PROMODE DEY
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 405 of 2008)

MARCH 22, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Penal Code, 1860 – s.302 – Murder – Child witness PW2 – Conviction by trial court – Upheld by High Court – Justification – Held: PW2 gave a very natural account of the incident – Right from the time of the incident till the time she was examined in court, PW2 consistently said that accused-appellant had killed her mother with a 'daa' – It cannot, therefore, be held that PW2 was tutored to depose against the appellant – Evidence of PW2 also corroborated by the fact that a blood-stained 'daa' was recovered on the very date of the incident from a jungle by the side of the house of the appellant – Medical evidence of PW10 (the doctor who carried out post mortem) did not contradict the evidence of PW2 that appellant struck the deceased on her head, back, fingers and her throat – Guilt of appellant established beyond reasonable doubt – High Court right in sustaining the conviction of appellant on the basis of eyewitness account of PW-2 and the evidence of PW-1, PW-8 and PW-11 as well as the recovery of 'daa' at the instance of the appellant.

The mother of an eight year old girl PW2 was found murdered. PW2 stated appellant had entered into their house with a big *daa* and killed her mother. The *daa* allegedly used in killing PW2's mother was recovered from a jungle at the side of the house of the appellant. The trial court convicted the appellant under Section 302 IPC and sentenced him to rigorous imprisonment for life. On appeal, the High Court held that the evidence of PW-2 as corroborated by the evidence of PW-1(the

grandmother of PW2), PW-8 (a resident of the village in which the house of the deceased was located) and PW-11 (the father of PW2) together with the fact of recovery of the *daa* at the instance of the appellant and its seizure soon after the incident had established that the appellant was guilty of the offence of murdering the deceased and accordingly sustained the conviction and sentence of the appellant.

The conviction of appellant was challenged before this Court on grounds that the prosecution was not able to prove that he had committed the murder of PW2's mother beyond reasonable doubt. It was contended that where the entire case is based on the evidence of a child witness (i.e. PW2), who is prone to tutoring, the conviction is not safe; that the Magistrate before whom the statement of PW2 under Section 164 of the Cr.P.C. was recorded was not examined; that the granduncle of PW-2, who was present in the house, was also not examined; that PW-3, PW-4, PW-5, PW-6, PW-7 and PW-9 had all turned hostile and not supported the prosecution case; and that from the evidence of PW-15, the I.O., who carried out the further investigation, it is clear that the blood-stained *daa* was sent for examination to the Forensic Science Laboratory (FSL) but the FSL report was not produced before the Court.

Dismissing the appeal, the Court

HELD: 1. It is seen that PW-2 had answered the first few questions put by the Court very smartly and intelligently and the Court made a mention while recording her evidence that she could become a witness in this case. That apart, she has given a very natural account of how the appellant killed her mother. Moreover, soon after the incident on 23.02.2002 she told her grandmother (PW-1) and her father (PW-11) that it was the appellant who had killed the deceased and both PW-1

and PW-11 deposed before the Court in their evidence that they were told by PW-2 that the appellant had killed the deceased with a *daa*. PW-8, who was a resident of the area, has also stated in his evidence that soon after the incident he had heard PW-2 saying that the appellant had killed the deceased. Moreover, two days after the incident on 25.02.2002 she had given a statement before the Magistrate under Section 164, Cr.P.C., that the *Panchayat*, namely, the appellant, had killed the deceased by a *daa*. Thus, right from the time of the incident till the time she was examined in court, PW-2 has consistently said that the appellant had killed the deceased with the *daa*. It cannot, therefore, be held that PW-2 has been tutored to depose against the appellant. [Paras 7, 8] [895-B-C; 896-A-D]

Arbind Singh v. State of Bihar, **1994 SCC (Cri) 1418 – distinguished.**

State of Madhya Pradesh v. Ramesh & Anr. **(2011) 4 SCC 786 : 2011 (5) SCR 1 and** *Ramappa Halappa Pujar & Ors. v. State of Karnataka,* **(2007) 13 SCC 31: 2007 (5) SCR 832 – cited.**

2. The evidence of PW-2 is also corroborated by the fact that a blood-stained *daa* was recovered on the very date of the incident from a jungle by the side of the house of the appellant. This is clear from the evidence of PW-14, the I.O., who had said that after the appellant was interrogated he took him to the jungle by the side of his house and he drew one *daa* from that jungle and the *daa* was blood-stained at that time and he seized a *daa* from him and prepared a seizure list in the presence of the witnesses, which is marked as Ext.6. The medical evidence of PW-10 (the doctor who carried out post mortem) does not also contradict the evidence of PW-2 that the appellant struck the deceased on her head, back, fingers and her throat. PW-10 has stated that there were

sharp cutting injuries on the left side of neck, left cheek, both the upper arms and left thumb and the injures were *ante-mortem* in nature and are 100% sufficient for causing death of the victim and a sharp cutting weapon has been used to cause the injuries. [Para 9] [896-E-H]

3. There is no merit in the submission of the appellant that the Magistrate before whom the statement under Section 164 Cr.P.C. was recorded has not been examined because the conviction of the appellant is based not on the statement of PW-2 recorded under Section 164 Cr.P.C. but on the evidence of PW-2 examined as a witness before the Court at the time of trial. In other words, even if the statement of PW-2 recorded under Section 164 Cr.P.C. is excluded from consideration, the offence is proved against the appellant by the substantive evidence of PW-2 and the evidence of PW-1, PW-8, PW-11 and by the fact of recovery of a *daa* at the instance of the appellant. Similarly, there is no merit in the contentions of the appellant that PW-3, PW-4, PW-5, PW-6, PW-7 and PW-9 do not support the prosecution case and that the FSL Report was not collected from the Forensic Science Laboratory if the guilt of the appellant is established beyond reasonable doubt through the evidence of PW-1, PW-2, PW-8, PW-11 and Ex.6. One cannot also draw any adverse inference from the fact that the granduncle of PW2, was not examined, as he was neither the eyewitness nor the complainant and was in fact not in the same house where the incident occurred as would be clear from the evidence of PW-2. [Para 10] [897-A-E]

4. The High Court is right in sustaining the conviction of the appellant on the basis of the eyewitness account of PW-2 and the evidence of PW-1, PW-8 and PW-11 as well as the recovery of the *daa* under Ext.6 at the instance of the appellant. [Para 11] [897-F]

Case Law Reference:

1994 SCC (Cri) 1418	**distinguished**	**Para 5**
2011 (5) SCR 1	**cited**	**Para 6**
2007 (5) SCR 832	**cited**	**Para 6**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 405 of 2008.

From the Judgment & Order dated 18.7.2006 of the High Court at Calcutta in C.R.A. No. 446 of 2004.

R.K. Gupta, S.K. Gupta, M.K. Singh, Shekhar Kumar for the Appellant.

Chanchal Kr. Ganguli, Abhijit Sengupta, Raja Chatterjee, Sampa Sengupta Ray for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution of India against the judgment dated 18.07.2006 of the High Court of Calcutta in C.R.A. No.446 of 2004 sustaining the conviction and sentence of life imprisonment on the appellant under Section 302 of the Indian Penal Code (for short 'the IPC') imposed by the Fast Track Court, Cooch Behar, in Sessions Case No.142 of 2002 (S.T. No.1(3)2002).

