 30 days of its receipt by sending its reply on January 10, 2011. Various pleas were raised in that reply and ultimately, the petitioner responded by stating "it is stated that the question of appointment of Arbitrator does not raise either from your side or from our side. There is no arbitral dispute to be decided by the arbitrator."

16. From the above response, it is clear that the petitioner declined to appoint its arbitrator as according to it there was no question of appointment of arbitrator by either of the parties and there being no arbitral dispute, there was no occasion for resolution of dispute as provided in the Development Agreement. The stance of the petitioner amounted to failure on its part to appoint its arbitrator on receipt of the request to do so from the respondent.

17. In view of the above, it cannot be said that the Designate Judge committed any error in nominating Mr. D.V. Seetharama Murthy, Sr. Advocate as an arbitrator on behalf of the petitioner. The order of the learned Single Judge is in conformity with the decision of this Court in *Bharat Battery Manufacturing Co. (P) Ltd*.[1] wherein this Court stated as follows:

"Once a party files an application under section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator."

18. The petitioner's right to appoint its arbitrator in terms of clause 25 of the Development Agreement got extinguished once it failed to appoint the arbitrator on receipt of the notice dated December 10, 2010. There is no merit in the submission of the learned senior counsel for the petitioner that the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator.

19. The order impugned in the present Special Leave Petition does not suffer from any infirmity. Special Leave Petition is, accordingly, dismissed with costs. The amount of Rs. one lakh deposited by the petitioner in the Registry of this Court shall be paid to the respondent.

B.B.B. Special Leave Petition dismissed.

MOHAMED IBRAHIM AND ORS.
v.
VINAYAKA MISSION UNIVERSITY AND ORS.
(Civil Appeal No. 2454 of 2012)

FEBRUARY 22, 2012

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

Education – Medical Education – Screening test for students with foreign medical qualifications – Eligibility criteria for screening test – Eligibility of "primary medical qualification" – Appellants-students, who had completed medical course from the off-shore campus of VMRF in Thailand, claimed eligibility for screening test – Claim upheld by Single Judge of High Court but negated by the Division Bench – On appeal, held: The eligibility criteria provided in the 2002 Regulations make it clear that a candidate intending to appear in the screening test must, inter-alia, possess primary medical qualification – Such qualification must be a recognised qualification for enrollment as a medical practitioner in the country in which the institution awarding such qualification is situated – In the instant case, the provisional degree awarded by VMRF, Thailand Off-shore campus to appellants-students was not recognised by the Medical Council of Thailand – Appellants-students were not entitled to register the degree awarded to them by VMRF with the Medical Council of Thailand – The provisional degree awarded by VMRF to these students, therefore, did not amount to primary medical qualification – The view taken by the Division Bench that the appellants-students did not possess eligibility of primary medical qualification, thus, cannot be said to suffer from any illegality – Screening Test Regulations, 2002 of the Medical Council of India – Regulations 2(f) and 4(1) – Indian Medical Council Act, 1956.

The Government of India, vide notification issued in 2006 had accorded its approval to the proposal of Vinayaka Mission's Research Foundation, Salem, now Vinayaka Mission University ("VMRF") as a deemed University for starting an Off-shore Campus offering medical programmes at Bangkok, Thailand. The approval so granted was *inter alia* subject to two conditions, namely – 1) the degree shall be awarded by the VMRF to the students studying at and passing of the Off-shore Campus, Thailand by clearly stating that the degree has been awarded by VMRF, Deemed University, Bangkok, Thailand Off-shore campus and 2) the degree awarded to the students shall be treated as a foreign medical degree and such students would be required to qualify the screening test as per the provisions of Indian Medical Council Act, 1956 and Screening Test Regulations, 2002 of the Medical Council of India.

The appellants-students, who had completed medical course from VMRF, Deemed University, Bangkok, Thailand Off-shore Campus and were issued a provisional certificate to that effect in the year 2009 by VMRF, applied for screening test through VMRF to the National Board of Examination (NBE). NBE did not respond to such applications. VMRF then filed writ petition which was allowed by a Single Judge of the High Court. In intra court appeal, however, the Division Bench set-aside the judgment of the Single Judge holding that the appellants-students did not possess eligibility of primary medical qualification. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1.1. A bare look at the eligibility criteria provided in Regulation 4(1) of the Screening Test Regulations, 2002 of the Medical Council of India leaves no manner of doubt that a candidate who intends to appear in the screening test must, inter-alia, possess

primary medical qualification. Such qualification must be a recognised qualification for enrollment as a medical practitioner in the country in which the institution awarding such qualification is situated. [Para 11] [557-B-C]

1.2. Admittedly, the provisional degree awarded by the VMRF to these students is not recognised by the Medical Council of Thailand. These students, who claim to have completed their course in the off-shore campus of VMRF, are not entitled to register the degree awarded to them by VMRF with the Medical Council of Thailand. The provisional degree awarded by VMRF to these students, therefore, does not amount to primary medical qualification. The view taken by the Division Bench that the students do not possess eligibility of primary medical qualification, thus, cannot be said to suffer from any illegality. [Para 12] [557-D-E]

Soham Mayankumar Vyas and others vs. Union of India and others **(2010) 13 SCC 137 : 2010 (11) SCR 818 – held inapplicable**

Case Law Reference:

2010 (11) SCR 818 held inapplicable Para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2454 of 2012 etc.

From the Judgment & Order dated 29.04.2010 of the High Court of Judicature at Madras in W.A. No. 716 of 2010.

With

C.A. Nos. 2455, 2456 & 2457 of 2012.

K. Ramamoorthy, Amarendra Sharan, Dinesh Dwivedi, N. Shoba, Sri Ram J. Thalapathy, V. Adhimoolam, G. Umapathy, C.V. Subramaniam, Rakesh K. Sharma, S. Ramsubramaniam,

S. Gowthaman Farrukh Rasheed (for D.S. Mahra), Amit Kumar Somesh Jha, Dhru Pal, Avijit Mani Tripathi, Rudreshwar Singh, Rakesh Gosain, Kaushik Paddar, Gopal Jha, Tapesh Kumar Singh, K.K. Mohan, Ashish Mohan, Manish Shrivastva, Abhishek Kumar Singh, S. Ramesh for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Permission to file Special Leave Petition is granted in S.L.P. (C) No. 19294 of 2011.