2. The facts very briefly are that one Puspa Nandi lodged a complaint before the Inspector-in-charge, Kotwali P.S., that on 23.02.2002 at about 10.00 a.m. she went to Nayarhat to purchase some ration and there she heard that her daughter-in-law Pratima Nandi had been murdered. She rushed to her house and saw that Pratima was lying dead at the southern side of her house and when she enquired, her grand daughter, Manika, told her that the appellant entered into their house with

a big *daa* and killed her mother Pratima. The complaint was registered as an FIR and the appellant was arrested on 23.02.2002 and the *daa* alleged to have been used in killing the deceased was recovered from a jungle at the side of the house of the appellant. On 25.02.2002, the statement of Manika was recorded by a Magistrate under Section 164 of the Criminal Procedure Code (for short 'the Cr.P.C.'). The p*ost-mortem* was carried out by Dr. V. Kumar and after investigation, charge-sheet was filed against the appellant under Section 302 of the IPC and trial was conducted.

3. Manika, who was aged only eight years at the time of trial, was examined as PW-2 and she gave a vivid account of how her mother Pratima was killed by the appellant with a *daa*. PW-1 (the complainant and the mother-in-law of the deceased), PW-8 (a resident of village Sajerpar in which the house of the deceased is located) and PW-11 (the husband of the deceased) who had heard soon after the incident from PW-2 that the appellant had killed the deceased with a *daa*, also supported the prosecution case. PW-3, PW-4 and PW-5, who were residents of village Sajerpar, however, turned hostile and said that they have not given any statement to the Police on how the deceased was murdered. PW-6, who was alleged to have scribed the FIR, also turned hostile saying that he had written the FIR on instructions from the Police, but he did not know the complainant PW-1. PW-7, who was a resident of village Sajerpar, said that he knew neither the appellant nor the deceased. PW-9, who was also a resident of the village Sajerpar, deposed that she did not know how the deceased was murdered. Dr. V. Kumar, who carried out the *post-mortem*, was examined as PW-10 and he described the injuries on the body of the deceased and opined that the injuries could be caused by a sharp-cutting weapon and the injuries are 100% sufficient for causing death of the victim. PW-12 is the Officer-in-charge of Kotwali P.S. and he received the complaint of PW-1 and entrusted the investigation to S.I. D. Jha. PW-13 is the constable of Kotwali P.S. who took the dead body of the

deceased to Sadar Hospital for *post-mortem*. PW-14 is S.I. D. Jha, the Investigating Officer, and he has said that the appellant took him to the jungle by the side of his house and he brought out one *daa* from the jungle which was blood-stained at that time and he seized a *daa* from him and prepared a seizure list (Ext.6) in the presence of the witnesses. PW-15 is S.I. D. Bhowmick to whom further investigation was entrusted and who after further investigation submitted the charge-sheet. On the basis of the evidence, the trial court convicted the appellant under Section 302, IPC. Thereafter, the trial court heard the appellant on the question of sentence and considering his age and other related factors, sentenced him to rigorous imprisonment for life.

4. The appellant carried an appeal to the High Court, but the High Court was of the view that the evidence of PW-2 as corroborated by the evidence of PW-1, PW-8 and PW-11 together with the fact of recovery of the *daa* (material Ext.1) at the instance of the appellant and its seizure under Ext.6 soon after the incident had established that the appellant was guilty of the offence of murdering the deceased.

5. Learned counsel for the appellant submitted that the conviction of the appellant is based on the sole testimony of a child witness PW-2. Relying on the decision of this Court in *Arbind Singh v. State of Bihar* [1994 SCC (Cri) 1418], he submitted that where the entire case is based on the evidence of a child witness, who is prone to tutoring, the conviction is not safe. He further submitted that the Magistrate before whom the statement under Section 164 of the Cr.P.C. was recorded has not been examined. He also submitted that Anath De, the granduncle of PW-2, who was present in the house, has also not been examined. He argued that PW-3, PW-4, PW-5, PW-6, PW-7 and PW-9 have all turned hostile and not supported the prosecution case. He submitted that PW-1 has also deposed that he wrote the FIR on the direction of the Police. He finally submitted that from the evidence of PW-15, the I.O., who carried out the further investigation, it is clear that the blood-stained *daa* was sent for examination to the Forensic Science Laboratory (FSL) but the FSL report has not been produced before the Court. He submitted that the prosecution has, therefore, not been able to prove that the appellant has committed the murder of the deceased beyond reasonable doubt.

6. Learned counsel for the respondent, on the other hand, submitted that in *State of Madhya Pradesh v. Ramesh & Anr.* [(2011) 4 SCC 786] this Court has held that in case the deposition of a child witness inspires confidence, the Court may rely upon his evidence. He submitted that there is no reason to think that PW-2 was tutored to give her evidence against the appellant. He submitted that in any case, as has been found by the High Court, the evidence of PW-2 is corroborated by the evidence of PW-1, PW-8 and PW-11. He submitted that the *daa*, with which the deceased was killed by the appellant, was also recovered at the instance of the appellant from a jungle by the side of the house of the appellant as per seizure list (Ext.6). He argued that since the prosecution has proved by the evidence of PW-2 as corroborated by the evidence of PW-1, PW-8 and PW-11 and Ext.6 that the appellant had committed the murder of the deceased, he cannot be acquitted only on the ground that some of the prosecution witnesses have turned hostile and have not supported the prosecution case. He argued that the fact that the FSL report was not collected from the FSL may be a defect in the investigation but a defect in investigation cannot result in acquittal of an accused against whom enough evidence is available for conviction. In support of this proposition, he relied on the decision of this Court in *Ramappa Halappa Pujar & Ors. v. State of Karnataka* [(2007) 13 SCC 31].

7. We have perused the decision of this Court in *Arbind Singh v. State of Bihar* (supra) cited by learned counsel for the appellant and we find that in that case the Court took the view

that implicit faith and reliance could not be placed on the evidence of a child witness as there were variations in her statement recorded on 25.10.1984, 28.10.1984 and 05.11.1984 and there were traces of tutoring on certain aspects of the case and it was not corroborated by any independent and reliable evidence. In the present case, on the other hand, we find that PW-2 had answered the first few questions put by the court very smartly and intelligently and the Court has made a mention while recording her evidence that she could become a witness in this case. That apart, she has given a very natural account of how the appellant killed her mother. The relevant portion of the evidence of PW-2 is extracted hereinbelow:

> "On 10th Falgun, Saturday at around 10.00 Hrs. she was killed by a person. Promode Dey killed my mother by striking on her head, back, fingers and throat with a Dao. I know that Promode Dey. He is now standing inside the Court room.
>
> At the time of incident my mother Pratima Nandi was making bidi sitting in the courtyard of our house. I was sitting just beside her. That time Promode Dey came to that place and asked my mother as to why my mother gave him medicine. Promode Dey told my mother "you have tried to kill me by medicine. I shall kill you." By saying so Promode Nandi hit my mother's head with a Dao. My mother thus fled away and entered into our room. Promode Dey broke the said door and entered into that room and again hit my mother with Dao. Then my mother came out of that room and accused Promode Dey followed her and came out of that room and again assaulted her with Dao. Then my mother again ran and thereafter fell on the ground. The accused hit my mother on her throat with Dao and the major portion of her throat was thus out and only a remaining portion of the head was still attached with the neck. I have seen the entire incident. That time, I shouted to call my grand mother but none came at my shouting. In the meantime Promode Dey returned to his house along with Dao.