2. I.A. No. 2 of 2012 – application for impleadment is granted in S.L.P. (C) No. 26236 of 2010. Leave granted in all the Special Leave Petitions.

3. We have heard Mr. G. Umapathy, learned counsel for Vinayaka Mission University, Mr. K.Ramamoorthy, learned senior counsel and Mr. Dinesh Dwivedi, learned senior counsel for the students, Mr. R.F. Nariman, learned Solicitor General for the Union of India and Mr. Amrendra Sharan, learned senior counsel for the Medical Council of India.

4. The Government of India, vide notification dated October 10, 2006, accorded its approval to the proposal of Vinayaka Mission's Research Foundation, Salem, now Vinayaka Mission University (for short "VMRF") as a deemed University for starting an Off-shore Campus offering medical programmes at Bangkok, Thailand with an intake capacity and conditions of 100 undergraduate medical students per annum on the terms and conditions mentioned in the Memorandum of Understanding dated September 19, 2004 between VMRF and Rangsit University, Thailand. The approval so granted was subject to certain conditions mentioned at serial No. 9 of the endorsement of the above Notification. The relevant conditions are as under:

> "(i) Vinayaka Mission's Research Foundation, Deemed University, Salem along with its constituent institutions and its off-shore campus in Bangkok, Thailand, will continue to abide by the norms and guidelines laid down and instructions issued from time to time by the University Grants Commission pertaining to institutions notified as Deemed to be Universities.
>
> (ii) Vinayaka Mission's Research Foundation, Deemed University's Bangkok, Thailand's Off-shore Campus shall be subjected to the laws of the land of Thailand as applicable.
>
> (iii) The students studying at and passing out from the off-shore campus in Thailand shall be awarded degree by Vinayaka Mission's Research Foundation, Deemed University, clearly distinguishing them (by stating that the degree awarded by Vinayak Mission's Research Foundation, Deemed University's Bangkok, Thailand Off-shore Campus) from the degrees awarded by the Deemed University in India.
>
> (iv) All norms of Medical Council of India, wherever applicable, will continue to be in force and complied with.
>
> (v) The students studying in and passing out from the proposed Off-shore campus centre at Thailand would be treated as those holding a foreign medical degree and would be required to qualify the screening test as per the provisions of Indian Medical Council Act, 1956 and Screening Test Regulations 2002 of Medical Council of India."

5. From the perusal of the above conditions, two things become very clear, namely; (one) the degree shall be awarded by the VMRF to the students studying at and passing of the Off-shore Campus, Thailand by clearly stating that the degree has been awarded by VMRF, Deemed University, Bangkok, Thailand Off-shore campus and (two) the degree awarded to the students shall be treated as a foreign medical degree and such students would be required to qualify the screening test

as per the provisions of Indian Medical Council Act, 1956 and Screening Test Regulations, 2002 (for short "2002 Regulations") as Medical Council of India.

6. Admittedly, the provisional MBBS degree awarded to the concerned students by the VMRF (Deemed University, Bangkok, Thailand Off-shore Campus) is not a degree recognised by the Medical Council of Thailand. The Medical Council of Thailand has accorded its approval now to the faculty of Medicine, VMRF as a medical institution for awarding MBBS degree for five years for the period March 10, 2011 till March 9, 2016. More over, nothing has been shown either to the High Court or to us that the course in Thailand is in any way recognised or is approved by the Medical Council of India.

7. Regulation 2(f) of 2002 Regulations defines "Primary Medical qualification" which means a medical qualification awarded by any medical institution outside India which is a recognised qualification for enrollment as medical practitioner in the country in which the institution awarding the said qualification is situated and which is equivalent to MBBS in India. Eligibility criteria for screening test is provided in Regulation 4 of 2002 Regulations. Regulation 4(1), as was existing during the relevant time, reads as under:

> "(1) No person shall be allowed to appear in the screening test unless:
>
> he/she is a citizen of India and possesses any primary medical qualification, either whose name and the institution awarding it are included in the World Directory of Medial Schools, published by the World Health Organization; or which is confirmed by the Indian Embassy concerned to be a recognised qualification for enrollment as medical practitioner in the country in which the institution awarding the said qualification is situated."

8. The students, who are before us, claim to have

completed medical course and have been issued provisional certificate by VMRF on June 20, 2009. One of such certificates reads as under:

VINAYAKA MISSIONS UNIVERSITY

UNDER SECTION 3 OF THE UGC ACT, 1956

SALEM, TAMILNADU, INDIA

Formerly known as Vinayaka Mission's Research Foundation Deemed University)

OFF-SHORE CAMPUS – BANGKOK- THAILAND

PROVISIONAL CERTIFICATE

REG. NO. VR MBU 04 1003 DATE: 20-06-2009

This is to certify that **J. MOHAMED IBRAHIM** has passed the Final Bachelor of Medicine and Bachelor of Surgery Degree Examination held in **May, 2009**. He/She will be qualified to receive the M.B.B.S. Degree after satisfactorily completing the prescribed period of Compulsory Rotatory Resident Internship for one year.

sd/-
CONTROLLER OF EXAMINATIONS

9. Based on the above certificate, these students applied for screening test through VMRF to the National Board of Examination (NBE). NBE did not respond to such applications. VMRF then moved to the Madras High Court during vacation. The Vacation Judge issued certain directions. Pursuant thereto, 21 students appeared in the screening test. Of these 21 students, 4 cleared the screening test. The Writ Petition ultimately came to be allowed. NBE challenged the judgment and order of the Single Judge in intra court appeal before the Division Bench. The Division Bench allowed the appeal and set-aside the judgment and order of the Single Judge.

10. The Division Bench, in the impugned order, has noted that VMRF was not approved by the Medical Council of Thailand and inspite of opportunity, nothing was produced to show that the degree awarded by the VMRF was recognised.

11. A bare look at the eligibility criteria provided in Regulation 4(1) of 2002 Regulations leaves no manner of doubt that a candidate who intends to appear in the screening test must, inter-alia, possess primary medical qualification. Such qualification must be a recognised qualification for enrollment as a medical practitioner in the country in which the institution awarding such qualification is situated.

12. Admittedly, the provisional degree awarded by the VMRF to these students is not recognised by the Medical Council of Thailand. These students, who claim to have completed their course in the off-shore campus of VMRF, are not entitled to register the degree awarded to them by VMRF with the Medical Council of Thailand. The provisional degree awarded by VMRF to these students, therefore, does not amount to primary medical qualification. The view taken by the Division Bench that the students do not possess eligibility of primary medical qualification, thus, cannot be said to suffer from any illegality.

13. Mr. K. Ramamoorthy, learned senior counsel for the students heavily relied upon the decision of this Court in *Soham Mayankumar Vyas and others vs. Union of India and others*[1]. However, in view of peculiar factual position of this case as noticed above, Soham Mayankumar Vyas has no application at all.

14. Civil Appeals are, accordingly, dismissed with no order as to costs.

B.B.B. Appeals dismissed.

1. (2010) 13 SCC 137

SONU SARDAR

v.

STATE OF CHHATISGARH

(Criminal Appeal Nos. 1333-1334 of 2010)

FEBRUARY 23, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Penal Code, 1860 – s. 396 – Conviction and sentence under – Commission of dacoity at the house of the deceased and murder of five persons including two minor children with knife, rod and axe by the appellant and four others – Appellant convicted u/s. 396 and sentenced to death by the courts below – Sustainability of – Held: Prosecution proved beyond reasonable doubt that the appellant participated in the offence of dacoity and murder – Conviction of the appellant based not only on the oral testimony of the daughter of the deceased but also on the evidence of other prosecution witnesses, seized articles and the forensic report – Clear and definite evidence to show that the appellant not only participated in the crime but also played the lead role in the commission of offence – Five members of a family including two minor children and driver were ruthlessly killed by use of a knife, an axe and an iron rod and with help of four others – Crime was obviously committed after pre-meditation with absolutely no consideration for human lives, and for money – Even though appellant was young, his criminal propensities are beyond reform and he is a menace to society – Thus, courts below rightly held that this is one of those rarest of rare cases in which death sentence is appropriate punishment – Order of conviction of the appellant as well as sentence of death sustained.

According to the prosecution, appellant, 'A' and others committed dacoity in the house of 'S' and thereafter, committed murder of 'S', his driver, his wife

and his two minor children with rod, knife and axe. The appellant and the other co-accused went to the house of 'S' and demanded money from 'S'. One of them bolted the door from inside, two others caught hold of the driver and one of them caught hold of 'S'. They kept knife on the neck of 'S' and compelled him to give cash. Daughter of 'S' (PW 1), managed to escape and went to the house of 'R' (PW-2) and narrated about the incident to him. FIR was lodged. The appellant and his co-accused 'A' and 'C' were arrested. On the basis of the statement of the appellant, blood stained clothes of the appellant, axe, knife and rod were seized. Test identification parade was carried out in which PW 1 identified the appellant and 'A'. PW 1, PW 2, PW 3 and PW 4 and other witnesses were examined. The trial court convicted the appellant under Section 396 IPC and imposed sentence of death. The High Court upheld the order. Therefore, the appellant filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1. During investigation a Test Identification Parade was carried out and out of the ten persons who were presented, the appellant and 'A' were identified by PW 1-'SH' as the two persons, who were amongst the five persons who had come to the house of 'S' and were demanding money from him. From the evidence of PW 2-'R' as well as the evidence of PW 4-'D' it is found that PW-1, soon after she escaped from the house of 'S', mentioned that one of the five persons who had gone to the house of 'S' was a *sardar*. In her cross-examination, PW-1 stated that she knew the appellant as he had come to their house for selling scrap. Moreover, the broken axe with broken handle and iron rod were recovered pursuant to the statement of the appellant. PW 36-doctor, after narrating the injuries on the dead bodies of 'S', 'AG', 'R', 'Y' and 'KR', opined that the death was on account

of shock as a result of fatal injuries. The injuries described by them were not only incised wounds but multiple fractures of temporal and parietal bones and on the head which could have been caused by the axe and the iron rod. The report of the Forensic Science Laboratory confirmed the presence of human blood on the clothes of the deceased persons, axe and iron rod as well as the turban and T-shirt of the appellant which had been seized. Thus, the conviction of the appellant was not only based on the oral testimony of PW-1, but also the evidence of PW-2, PW-3, PW-4, PW-36, the seized articles and also the report of the Forensic Science Laboratory. It is further established from the evidence of PW-1 and the *Panchanama* of the house of 'S' that only cash of Rs.65,760/- was available and the remaining cash out of Rs.1,70,000/- was missing. The prosecution proved beyond reasonable doubt that the appellant participated in the offence of dacoity and murder and was rightly convicted for the offence under Section 396 IPC. [Para 6] [566-C-H; 567-A-B]

Ramesh and others v. State of Rajasthan **(2011) 3 SCC 685: 2011 (4) SCR 585;** *Sushil Murmu v. State of Jharkhand* **(2004) 2 SCC 338: 2003 (6) Suppl. SCR 702;** *Atbir* v. *Government of NCT of Delhi* **(2010) 9 SCC 1: 2010 (9) SCR 993;** *Sunder Singh v. State of Uttaranchal* **(2010) 10 SCC 611: 2010 (11) SCR 927 – referred to.**

1.2. The trial court recorded special reasons under Section 354 (3) of the Code of Criminal Procedure, 1973 for awarding the death sentence on the appellant that the crime was pre-meditated; the crime struck fear and terror in the public mind; helpless and defenceless women and two minor children aged eight and four years besides two adult men were murdered; the driver of 'S', who had only stopped in the house for his food, was also not spared; taking advantage of earlier business relations with 'S', the

appellant made a friendly entry and committed the murders; the intention was to kill all members of the family though surprisingly a six month old baby and a four year old child remained alive; the five murders were brutal, grotesque, diabolical, revolting and dastardly, which indicated the criminality of the perpetrators of the crime; and no physical or financial harm appears to have been caused by the deceased to the accused. As against the aggravating circumstances, the trial court did not find any mitigating circumstance in favour of the appellant to avoid the death penalty. This is, therefore, not one of those cases in which the trial court has not recorded elaborate reasons for awarding death sentence to the appellant. [Para 9] [568-D-H; 569-A, B, C]