8. Moreover, soon after the incident on 23.02.2002 she has told her grandmother (PW-1) and her father (PW-11) that it was the appellant who had killed the deceased and both PW-1 and PW-11 have deposed before the Court in their evidence that they have been told by PW-2 that the appellant had killed the deceased with a *daa*. PW-8, who was a resident of the area, has also stated in his evidence that soon after the incident he had heard PW-2 saying that the appellant had killed the deceased. Moreover, two days after the incident on 25.02.2002 she had given a statement before the Magistrate under Section 164, Cr.P.C., that the *Panchayat*, namely, the appellant, had killed the deceased by a *daa*. Thus, right from the time of the incident till the time she was examined in court, PW-2 has consistently said that the appellant had killed the deceased with the *daa*. We cannot, therefore, hold that PW-2 has been tutored to depose against the appellant.

9. The evidence of PW-2 is also corroborated by the fact that a blood-stained *daa* was recovered on the very date of the incident from a jungle by the side of the house of the appellant. This is clear from the evidence of PW-14, the I.O., who had said that after the appellant was interrogated he took him to the jungle by the side of his house and he drew one *daa* from that jungle and the *daa* was blood-stained at that time and he seized a *daa* from him and prepared a seizure list in the presence of the witnesses, which is marked as Ext.6. The medical evidence of PW-10 does not also contradict the evidence of PW-2 that the appellant struck the deceased on her head, back, fingers and her throat. PW-10 has stated that there were sharp cutting injuries on the left side of neck, left cheek, both the upper arms and left thumb and the injures were *ante-mortem* in nature and are 100% sufficient for causing death of the victim and a sharp cutting weapon has been used to cause the injuries.

10. We do not find any merit in the submission of the learned counsel for the appellant that the Magistrate before whom the statement under Section 164 Cr.P.C. was recorded has not been examined because the conviction of the appellant is based not on the statement of PW-2 recorded under Section 164 Cr.P.C. but on the evidence of PW-2 examined as a witness before the Court at the time of trial. In other words, even if the statement of PW-2 recorded under Section 164 Cr.P.C. is excluded from consideration, the offence is proved against the appellant by the substantive evidence of PW-2 and the evidence of PW-1, PW-8, PW-11 and by the fact of recovery of a *daa* at the instance of the appellant. Similarly, we do not find any merit in the contentions of the learned counsel for the appellant that PW-3, PW-4, PW-5, PW-6, PW-7 and PW-9 do not support the prosecution case and that the FSL Report was not collected from the Forensic Science Laboratory if the guilt of the appellant is established beyond reasonable doubt through the evidence of PW-1, PW-2, PW-8, PW-11 and Ex.6. We cannot also draw any adverse inference from the fact that Anath Dey, the granduncle of Manika, was not examined, as he was neither the eyewitness nor the complainant and was in fact not in the same house where the incident occurred as would be clear from the evidence of PW-2.

11. In our considered opinion, the High Court is right in sustaining the conviction of the appellant on the basis of the eyewitness account of PW-2 and the evidence of PW-1, PW-8 and PW-11 as well as the recovery of the *daa* under Ext.6 at the instance of the appellant. The impugned judgment of the High Court is, therefore, sustained and the appeal is dismissed.

B.B.B. Appeal dismissed.

HEINZ INDIA PVT. LTD. & ANR.
v.
STATE OF U.P. & ORS.
(Civil Appeal N0. 1476 of 2006)

MARCH 23, 2012

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

The Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964:

ss. 2(h), 32 and 33 of the Act read with r.133-A of the Rules framed under the Act – Market fee – Levy of – Assessment and adjudicatory machinery – Held: Dealers aggrieved of an order of assessment or an order declining refund of the fee paid by them are entitled to question the correctness of any such demand in terms of s.32 which is in the nature of a revisional power vested in the Board – The power vested in the Board including that u/s 32 of the Act could be exercised by the Director as a delegate of the Board keeping in view the provisions of s.33 of the Act which permits such delegation – Rule 133-A of the Rules regulates the filing and disposal of the revision petitions u/s 32 and is, therefore, a step in the direction of providing a machinery under the Act for adjudication of disputes that may arise between dealers on the one hand and the market committee on the other – That being so, the Act is not completely bereft of a machinery nor can it be said that the observations made in Ram Chandra Kailash Kumar's case have gone unheeded – However, in order to make the Board's revisional power more effective and its exercise more transparent and credible, the Board would do well to delegate the power of hearing and disposal of the revision petitions to a senior and experienced officer who is well-versed in dealing with legal issues concerning assessment and/or determination of the liability under the Act.

s.2(h) – 'Director' – Held: It is manifest from a plain reading of s.2(h) that the expression 'Director' wherever used in the Act including s. 33 thereof includes an officer authorised by the Director to perform all or any of his functions under the Act.

s.17(iii), Explanation – Presumption as regards sale of a product within the market area – Standard of proof to rebut the presumption – Held: The presumption is rebuttable in nature, for it holds good only till the contrary is not proved by the dealer – The evidence intended to rebut the statutory presumption u/s 17 of the Act ought to be clear and convincing, showing that what is presumed under the provision is not the real fact – In the instant case, the Market Committee and the Director have recorded concurrent findings of fact to the effect that the dealers had failed to establish that no sale of the stocks of Ghee had taken place within the Mandi limits – The statutory presumption that any transfer of stocks from within the Mandi area was pursuant to a sale was, thus, held to have remained unrebutted.

Judicial Review:

Mandi Samiti – Market fee – Levy of – Judicial review of – Held: The court in exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of the either – In the instant case, the Mandi Samiti appreciated each piece of evidence and found the same to be insufficient to hold that the sale transactions had, in fact, taken place outside the Mandi area so that the presumption arising u/s 17(iii) of the Act stood rebutted – The Director exercising powers of the Mandi Parishad once again evaluated the evidence and concurred with the view taken by the Mandi Samiti – It is neither feasible for the Court to embark upon an exercise of re-appreciating the entire material nor to substitute its own findings for those recorded by the Mandi Samiti and the Director/Mandi Parishad – So long as the

finding recorded by the Mandi Samiti and the Mandi Parishad are not irrational or perverse, and so long as the view taken by them is a reasonably possible view, the Court would not interfere.