1.3. Regarding the role of the appellant in the commission of the offence of dacoity and murder, it is found that the turban and T-shirt of the appellant, which were seized and sent for examination to the Forensic Science Laboratory, had presence of human blood; the axe and the iron rod, which were recovered pursuant to the statement of the appellant, had also blood-stains; and that the evidence of PW-1 that when her mother was cooking food and came out on hearing the commotion, the appellant was demanding money from her father and her father gave to the appellant all the money which he was having in his pocket. There is, therefore, clear and definite evidence in the instant case to show that the appellant not only participated in the crime, but also played the lead role in the offence under Section 396 IPC. Therefore, this is not a case where it can be held that the role of the appellant was not such as to warrant death sentence under Section 396 IPC. [Para 10] [569-D-F]

1.4. In the instant case, five members of a family including two minor children and the driver were ruthlessly killed by the use of a knife, an axe and an iron

rod and with the help of four others. The crime was obviously committed after pre-meditation with absolutely no consideration for human lives and for money. Even though the appellant was young, his criminal propensities are beyond reform and he is a menace to the society. The trial court and the High Court were therefore, right in coming to the conclusion that this is one of those rarest of rare cases in which death sentence is the appropriate punishment. The conviction of the appellant as well as the sentence of death under Section 396, IPC is sustained. [Paras 11 and 12] [570-B-D]

Sunder Singh v. State of Uttaranchal **(2010) 10 SCC 611: (2010) 11 SCR 927 – referred to.**

Case Law Reference:

2011 (4) SCR 585	**Referred to.**	**Para 7**
2003 (6) Suppl. SCR 702	**Referred to.**	**Para 8**
2010 (9) SCR 993	**Referred to.**	**Para 8**
2010 (11) SCR 927	**Referred to.**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1333-1334 of 2010.

From the Judgment & Order dated 08.03.2010 of the High Court of Chattishgarh at Bilaspur in Reference No. 1 of 2008 & Criminal Appeal No. 240 of 2008 in case arising out of Judgment & Order of sentence dated 18.02.2008 in ST No. 6 of 2006 of Ld. Sessions Judge Baikanthpur, Dist. Koriya.

Vanita Mehta for the Appellant.

Dharmendra Kumar Sinha, Atul Jha, Sandeep Jha for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. These are appeals against the judgment of the High Court of Chhattisgarh in Criminal Reference No.1 of 2008 and Criminal Appeal No. 240 of 2008 confirming the conviction of the appellant and the death penalty imposed on him under Section 396 of the Indian Penal Code (for short 'IPC').

2. The prosecution case very briefly is that on 26.11.2004, Shamim Akhtar (for short 'Shamim'), a scrap dealer and a resident of village Cher, Distt. Baikunthpur, Chhattisgarh, had gone to Raipur for selling scrap. He sold the scrap and received cash of Rs.1,70,000/- and returned to his house with the cash. His wife, Ruksana Bibi, kept the cash in different places of her house, which was to be deposited in the bank the next day. At about 6.00 p.m. on 26.11.2004, Sonu Sardar, the appellant herein, and Ajay Singh @ Fotu along with three other persons came with scrap to the shop of Shamim and left after selling scrap for Rs.480/-. The appellant and Ajay Singh and three other persons, however, returned at about 7.00 p.m. on the same day and knocked on the door of the house of Shamim. When the door was opened, the appellant and Ajay Singh and three other persons demanded money from Shamim. One of these five persons then bolted the door from inside and two other persons caught hold of Asgar Ali, driver of Shamim, and one of them caught hold of Shamim. They kept a knife on the neck of Shamim and compelled him to give cash which he was having in his pocket. Shabana Khatun (for short 'Shabana'), the daughter of Shamim, who was present inside, tried to fight but an attempt was made by the appellant and his people to assault her and she somehow escaped through the back door and went to the house of Ramlal, a kilometer away from the house of Shamim. Shabana told Ramlal about the incident at her house and when Ramlal wanted to go to their house, Shabana asked him not to go because she was afraid that Sonu Sardar and others may kill him. That night Shabana stayed at the house of Ramlal and next morning at about 4-5 a.m., Shabana, Ramlal and his wife Dhanpatbai came to the

house of Shamim and found that Yakut and Asna, 3 years old son and 5 years old daughter of Shamim, were crying near the dead bodies of Shamim, Ruksana Bibi, Yakub and Kumari Rana, 7 years old son and 9 years old daughter of Shamim. Shabana then went to Baikunthpur and narrated the incident to her uncle Nasim Akhtar, who reported the matter the Police. The Police reached the spot and the FIR was lodged. The dead bodies were sent for autopsy to the Community Health Centre, Baikunthpur, and a team led by Dr. Ashok Kumar carried out the *post mortem.* In course of investigation, the Investigating Officer recorded statements of several persons under Section 161, Cr.P.C. The appellant and his co-accused, Ajay and Chhoti Bai, were arrested but the other persons absconded after commission of crime. Blood-stained T-shirt and turban of the appellant and an axe with broken handle, a rod and a knife were seized. Test Identification Parade was carried out on 01.12.2004 in which Shabana identified the appellant as well as Ajay as two of the five persons who had come to the house of Shamim on 26.11.2004 and were demanding money. The seized articles were sent to the Forensic Science Laboratory, Raipur. After completion of investigation, a chargesheet was filed and Sessions Trial No.06/2006 was conducted by the Sessions Judge, Koriya, Baikunthpur (Chhattisgarh).