The predecessor-in-interest of appellant no. 1 in C.A. No. 1476 of 2006 manufactured certain products generically called milkfoods/weaning foods and energy beverages. The manufacturing process also produced 'ghee' as a by-product of the said items. With effect from 1.10.1994, the unit was taken over by appellant no. 1 and it continued to manufacture the said items including 'ghee'. After February 1995, the Mandi Samiti constituted under the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (the Act), started issuing gate passes only on payment of Mandi fee. However, the dealers could make a claim for refund of the amount paid by them on furnishing proof of the fact that the goods had moved out of the Mandi area without being subjected to a transaction of sale. The appellants made claims for the refund of the amount paid by them towards Mandi fee and furnished to the Mandi Samiti the material in support of their claim. The Mandi Samiti rejected the claim holding that the material produced by the appellants was not sufficient to rebut the statutory presumption that the removal of goods from the Mandi limits was pursuant to a sale effected within such limits. The revision petitions filed by the dealers were dismissed by the Director, Mandi Parishad; and the writ petitions challenging the orders of the Director were dismissed by the High Court.

In the instant appeals filed by the dealers, the question for consideration before the Court were: (i) "Whether the Krishi Utpadan Mandi Adhiniyam does not contain the necessary machinery provisions for assessment of the fees and for adjudication of disputes in relation thereto? If so to what effect?" (ii) "What precisely is the correct legal standard/test for determining

whether or not the presumption arising under the Explanation to Section 17(iii) of the Act has been rebutted"? and (iii) "Whether the orders passed by the Mandi Samiti and those passed by the Director, as delegate of the Mandi Parishad, suffer from any legal infirmity to call for interference?"

Dismissing the appeals as also the writ petition, the Court

HELD: 1.1. This Court in the case of *Ram Chandra Kailash Kumar & Co.** **specifically rejected the contention that in the absence of any machinery under the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 and the Rules no market fee could be levied or collected. [para 18-19] [922-E]**

Ram Chandra Kailash Kumar & Co. & Ors. v. State of U.P. & Anr.* **1980 SCR 104 =1980 (Supp) SCC 27; *Kunnathat Thathunni Moopil Nair etc., v. State of Kerala and Anr*. **1961 SCR 77 = AIR 1961 SC 552;** *Rai Ramkrishna and Ors. etc. v. State of Bihar* **1964 SCR 897 = AIR 1963 SC 1667;** *Raja Jagannath Baksh Singh v. State of Uttar Pradesh and Anr.* **1963 SCR 220 = AIR 1962 SC 1563;** *The State of Andhra Pradesh and Anr. v. Nalla Raja Reddy and Ors.* **1967 SCR 28 = AIR 1967 SC 1458;** *M/s Vishnu Dayal Mahendra Pal and Ors. v. State of Uttar Pradesh and Ors.* **1975 (1) SCR 376 = (1974) 2 SCC 306, and** *D.G. Gose and Co. (Agents) Pvt. Ltd. v. State of Kerala and Anr.* **1980 (1) SCR 804 = (1980) 2 SCC 410 – referred to.**

1.2. Section 32 of the Act empowers the Board to call for and examine the proceedings of the Committee for the purpose of satisfying itself as to the legality or propriety of any decision or order passed by a Committee and to pass such orders thereon as it may deem fit including an order modifying, annulling or reversing any such decision or order of the Committee. Dealers aggrieved of an order

of assessment or an order declining refund of the fee paid by them are entitled to question the correctness of any such demand in terms of the said provision which is in the nature of a revisional power vested in the Board. It is common ground that the dealers in the instant case had invoked the said power of the Board u/s 32. It is also common ground that the revisions so filed have been entertained and dealt with on merits. It has not been disputed that the power vested in the Board including that u/s 32 of the Act could be exercised by the Director as a delegate of the Board keeping in view the provisions of s.33 of the Act which permits such delegation.[para 21] [923-H; 924-A-C]

1.3. It is manifest from a plain reading of s.2(h) that the expression 'Director' wherever used in the Act including s. 33 thereof includes an officer authorised by the Director to perform all or any of his functions under the Act. Significantly enough, neither before the High Court nor before this Court was it contended that the officer who had handled and disposed of the revision petitions filed by the dealers, was not duly authorised in terms of s.2(h) or that the power of the Board u/s 32 of the Act was not duly delegated to the Director. It is not, therefore, a case of inherent lack of jurisdiction. [para 24] [825-C-D]

1.4. It is true that the stakes involved are substantial and those called upon to satisfy the demands raised against them would like their cases to be heard by a senior officer or a Committee of officers to be nominated by the Board. But in the absence of any data as to the number of cases that arise for consideration involving a challenge to the demands raised by the Market Committee and the nature of the disputes that generally fall for determination in such cases, it will not be possible for this Court to step in and direct an alteration in the mechanism that is currently in place. The power to

decide the revisions vests with the Board, which also enjoys the power to delegate that function to the Director. So long as there is statutory sanction for the Director to exercise the revisional power vested in the Board, it cannot be said that such a delegation is either impermissible or does not serve the purpose of providing a suitable machinery for adjudication of the disputes. [para 24] [925-E-H]

1.5. It is noteworthy that r.133-A of the Rules framed under the Act regulates the filing and disposal of the revision petitions u/s 32 thereof. This provision has been inserted with effect from 11.5.2008 and empowers the Board either to decide the revision petition itself or to nominate an officer for doing so. It also provides for grant of an opportunity of being heard to the person concerned and a time bound disposal of the revision. Rule 133-A is, therefore, a step in the direction of providing a machinery under the Act for adjudication of disputes that may arise between dealers on the one hand and the market committee on the other. That being so, the Act is not completely bereft of a machinery nor can it be said that the observations made by this Court in *Ram Chandra Kailash Kumar's* **case have gone unheeded. [para 24] [926-A-C]**

1.6. However, in order to make the Board's revisional power more effective and its exercise more transparent and credible, the Board would do well to delegate the power of hearing and disposal of the revision petitions to a senior and experienced officer who is well-versed in dealing with legal issues concerning assessment and/or determination of the liability under the Act. [para 24] [926-D-E]

2.1. Explanation to s.17(iii) of the Act raises a presumption to the effect that any specified agricultural produce taken out of or proposed to be taken out of a

market area by or on behalf of a licensed trader has been sold within such area; the price of the produce so presumed to be sold is then determinable in the manner prescribed. It is fairly evident that the presumption is rebuttable in nature; for it holds good only till the contrary is not proved by the dealer. [para 25-26] [926-F-G; 937-B]

Sodhi Transport Co. & Ors. v. State of U.P. & Ors. **1986 (1) SCR 939 = (1986) 2 SCC 486;** *Izhar Ahmad Khan v. Union of India and Ors*. **1962 Suppl. SCR 235 =AIR 1962 SC 1052;** *Harbhajan Singh v. State of Punjab & Anr.* **1965 SCR 235 =AIR 1966 SC 97 – referred to.**

Miller v. Minister of Pensions **[1947] 2 All ER 372;** *Bater v. Bater* **[1950] 2 All ER 458;** *Hornal v. Neuberger Products Ltd.* **[1957] 1 Q.B. 247;** *Addington v. Texas,* **441 U.S. 418, 423 (1979);** *R. v. Clark* **(1921 61 SCR 608);** *Sodeman v. R* **[1936] 2 All ER 1138 – referred to.**

Black's Law Dictionary 5th Edition, 1979*; and 32A Corpus Juris Secundum Evidence § 1624* – referred to.

2.2. It is well-settled that a decision is an authority for the point it decides. It is equally well-settled that the text of the decision cannot be read as if it were a statute. That apart, the expression used by this Court in *Sodhi Transport Co.* is "evidence fairly and reasonably tending to show", which signifies that it is not just any evidence, howsoever shaky and nebulous that would satisfy the test of preponderance of probability to rebut the statutory presumption, but evidence that can by proper and judicial application of mind be said to be fairly and reasonably showing that the real fact is not as presumed. The evidence required to rebut a statutory presumption ought to be clear and convincing, no matter the degree of proof may not be as high as proving the fact to the contrary beyond a reasonable doubt. [para 39] [935-A-C]

2.3. The heightened standard of proof required to

rebut a presumption raised under the statute at hand is applicable for two distinct reasons: The first and foremost is that the presumption is raised in relation to a fiscal statute. While the amount payable is not a tax it is nevertheless a statutory levy which is attracted the moment the transaction of sale takes place within the market area. Goods, admittedly produced within the market area and not consumed within such area are presumed to be leaving pursuant to a transaction of sale unless the contrary is proved. That the goods are produced within the market area is not in dispute in the instant case. That they left the market area is also admitted. In the ordinary course, therefore, the presumption would be that the goods left pursuant to a sale unless the appellants are in a position to prove the contrary. The second reason is that the nature of transaction pursuant to which the goods are removed from the market area is within the exclusive knowledge of the appellants or the persons to whom such goods are being dispatched. The circumstances in which the transactions, which the statute presumes to be sales, but which the appellants claim are simple transfer of stocks are within the exclusive knowledge of the appellants. The entire evidence relevant to the transactions, being available only with the appellants and the true nature of the transactions being within their special knowledge, there is no reason why the rebuttal evidence should not satisfy the higher standard of proof and clearly and convincingly establish that the fact presumed is not the actual fact. The evidence intended to rebut the statutory presumption u/s 17 of the Act ought to be clear and convincing evidence showing that what is presumed under the provision is not the real fact. [para 39-40] [935-D-H; 936-A-C]

2.4. The Market Committee and the Director have recorded concurrent findings of fact to the effect that the

dealers had failed to establish that no sale of the stocks of *Ghee* had taken place within the Mandi limits. The statutory presumption that any transfer of stocks from within the Mandi area, was pursuant to a sale was thus held to have remained unrebutted. [para 41] [936-D-E]

3.1. The power of judicial review is neither unqualified nor unlimited. It has its own limitations. That the court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of either, and that the court does not supplant 'the feel of the expert' by its own review, is also fairly well-settled by the decisions of this Court. In all such cases judicial examination is confined to finding out whether the findings of fact have a reasonable basis on evidence and whether such findings are consistent with the laws of the land. [para 42 and 46] [936-F; 939-H; 940-A-B]

Council of Civil Service Unions (CCSU) v. Minister for the Civil Service **[1984] 3 All ER 935;** *Tata Cellular v. Union of India* **1994 (2) Suppl. SCR 122 = (1994) 6 SCC 651;** *State of Punjab v. Gurdial Singh* **1980 (1) SCR 1071 = (1980) 2 SCC 471;** *Union of India v. S.B. Vohra*, **2004 (1) SCR 36 = (2004) 2 SCC 150,** *Shri Sitaram Sugar Co. Ltd. v. Union of India*, **1990 (1) SCR 909 = (1990) 3 SCC 223, and** *Thansingh Nathmal and Ors. v. Supdt. of Taxes and Ors., Dhubri,* **1964 SCR 654 = AIR 1964 SC 1419 ;** *Dharangadhra Chemical Works Ltd. v. State of Saurashtra and Ors*., **1957 SCR 152 = AIR 1957 SC 264 – relied on**

Chief Constable of North Wales Police v. Evans **[1982] 3 All ER 141;** *Trop v. Dulles* **356 U.S. 86 (1958*); and*** *Reid v. Secretary of State for Scotland* **[1999] 1 All ER 481 – referred to.**

3.2. The Mandi Samiti has upon examination of the evidence adduced before it recorded a finding that the

same did not inspire confidence for a variety of reasons. The Samiti has found that the appellants had failed to produce any evidence as to when and where any transaction regarding sale and purchase of *ghee* manufactured within Mandi area was finalised. No evidence was adduced by the appellants to show as to who had been instrumental in finalising such sale transactions out of its officers and employees. The Samiti was of the view that although the appellant had claimed that there were separate C&F agreements with various agents appointed by it at several destinations outside the mandi area the appellant had produced only two of such agreements in support of its case that such C&F agents existed at all such destinations. The Samiti found information furnished by the appellant incomplete and discrepant in regard to the sales. The Samiti took the view that the so called C&F agents were the actual purchasers of *ghee* from the company and the C&F agreements, two of which were placed on record, were only meant to avoid payment of market fee. Suffice it to say that the Mandi Samiti appreciated each piece of evidence and found the same to be insufficient to hold that the sale transactions had, in fact, taken place outside the mandi area so that the presumption arising u/s 17(iii) of the Act stood rebutted. The Director exercising powers of the Mandi Parishad has in its order dated 25.9.2004 once again evaluated the evidence and concurred with the view taken by the Mandi Samiti. The orders passed by the Mandi Samiti and the Director clearly show that there was no clear and convincing evidence to establish that the presumption arising u/s 17(iii) of the Act stood rebutted and that the actual was not, what was presumed under the said provision. [para 50-52, 55 and 56] [941-E-H; 942-A-E; 943-E; 944-F-G]

3.4. In the light of the legal position, it is neither feasible for this Court to embark upon an exercise of re-

appreciating the entire material nor to substitute its own findings for those recorded by the Mandi Samiti and the Director/Mandi Parishad. So long as the findings recorded by the Mandi Samiti and the Mandi Parishad are not irrational or perverse, and so long as the view taken by them is a reasonably possible view, this Court would not interfere. [para 57] [944-H; 945-A]

4. No remand ought to be made only to enable a party to produce additional material. A remand is neither mechanical nor a routine affair. If there is nothing wrong in the orders under challenge, there is no question of interference with the same. [para 61] [946-D]

Krishi Utpadan Mandi Samiti & Ors. v. Shree Mahalaxmi Sugar Works & Ors. **(1995) Supp (3) SCC 433 – cited.**

Case Law Reference:

(1995) Supp (3) SCC 433	cited	para 3
1961 SCR 77	referred to	para 12
1964 SCR 897	referred to	para 13
1963 SCR 220	referred to	para 14
1967 SCR 28	referred to	para 15
1975 (1) SCR 376	referred to	para 17
1980 (1) SCR 804	referred to	para 17
1980 SCR 104	referred to	para 18
1986 (1) SCR 939	referred to	para 27
[1947] 2 All ER 372	referred to	para 31
[1950] 2 All ER 458	referred to	para 32
[1957] 1 Q.B. 247	referred to	para 33
441 U.S. 418, 423 (1979)	referred to	Para 34

1962 Suppl. SCR 235	**referred to**	**para 35**
1965 SCR 235	**referred to**	**para 37**
(1921 61 SCR 608)	**referred to**	**para 37**
[1936] 2 All ER 1138	**referred to**	**para 37**
[1984] 3 All ER 935	**referred to**	**para 42**
1994 (2) Suppl. SCR 122	**referred to**	**para 43**
1980 (1) SCR 1071	**referred to**	**para 44**
[1982] 3 All ER 141	**referred to**	**para 45**
356 U.S. 86 (1958*)*	**referred to**	**para 45**
2004 (1) SCR 36	**referred to**	**para 46**
1990 (1) SCR 909	**referred to**	**para 46**
1964 SCR 654	**referred to**	**para 46**
1957 SCR 152	**referred to**	**para 47**
[1999] 1 All ER 481	**referred to**	**para 48**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1476 of 2009.