3. In course of the trial, the prosecution examined 38 witnesses. Shabana was examined as PW-1, Ramlal was examined as PW-2, Nasim Akhtar was examined as PW-3 and Dhanpatbai was examined as PW-4. Dr. Ashok Kumar was examined as PW-36 and the Investigating Officer was examined as PW-37. A large number of documents and the seized articles were also exhibited. The trial court recorded the statements of the appellant under Section 313, Cr. P.C. After hearing the arguments, the trial court held that it was clear from the evidence of PW-1, PW-2, PW-3 and PW-4 that the appellant had committed the dacoity at the house of Shamim between 7.00 p.m. of 26.11.2004 and 4.00 a.m. of 27.11.2004 and thereafter committed murder of Shamim, Asgar, Ruksana

Bibi, Yakub and Kumari Rana with rod, knife and axe and that the prosecution had succeeded in establishing the guilt of the appellant under Section 396, IPC, beyond reasonable doubt. After hearing counsel for the parties on the question of sentence, the trial court also held that the case falls in the category of rarest of rare cases and imposed the sentence of death on the appellant. By the impugned judgment, the High Court has confirmed the conviction of the appellant under Section 396, IPC, and also the sentence of death.

4. Learned counsel for the appellant submitted that the appellant had been convicted on the sole testimony of Shabana (PW-1), a ten years old child who could not have identified the appellant as one of the five persons who committed the dacoity and murder on the night of 26.11.2004. She submitted that it is on the information received from PW-1 that PW-3 had lodged the FIR, but in the FIR the appellant has not been named. She argued that had PW-1 known the appellant, she would have told PW-3 the name of the appellant and PW-3 would have mentioned the name of the appellant in the FIR. She submitted that it will therefore not be safe for this Court to sustain the conviction of the appellant.

5. Learned counsel for the State, on the other hand, submitted that although PW-1 is a minor, her evidence was reliable and she had stood the test of cross-examination. He further submitted that PW-1 narrated the incident not only to PW-3, but also to PW-2 and PW-4 and the evidence of PW-2 and PW-4 would show that PW-1 had clearly mentioned that out of the five persons, who had committed the dacoity and murder on the night of 26.11.2004, there was a *sardar*. He further submitted that PW-1 has also stated in her evidence that the appellant had gone to her father's shop 5 to 6 times before the 26.11.2004 to sell scrap and hence she could identify him as one of the five persons who had committed the dacoity and murder on the night of 26.11.2004. Moreover, at the time of the Test Identification Parade conducted by the Magistrate (PW-11), PW-1 identified the appellant as one of the five persons,

who had come to the house of Shamim on 26.11.2004 and were demanding money. He submitted that the evidence of PW-1 that the appellant participated in the dacoity and murder on 26.11.2004 is corroborated by the recovery of the iron rod and axe on the statement of the appellant and by the fact that the seized T-shirt and turban of the appellant were blood-stained.

6. We have considered the submissions of learned counsel for the parties and we find that during investigation a Test Identification Parade was carried out on 01.12.2004 and out of the ten persons who were presented, the appellant and Ajay Singh @ Fotu were identified by PW-1 as the two persons, who were amongst the five persons who had come to the house of Shamim and were demanding money from him. From the evidence of PW-2 as well as the evidence of PW-4, we find that PW-1, soon after she escaped from the house of Shamim, has mentioned that one of the five persons who had gone to the house of Shamim was a *sardar*. In her cross-examination, PW-1 has stated that she knew the appellant as he had come to their house for selling scrap. Moreover, the broken axe with broken handle and iron rod (Ext. P.24) were recovered pursuant to the statement of the appellant (Ext. P.16). PW-36, Dr. Ashok Kumar, after narrating the injuries on the dead bodies of Shamim, Asgar Ali, Ruksana Bibi, Yakub and Kumari Rana, has opined that the death has been on account of shock as a result of fatal injuries. The injuries described by them are not only incised wounds but multiple fractures of temporal and parietal bones and on the head which could have been caused by the axe and the iron rod. The report of the Forensic Science Laboratory (Ext.P.61) confirms presence of human blood on the clothes of the deceased persons, axe and iron rod (Ext. P.24) as well as the turban and T-shirt of the appellant (Ext. P.37) which had been seized. Thus, the conviction of the appellant is not only based on the oral testimony of PW-1, but also the evidence of PW-2, PW-3, PW-4, PW-36, the seized articles and also the report of the Forensic Science Laboratory. It is

further established from the evidence of PW-1 and the *Panchanama* of the house of Shamim made on 28.11.2004 that only cash of Rs.65,760/- was available and the remaining cash out of Rs.1,70,000/- was missing. The prosecution has, in our considered opinion, proved beyond reasonable doubt that the appellant participated in the offence of dacoity and murder and has been rightly convicted for the offence under Section 396, IPC.

7. On the question of sentence, learned counsel for the appellant submitted that this Court has held in *Ramesh and others v. State of Rajasthan* [(2011) 3 SCC 685] that before awarding death sentence, the trial court was expected to give elaborate reasons. She submitted that the reasons given by the trial court for awarding death sentence on the appellant were not elaborate. She submitted that in *Ramesh and others v. State of Rajasthan* (supra) this Court did not find clear evidence as to which of the three persons who participated in the crime was the actual author of the injuries on Ramlal and Shanti Devi and held that as it is difficult to say that Ramesh alone was the author of the injuries on Ramlal as well as Shanti Devi, death sentence awarded to Ramesh should be modified to life imprisonment. She submitted that in the present case also five persons have committed the offence under Section 396, IPC, and as the actual role of the appellant in the offence is not known the death sentence should be modified to life imprisonment.

8. Learned counsel for the State, on the other hand, submitted that the appellant has participated in the offence under Section 396, IPC, and as many as five innocent persons, including two children, have lost their lives and the trial court has given sufficient reasons for awarding death sentence to the appellant. He cited the decision of this Court in *Sushil Murmu v. State of Jharkhand* [(2004) 2 SCC 338] for the proposition that the punishment should be proportionate to the crime committed by the accused. He submitted that in the facts of the

present case, since the crime was heinous in nature and resulted in the death of five persons, death sentence would be proportionate to the crime committed by the appellant. He also relied on *Atbir* v. *Government of NCT of Delhi* [(2010) 9 SCC 1] in which this Court held that preventing persons in the house to escape and committing brutal murder of as many as three persons inside the house are aggravating circumstances warranting imposition of death sentence on the accused. He submitted that in the present case also, as the appellant had closed and bolted the door to prevent an escape of any person from the house, and had then brutally murdered as many as five persons, death sentence should be imposed on the appellant.