From the Judgment & Order dated 20.08.2004 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Civil Misc. Writ Petition No. 2323 (M/S), 2321 (M/S), 2322 (M/S), 2324 (M/S), 2325 (M/S), 2326 (M/S), 2474 (M/S), 2475 (M/S), 2476 (M/S), 2477 (M/S), 2478 (M/S) of 1997.

WITH

W.P. (C) No. 144 of 2005, C.A. Nos. 1477 & 1478 of 2006.

Sudhir Chandra, Rakesh Dwivedi, Gaurav Goel, Abhinav Agarwal, Mahesh Agarwal, E.C. Agrawala, U.A. Rana, Mrinal Mazumdar, Awigin M. George (for Gagrat & Co.), Daleep Kr. Dhyani, Suraj Singh, Pradeep Misra, Kamlendra Mishra, Manoj Swarup, Ashok Anand, Anil Kapur, Ajay Kumar for the appearing parties.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These appeals by special leave arise out of an order dated 20th August, 2004, passed by the High Court of Judicature at Allahabad whereby a batch of writ petitions challenging an order passed by the Director, Rajya Krishi Utpadan Mandi Parishad, Lucknow, dated 3rd July, 1997, under Section 32 of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (hereinafter called 'the Act'), have been dismissed. The order passed by the Director, Rajya Krishi Utpadan Mandi Parishad pertained to 19 revision petitions of which 8 petitions were filed by Glaxo India Ltd. relevant to the period 1st November, 1990 to 30th September, 1994 while the remaining 11 petitions pertained to Heinz India Pvt. Ltd. relevant to the period between 1st October, 1994 and 31st May, 1996. During the pendency of the Special Leave Petitions, Writ Petition (C) No.144/2005 was filed under Article 32 of the Constitution of India, *inter alia*, praying for a writ of certiorari, quashing order dated 25th September, 2004 passed by the Deputy Director (Administration) Krishi Utpadan Mandi Parishad, Gomti Nagar, Lucknow in another batch of revision petitions (pertaining to the period between 3rd June, 1996 and 30th April, 2004) and an assessment order dated 7th July, 1998 passed by the Krishi Utpadan Mandi Samiti, Aligarh. A declaration to the effect that the goods removed from the petitioner's unit at Aligarh to places outside the State of Uttar Pradesh were by way of stock transfer and no Mandi Fee was payable on such transfers has also been prayed for. The facts giving rise to the appeals and the writ petition may be summarised as under:

2. Glaxo India Ltd., set up an industrial unit at Aligarh for the manufacture of what is sold in the market under the brand names Glacto, Complan, Farex, Glucon D and other products

generically called milk foods/weaning foods and energy beverages. It is not in dispute that the manufacturing process undertaken in the said unit produced *ghee* as a by-product of the said items. It is also not in dispute that with effect from 1st October, 1994, the Family Products Division of Glaxo India Ltd. was taken over by Heinz India Pvt. Ltd. who continued manufacturing the products mentioned above including *ghee* as a by-product of its manufacturing activity.

3. In terms of Section 17(iii) of the Act, sale of specified agricultural produce within the Mandi limits attracts levy of what is described as Mandi Fee from the person effecting the sale. The Mandi Samiti accordingly started demanding the said fee from Glaxo India Ltd., upto the year 1994 and from Heinz India Ltd., from 1994 onwards *qua* sales effected by the said two companies of its products including *ghee.* These demands were resisted by both the companies primarily on the ground that bulk of the *ghee* produced in their unit at Aligarh, if not the entire quantity, was sent out of the Mandi limits on stock transfer basis and that there was no sale involved in such transfers so as to attract the levy of the Mandi Fee on the same. Even so, the companies appear to have continued removing their goods from the Mandi limits in accordance with the procedure in vogue at the relevant time. In *Krishi Utpadan Mandi Samiti & Ors. v. Shree Mahalaxmi Sugar Works & Ors.* (1995) Supp (3) SCC 433, decided on 2nd February, 1995, this Court noticed the Explanation to Section 17(iii) of the Act and observed that there was a presumption against the dealers. This Court held that in view of the said presumption it is open to the Mandi Samiti to raise demands against the dealers before the issue of passes. If there is a valid rebuttal to the presumption and it is shown that no sale took place within the notified market area the dealers will be entitled to the passes, otherwise not. This Court further held that even if the dealers are compelled to pay the market fee as demanded it shall be open to them to challenge the same in the manner provided under the Act. This implied that if the claim of the dealers that the goods were not being

removed pursuant to any sale transaction was rejected and a demand for payment of Mandi Fee raised, the aggrieved dealer could question that demand in appropriate proceedings.

4. It is evident from a reading of the order passed by the Mandi Parishad that the earlier procedure of issuing free gate passes remained in vogue upto February, 1995, whereafter the Mandi Samiti started issuing gate passes only on payment of the Mandi Fee demanded by it. This change came about as a result of the aforementioned decision of this Court in *Shree Mahalaxmi Sugar Works* (supra). Subsequently, in *Krishi Utpadan Mandi Samiti v. M/s Saraswati Cane Crusher & Ors.* (Civil Appeal Nos. 1769-1773 of 1998), decided on 25th March, 1998 this Court prescribed the procedure to be followed in the matter of issue of gate passes, making of provisional assessment and the time frame for making a final assessment.

> "We are satisfied that the orders of this Court afore-referred to would need some repair work. We treat the said order to be conceiving of a provisional assessment where after doors are opened for a final assessment. We conceive that when demands are raised by the Krishi Utpadan Mandi Samiti against a trader before he could ask for transit of goods outside the market area, the trader would be entitled to tender a valid rebuttal to say that no sale had taken place within the notified area and that if the explanation is accepted there and then by the Mandi Samiti, no question of payment would arise as also of withholding the gate passes. If prima facie evidence led by the trader is not accepted by the Mandi Samiti, the trader or the dealer can be compelled to pay the market fee as demanded before issuance of gate pass. If the trader makes the payment without demur, the matter ends and the assessment finalized. But in case he does so and raises protest, then the assessment shall be taken to be provisional in nature making it obligatory on the trader to pay the fee before obtaining the requisite gate pass. After

protest has been lodged and the provisional assessment has been made, a time frame would be needed to devise making the final assessment. We, therefore, conceive that it innately be read in the order of this Court that a final assessment has to be made within a period of two months after provisional assessment so that the entire transaction in that respect is over enabling the aggrieved party, if any, to challenge the final assessment in the manner provided under the afore Act or under the general law of the land in appropriate fora. Having added this concept in this manner in the two Judge Bench decision of this Court, we declare that what repair has been done instantly would add to the order of the High Court and the instant corrective decision shall be the governing rule. The Civil Appeals would thus stand disposed of.