9. We have considered the submissions of the learned counsel for the parties and we find that the trial court has recorded the following special reasons under Section 354 (3) of the Criminal Procedure Code, 1898 for awarding the death sentence on the appellant:

(i) The crime was pre-meditated.

(ii) The crime has struck fear and terror in the public mind.

(iii) Helpless and defenceless women and two minor children aged eight and four years besides two adult men were murdered.

(iv) Asgar Ali, the driver of Shamim, who had only stopped in the house for his food, was also not spared.

(v) Taking advantage of earlier business relations with Shamim, the appellant made a friendly entry and committed the murders.

(vi) The intention was to kill all members of the family though surprisingly a six month old baby and a four year old child remained alive.

(vii) The five murders were brutal, grotesque, diabolical, revolting and dastardly, which indicated the criminality of the perpetrators of the crime.

(viii) No physical or financial harm appears to have been caused by the deceased to the accused.

As against these aggravating circumstances, the trial court did not find any mitigating circumstance in favour of the appellant to avoid the death penalty. This is, therefore, not one of those cases in which the trial court has not recorded elaborate reasons for awarding death sentence to the appellant as contended by learned counsel for the appellant.

10. Regarding the role of the appellant in the commission of the offence of dacoity and murder, we have already found that the turban and T-shirt of the appellant, which were seized and sent for examination to the Forensic Science Laboratory, had presence of human blood. We have also found that the axe and the iron rod, which were recovered pursuant to the statement of the appellant, had also blood-stains. We have also found from the evidence of PW-1 that when her mother was cooking food and came out on hearing the commotion, the appellant was demanding money from her father and her father gave to the appellant all the money which he was having in his pocket. There is, therefore, clear and definite evidence in this case to show that the appellant not only participated in the crime, but also played the lead role in the offence under Section 396, IPC. This is, therefore, not a case where it can be held that the role of the appellant was not such as to warrant death sentence under Section 396, IPC.

11. In a recent judgment in *Sunder Singh v. State of Uttaranchal* [(2010) 10 SCC 611], this Court found that the accused had poured petrol in the room and set it to fire and closed the door of the room when all the members of the family were having their food inside the room and, as a result, five members of the family lost their lives and the sixth member of

the family, a helpless lady, survived. This Court held that the accused had committed the crime with pre-meditation and in a cold blooded manner without any immediate provocation from the deceased and all this was done on account of enmity going on in respect of the family lands and this was one of those rarest of rare cases in which death sentence should be imposed. The facts in the present case are no different. Five members of a family including two minor children and the driver were ruthlessly killed by the use of a knife, an axe and an iron rod and with the help of four others. The crime was obviously committed after pre-meditation with absolutely no consideration for human lives and for money. Even though the appellant was young, his criminal propensities are beyond reform and he is a menace to the society. The trial court and the High Court were therefore right in coming to the conclusion that this is one of those rarest of rare cases in which death sentence is the appropriate punishment.

12. In the result, we find no merit in these appeals and we sustain the conviction of the appellant as well as the sentence of death under Section 396, IPC, and dismiss the appeals.

N.J. Appeals dismissed.

KRISHAN LAL
v.
FOOD CORPORATION OF INDIA & ORS.
(Civil Appeal Nos. 8569-8570 of 2003)

FEBRUARY 24, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Tenders – Invitation of tenders for appointment of handling and transportation contracts at various depots – Submission of tender by the appellant offering to undertake the work – Respondent-Corporation accepted the offer – Allotment of contract to the appellant – However, appellant expressed his inability to undertake the contract due to security problems and withdrew the offer made by him – Meanwhile, appellant had deposited certain amount towards security with the respondent-Corporation, pursuant to the order of the High Court – Refusal of the Corporation to refund the amount – Writ petition by the appellant seeking refund of the security amount, dismissed – On appeal, held: There was an arbitration clause in the agreement executed between the parties and in view of the nature of dispute, the claim for refund of the amount deposited by the appellant should have been raised before the arbitrator – However, the High Court had entertained the writ petition as early as in the year 2002 and the instant appeals had been pending in this Court for the past ten years or so – Relegating the parties to arbitration when the matter has been pending for past ten years not feasible – Availability of alternative remedy cannot be pressed into service at this belated stage – The amount was deposited but was refundable in case the contract was not allotted and was adjustable towards security if the appellant succeeded in emerging as the successful tenderer – In the event of adjustment of the amount towards security the breach of the contract would have led to the forfeiture of the security amount alone and not the entire

amount deposited by the appellant – Respondent-Corporation had engaged an alternative agency for getting the work executed and had incurred an extra amount in that regard and thus, could make a claim for recovery of the extra expenditure incurred by it – Corporation directed to refund the balance amount to the appellant after deducting the amount towards forfeiture of security deposit and a sum towards extra expenditure in getting the work executed at the risk and cost of the appellant.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8569-8570 of 2003.

From the Judgment & Order dated 15.02.2000 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 2416 of 2000 and Judgment & Order dated 23.05.2003 in Review Application No. 134 of 2002.

M.P. Jha, Ram Ekbal Roy, Anil K. Chopra for the Appellant.

Indra Sawhney for the Respondents.

The Order of the Court was delivered

T.S. THAKUR, J. 1. These appeals by special leave arise out of an order passed by the High Court of Punjab and Haryana whereby Civil Writ Petition No. 2416 of 2002 and R.A. No.134 of 2002 filed by the appellant seeking refund of Rs.10 lakhs deposited towards security pursuant to the order passed by the High Court has been dismissed.

2. On 12th November, 1999 the Food Corporation of India invited tenders for appointment of Handling and Transportation Contracts at various depots including the depot at Dabwali in the State of Haryana. Several persons appear to have submitted their tenders in response to the said tender notice including M/s R.R.S. Chautala & Company who eventually bagged the contract in question having offered to undertake the contracted work in consideration of payment at 186% above

the schedule of rates. The appellant questioned the said allotment in Writ Petition No.1368 of 2000, inter alia, alleging that he had been illegally prevented from submitting his tender by being denied the requisite form for submission of the tender. The appellant also asserted that he was ready to undertake the Handling and Transportation work at a much lower rate of 110% above the schedule of rates as against 186% offered by the successful tenderer mentioned above. The appellant even offered to deposit a sum of Rs.10 lakhs by way of security to show his *bona fides*. An affidavit to that effect was also, it appears, filed by the appellant.

3. The Writ Petition filed by the appellant was eventually allowed by the High Court by its order dated 5th April, 2001. The High Court held that the decision taken by the Food Corporation of India was without consideration of relevant facts and was not reasonable. The High Court therefore, found a case justifying interruption of contract and setting aside of the allotment of work in favour of the successful tenderer. Having said that, the High Court issued the following directions:

> "It is directed that the fifth respondent shall cease to operate immediately. The respondent-corporation shall invite fresh tenders and proceed to allot the work in accordance with law. The petitioner shall be bound by his offer to work at 110% above the schedule of rates. He would deposit an amount of Rs.10 lacs by way of security within one week from today with the office of the Senior Regional Manager, Food Corporation of India, Chandigarh. This amount shall be adjusted towards security, etc. if the work is allotted to the petitioner. Otherwise, it would be refunded within one week of the final decision regarding the allotment of the work."

4. In obedience to the above directions the respondent-Food Corporation of India (FCI) invited sealed tender for handling and transport contact for its Dabwali depot for a period of six months. The short term tender notice required the

intending tenderers to submit their tenders along with complete documents and the earnest money prescribed in the form of a Demand Draft.

5. In response to the above tender notice, the appellant also submitted a tender offering to undertake the work @ 50% above the schedule of rates. This offer was accepted by the respondent-Corporation with a direction to the District Manager, FCI, Hissar that no amount towards security be demanded from the appellant as the security amount of Rs.3,09,500/- stood deposited in the Regional Office. Shortly after the allotment of the contract to the appellant, the appellant sent a fax message expressing his inability to undertake the handling and transport contract and withdrawing the offer made by him. By this time the appellant had already executed a formal agreement with the respondent-Corporation on 28th May, 2001. In response, the respondent-Corporation informed the appellant that any withdrawal after the execution of the formal agreement was tantamount to a breach of the terms and conditions of the contract and would attract action under Clause X(b) of the agreement. The appellant was requested to take up the handling and transport work within one week positively, failing which the respondent-Corporation proposed to take recourse to Clause X(b) of the agreement to get the work done at the risk and cost of the appellant.

6. It is common ground that the appellant did not undertake the work. He cited some security problems which according to the appellant prevented him from discharging his contractual obligations. Not only that the appellant demanded the refund of Rs.10 lakhs which stood deposited with the respondent-Corporation pursuant to the direction issued by the High Court in the writ petition referred to earlier. Upon refusal of the respondent-Corporation to refund the amount in question the appellant filed Writ Petition No.2416 of 2002 in the High Court of Punjab and Haryana for a mandamus directing the respondent-Corporation to refund the same. The High Court dismissed the said petition holding that since the parties had

entered into a written contract their mutual rights and obligations were governed by the terms and conditions of the said contract. The High Court observed:

> "It appears from the record of the case and in particular Annexure-P-5 dated 20.6.2001 addressed to the petitioner by the F.C.I. that the petitioner had executed agreement in the office on 28.5.2001 and his offer at 50% ASOR was accepted by the office vide telegram dated 25.5.2001, a copy whereof was sent to the petitioner through registered post. It has been clearly mentioned in Annexure-P-5 that the F.C.I had accepted the offer of the petitioner and that being so, in our view, a concluded contract had come into existence. Withdrawal of offer would certainly attract relevant condition of the contract. "The contract that has been arrived at between the parties has not been placed on records. The terms of contract in the event a party, after its offer has been accepted, may back out, are, thus, not known. There is, however, sufficient indication forthcoming from Annexure-P-5 that Clause 10(b) would apply in the event of contractor may not carry out the work allotted to him. This clause too has not been shown to us nor made a part of pleadings. All that we would, thus, like to observe at this stage is that once the parties have arrived at concluded contract, the terms thereof would alone determine the rights inter se parties. Be that as it may, petitioner cannot ask for refund of Rs.10 Lacs on the dint of orders passed in his earlier petition bearing No.1368 of 2000 as it is only in the event work was not to be allotted to him that, he could ask for refund of the money deposited by him."

7. We have heard learned counsel for the parties at some length. The material facts are not in dispute. It is not in dispute that the amount of Rs.10 lakhs was deposited by the appellant in terms of the order of the High Court in Writ Petition No.1368 of 2000. The said amount had to be refunded to the appellant

if the work was not allotted to the appellant upon the issue of the fresh tenders. In case the appellant succeeded in bagging the contract the amount was to be adjusted towards security. This clearly implied that the order passed by the High Court envisaged a situation where the appellant would not succeed in securing the contract pursuant to the fresh tender process, in which event the amount deposited by the appellant had been refundable *in toto*. In case, however, the appellant succeeded in bagging the contract which obviously depended upon whether he offered the lowest rate for undertaking the work in question, the amount deposited by him had to be adjusted towards security in relation to the said contract. It is also not in dispute that a short-term tender was issued pursuant to the direction of the High Court and that the security amount required to be furnished by the appellant was limited to a sum of Rs.3,09,500/-. The High Court order did not provide for a situation where the security amount required under the contract may be Rs.3,09,500/- for other tenderers but Rs.10 lakhs in the case of the appellant. That a formal agreement was executed between the parties is also admitted before us as indeed it was before the High Court. Withdrawal of the offer tantamount to refusal to undertake the contract, hence a breach of the terms of the contract, and shall attract the penal provisions contained in the same is also not in question. Our attention was, in this regard, drawn by learned counsel for the appellant to Clause X (b) and XI (f) of the agreement which read as under:

> **"X(b)** The Senior Regional Manager shall also have without prejudice to other rights and remedies, the right, in the even of breach by the contractors of any of the terms and conditions of the contract to terminate the contract forthwith and to get the work done for the unexpired period of the contract at the risk and cost of the contractors and/or forfeit the security deposit at any part thereof for the sum of sums due for any damages, losses, charges, expenses of costs that may be suffered or incurred by the corporation

due the contractor's negligence or unworkment like performance of any of the services under the contract.