Since the assessment thus far made against the traders, who are involved in the instant appeals, would have to be treated as provisional awaiting final assessment, we permit the concerned traders to move the respective Mandi Samiti within two months from today to hear their objections and proceedings onwards be regulated in accordance with procedure devised hereinbefore. Nonetheless we add that should the basis of provisional assessment be knocked off, the Samiti would refund the market fee to the traders/ dealers within two months thereafter."

5. Suffice it to say that according to the above decision the dealers could make a claim for the refund of the amount paid by them on furnishing of proof of the fact that the goods had moved out of the mandi area without being subjected to a transaction of sale.

6. What is important for the present is that Heinz made claims for the refund of the amount paid by it towards market fee and furnished to the Mandi Samiti material to support that claim. The material so produced was then evaluated by the Mandi Samiti who came to the conclusion that the same was

not sufficient to rebut the statutory presumption that the removal of goods from the Mandi limits was pursuant to a sale effected within such limits. The claim for refund of the amount paid by the appellant-Heinz was accordingly rejected by the Mandi Samiti in terms of the orders referred to earlier.

7. Aggrieved by the order passed by the Mandi Samiti both Glaxo India Ltd. and Heinz India Pvt. Ltd. filed revision petitions before the Director, Mandi Parishad, invoking his jurisdiction under Section 32 read with Section 33 of the Act as a delegate of the Mandi Parishad. By his order dated 24th October, 1996, the Director dismissed the revision petitions, aggrieved whereof the companies filed Writ Petitions before the High Court of Allahabad. These Writ Petitions were eventually allowed by the High Court in terms of an order dated 3rd April, 1997, and the matter remitted back to the Director for a fresh consideration and disposal in accordance with law.

8. The Director accordingly heard the revision petition afresh, re-appraised the material relied upon by the companies in support of their claim for refund and came to the conclusion that the claim of the companies for refund remained unsubstantiated and the presumption arising under the Explanation to Section 17(iii) un-rebutted. The Director observed:

"17.....

(3) Neither the evidences produced by Revisionist company with the details of information of sale has been given to C & F Agent with dates on the basis of which C & F Agent would deliver the goods to the buyer after receipt of payment nor any instance has been produced for giving required instructions to C & F Agent regarding the sale of goods and nor even any evidence has been produced. In this way, the evidence produced regarding the actual mode of sale at the place of destination as to how and by whom it is being done, are contradictory or

are missing. Mandi Samiti gave time to revisionist for clarifying and proving this sale process but, the revisionist has not been able to produce clear case and desired evidence on this subject till date.

(4) When the chain related to the sale at the place of destination in accordance with aforesaid through stock transfer breaks then while keeping in view the declaration given under Excise Rule 52(A)/173C, two possibilities appear. First is that the sale agreement for deal at the place of destination and according to marketing system given in letter dated 4.1.95 it may be, that the Revisionist company by itself or through its marketing staff who might be visiting the place of destination give the delivery of goods to C & F Agent by fixing before the arrival of goods at the place of destination after receiving amount of money in the form of bank draft and pay order which resulted in the sale having taken place from the factory at Aligarh office because the direct contact of buyer with revisionist took place at Aligarh or it took place through the employees/officers of revisionist's marketing department at Aligarh and they were given the delivery on that basis only.

xxx xxx xxx

xxx xxx xxx

19. In this way by the analysis and close consideration of said paras 16, 17 and 18 it is concluded that under the arrangement given by Hon'ble Supreme Court in 1995 (Supp.3) S.C.C. 433 the sale taking place in the matter of M/s Mahalaxmi Sugar Works, Revisionist's disputed transmitted and its sale taking place at the place of destination by taking stock outside the mandi area in the form of stock transfer and the concept of taking out the sale under explanation of 17(3)(B), it has failed to prove by producing counter valid rebuttal of concept because according to the case went for revision on stock transfer and place of destination it has failed to tell the presence by producing the best chain of evidence for proving...."

9. Writ Petition Nos. 2320(M/S), 2516(M/S), 2517(M/S), 2518(M/S), 2519(M/S), 250(M/S), 226(M/S) and 2527(M/S) of 1997 filed by Glaxo India Ltd., before the High Court of Allahabad challenged the correctness of the above order. Heinz India Pvt. Ltd. also filed Writ Petition Nos. 2323(M/S), 2321(M/S), 2322(M/S), 2324(M/S), 2325(M/S), 2326(M/S), 2474(M/S), 2475(M/S), 2476(M/S), 2477(M/S) and 2478(M/S) of 1997 before the High Court challenging the same order. The High Court, however, concurred with the view taken by the Mandi Samiti and the Director of the Parishad and dismissed the writ petitions by its order dated 20th August, 2004. The High Court held that the material produced by the companies did not make out a case for refund for it did not rebut the presumption that *ghee* produced in the company's unit at Aligarh was not sold from Aligarh or that the stocks of *ghee* had been transferred outside the Mandi limit on consignment basis. The High Court gave several reasons for holding that the material produced by the companies in support of their claim that the so called sales were in fact stock transfer was either not reliable or was deficient. High Court also held that the companies had withheld the best evidence available to them without offering any explanation for doing so. The High Court said:

> "The long and short of the discussions made above is that the petitioners have miserably failed to rebut the presumption of sale in the market area at Aligarh and therefore, the Director and the assessing authorities rightly levied the Mandi fee on the consignments of Ghee transported by Glaxo and its successor Heinz India Private Limited to other States. The judgments passed by the Revisional Authority are not perverse so as to be interfered with by this Court; rather all the questioned judgments are

well discussed and reasoned. In the result, the petitioners are not entitled to claim any relief."

10. The present appeals assail the above order as already mentioned.

11. We have heard the learned counsels of the parties at considerable length. Three questions fall for our determination. These are:

1. Whether the Krishi Utpadan Mandi Adhiniyam does not contain the necessary machinery provisions for assessment of the fees and for adjudication of disputes in relation thereto? If so to what effect?

2. What precisely is the correct legal standard/test for determining whether or not the presumption arising under the Explanation to Section 17(iii) of the Act has been rebutted?

And

3. Whether the orders passed by the Mandi Utpadan Samiti and that passed by the Director, as delegate of the Mandi Parishad, suffer from any legal infirmity to call for interference?