XI (f) In the event of termination of the contract envisaged in clause X, of the Senior Regional Manager shall have the rights of forfeit the entire or part of the amount of security deposit lodged by the contractors or to appropriate the Security Deposit or any part thereof in or towards the satisfaction of any sum due to be claimed for any damages, losses, charged expenses or cost that may be suffered or incurred by the Corporation."

8. It was argued on behalf of the appellant that even the widest and most favourable interpretation of the above terms would not entitle the respondent-Corporation to forfeit any amount besides the security deposit and recover any damages, losses or cost that may be suffered or incurred by the respondent-Corporation in getting the contracted work executed through some other agency. Such being the position the respondent-Corporation could at best forfeit the sum of Rs.3,09,500/- towards security deposit and a sum of Rs.2,17,274/- which the respondent-Corporation claimed to have incurred towards extra expenditure in getting the work executed at the risk and cost of the appellant. The extra expenditure incurred by the respondent-Corporation after termination of the contract allotted to the appellant, it is noteworthy, has been quantified by the respondent-Corporation in para 5(i) & (ii) of the counter-affidavit filed on its behalf. The respondent-Corporation has inter alia said:

"I say that during the contract period of six months of the petitioner, the Respondent Corporation had to incur an extra expenditure of Rs.2,17,274/- and suffered heavy losses. I say that security amount of Rs.10 lakhs was furnished by the petitioner as security for fulfilment of contract in terms of High Court order. Even after depositing Rs.10 lakhs as per the High Court Orders, the petitioner did not resume the work and the entire amount of Rs. 10

lakhs was rightly forfeited against excess payment made towards alternative arrangements made at the risk and cost of the petitioner. I say that the amount of Rs.10lakhs was stand forfeited under Clause X(b) read with Clause XI(f) of the contract."

9. It was in the light of the above assertions, argued Mr. Jha, learned counsel for the appellant, that the respondent-Corporation could not lay any claim against the amount in question in excess of Rs.3,09,500/ plus Rs.2,17,274/- and that the balance amount was liable to be refunded to the appellant.

10. On behalf of the respondent-Corporation it was argued that the appellant ought to have resorted to the arbitration clause under the agreement instead of filing a writ petition in the High Court. Alternatively, it was argued that the security deposit having been made under the orders of the High Court, the entire amount of Rs.10 lakhs was liable to be forfeited on the failure of the appellant to work once the same was allotted to him.

11. It is true that there was an arbitration clause in the agreement executed between the parties. It is equally true that, keeping in view the nature of the controversy, any claim for refund of the amount deposited by the appellant could be and ought to have been raised before the Arbitrator under the said arbitration. The fact, however, remains that the High Court had entertained the writ petition as early as in the year 2002 and the present appeals have been pending in this Court for the past ten years or so. Relegating the parties to arbitration will not be feasible at this stage especially when the proceedings before the Arbitrator may also drag on for another decade. Availability of an alternative remedy for adjudication of the disputes is, therefore, not a ground that can be pressed into service at this belated stage and is accordingly rejected.

12. Equally untenable is the alternative argument that since the amount of Rs.10 lakhs had been deposited pursuant to the order passed by the High Court the same was liable to be

forfeited *in toto* in the event of any breach of the agreement between the parties. The deposit was, no doubt, made pursuant to the direction of the High Court but the said direction did not go further to say that in case the appellant committed a breach of the agreement executed between the parties, any such breach would result in the forfeiture of the entire amount of Rs.10 lakhs. A closer reading of the order passed by the High Court leaves no manner of doubt that the amount was deposited but was refundable in case the contract was not allotted and was adjustable towards security if the appellant succeeded in emerging as the successful tenderer. In the event of adjustment of the amount towards security the breach of the contract would have led to the forfeiture of the security amount alone and not the entire amount deposited by the appellant.

13. Even so, the terms of the contract provided for execution of the contracted work through another agency at the risk and cost of the appellant. It is not in dispute that the respondent-Corporation had engaged an alternative agency for getting the work executed. It is also not in dispute that an extra amount was incurred by the respondent-Corporation in that regard. If that be so, the amount lying with the respondent-Corporation could be utilised for recovery of the loss. The respondent-Corporation could therefore make a claim for recovery of the extra expenditure, incurred by it. We must mention, in fairness to Mr. Jha, that the respondent-Corporation's right to forfeit the security amount or to recover the extra expenditure incurred in getting the work executed from alternative agency was not disputed by him.

14. That being the position, the respondent-Corporation would be entitled to retain a sum of Rs.3,09,500/ plus Rs.2,17,274/- = Rs.5,26,774/-. The balance amount of Rs.4,73,226/- ought to have been refunded to the appellant on the admitted factual and contractual premise.

15. In the result, we allow this appeal, set aside the order passed by the High Court and direct the respondent-Corporation

to refund the balance amount of Rs.4,73,226/- to the appellant within a period of three months from today failing which the said amount shall start earning interest @ 10% p.a. from the date of expiry of the stipulated period of three months mentioned above. We are consciously making no order for payment of interest on the amount held refundable to the appellant, for we are of the opinion that the appellant had without any real intention to perform the work in question got the earlier contract terminated by a judicial order and put the Corporation through the unnecessary botheration and consequential prejudice of calling for fresh tenders. The appellant, it appears to us, was interested only in scoring a point over his rival for whatever reasons he had in view. The conduct of the appellant has, therefore, dissuaded us from directing payment of any interest to him on the amount that is held refundable.

16. These appeals are, with above directions & observations, allowed and disposed of leaving the parties to bear their own costs.

N.J. Appeals disposed of.