Re: Question No.1

12. This Court has in a long line of decisions rendered from time to time, emphasised the importance of machinery provisions for assessment of taxes and fees recoverable under a taxing statute. In one of the earlier decisions on the subject a Constitution Bench of this Court in *Kunnathat Thathunni Moopil Nair etc., v. State of Kerala and Anr.* (AIR 1961 SC 552) examined the constitutional validity of the Travancore-Cochin Land Tax Act (15 of 1955). While recognising what is now well-settled principle of law that taxing statute is not wholly immune from attack on the ground that it infringes the equality

clause in Article 14, this Court found that the enactment in question was violative of Article 14 of the Constitution for inequality was writ large on the Act and inherent in the very provisions under the taxing section thereof. Having said so, this Court also noticed that the Act was silent as to the machinery and the procedure to be followed in making the assessment. It was left to the Executive to evolve the requisite machinery and procedure thereby making the whole thing from beginning to end purely administrative in character completely ignoring the legal position that the assessment of a tax on person or property is a quasi-judicial exercise. Speaking for the majority Sinha, C.J. said:

> *"Ordinarily, a taxing statute lays down a regular machinery for making assessment of the tax proposed to be imposed by the statute. It lays down detailed procedure as to notice to the proposed assessee to make a return in respect of property proposed to be taxed, prescribes the authority and the procedure for hearing any objections to the liability for taxation or as to the extent of the tax proposed to be levied, and finally, as to the right to challenge the regularity of assessment made, by recourse to proceedings in a higher Civil Court. The Act merely declares the competence of the Government to make a provisional assessment, and by virtue of s. 3 of the Madras Revenue Recovery Act, 1864, the land-holders may be liable to pay the tax. The Act being silent as to the machinery and procedure to be followed in making the assessment leaves it to the Executive to evolve the requisite machinery and procedure. The whole thing, from beginning to end, is treated as of a purely administrative character, completely ignoring the legal position that the assessment of a tax on person or property is at least of a quasi-judicial character.*"
>
> (emphasis supplied)

13. In *Rai Ramkrishna and Ors. etc. v. State of Bihar* (AIR 1963 SC 1667) this Court was examining the constitutional validity of the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961. Reiterating the view taken in *Kunnathat Thathunni Moopil Nair* (supra) this Court held that a statute is not beyond the pale of limitations prescribed by Articles 14 and 19 of the Constitution and that the test of reasonableness prescribed by Article 304(b) is justiciable. However, in cases where the statute was completely discriminatory or provides no procedural machinery for assessment and levy of tax or where it was confiscatory, the Court would be justified in striking it down as unconstitutional. In such cases the character of the material provisions of the impugned statute may be such as may justify the Court taking the view that in substance the taxing statue is a cloak adopted by the legislature for achieving its confiscatory purpose.

14. In *Raja Jagannath Baksh Singh v. State of Uttar Pradesh and Anr.* (AIR 1962 SC 1563) this Court was examining the constitutional validity of U.P. Large Land Holdings Tax Act (31 of 1957). Dealing with the argument that the Act did not make a specific provision about the machinery for assessment or recovery of tax, this Court held:

> *"….if a taxing statute makes no specific provision about the machinery to recover tax and the procedure to make the assessment of the tax and leaves it entirely to the executive to devise such machinery as it thinks fit and to prescribe such procedure as appears to it to be fair, an occasion may arise for the Courts to consider whether the failure to provide for a machinery and to prescribe a procedure does not tend to make the imposition of the tax an unreasonable restriction within the meaning of Article 19(5). An imposition of tax which in the absence of a prescribed machinery and the prescribed procedure would partake of the character of a purely administrative affair can, in a proper sense, be challenge as contravening Article 19(1)(f).'"* (emphasis supplied)

15. In *The State of Andhra Pradesh and Anr. v. Nalla Raja Reddy and Ors.* (AIR 1967 SC 1458), this Court was examining the constitutional validity of Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision Act (22 of 1962) as amended by Amendment Act (23 of 1962). Noticing the absence of machinery provisions in the impugned enactments this Court observed:

> *"…if S.6 is put aside, there is absolutely no provision in the Act prescribing the mode of assessment. Section 3 and 4 are charging sections and they say in effect that a person will have to pay an additional assessment per acre in respect of both dry and wet lands. They do not lay down how the assessment should be levied. No notice has been prescribed; no opportunity is given to the person to question the assessment on his land. There is no procedure for him to agitate the correctness of the classification made by placing his land in a particular class with reference to ayacut, acreage or even taram. The Act does not even nominate the appropriate officer to make the assessment to deal with questions arising in respect of assessments and does not prescribe the procedure for assessment. The whole thing is left in a nebulous form. Briefly stated, under the Act there is no procedure for assessment and however grievous the blunder made there is no way for the aggrieved party to get it corrected. This is a typical case where a taxing statute does not provide any machinery of assessment."*
>
> (emphasis supplied)

16. The appeals filed by the State against the judgment of the High Court striking down the enactment were on the above basis dismissed.

17. Reference may also be made to *M/s Vishnu Dayal Mahendra Pal and Ors. v. State of Uttar Pradesh and Ors.* (1974) 2 SCC 306, and *D.G. Gose and Co. (Agents) Pvt. Ltd.*

v. State of Kerala and Anr. (1980) 2 SCC 410, where this Court held that sufficient guidance were available from the preamble and other provisions of the Act. The members of the committee owe a duty to be conversant with the same and discharge their functions in accordance with the provisions of the Act and the Rules and that in cases where the machinery for determining annual value has been provided in the Act and the Rules of the local authority, there is no reason or necessity of providing same or similar provisions in the other Act or Rules.

18. There is no gainsaying that a total absence of machinery provisions for assessment/recovery of the tax levied under an enactment, which has the effect of making the entire process of assessment and recovery of tax and adjudication of disputes relating thereto administrative in character, is open to challenge before a Writ Court in appropriate proceedings. Whether or not the enactment levying the tax makes a machinery provision either by itself or in terms of the Rules that may be framed under it is, however, a matter that would have to be examined in each case. In our opinion, it is not necessary to dilate any further on this aspect in the context of the provisions of Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 having regard to the fact that the question whether the said Act provides a suitable machinery for assessment and recovery of the fee has been examined by this Court in *Ram Chandra Kailash Kumar & Co. & Ors. v. State of U.P. & Anr.* 1980 (Supp) SCC 27. That decision arose out of a writ petition filed before the High Court of Allahabad challenging the constitutional validity of the Adhiniyam. The High Court had dismissed the challenge to the constitutional validity of the enactment which order was then assailed before this Court in an appeal by special leave. This Court formulated as many as 24 distinct points for determination based on the grounds that were urged in support of the challenge. One of the points that fell for consideration was whether the rules framed under the Act provide for any machinery for adjudication of disputes in addition to the factum and quantum of liability arising as under the Act. The contention

precisely was that neither the Act nor the rules made any provision for adjudication of disputes that would arise on both these aspects. While rejecting the submission on behalf of the Marketing Committee that no such disputes actually exist or are likely to exist which would require any machinery of the Market Committee for adjudication, this Court observed:

> "xxxxxxx A machinery for adjudication of dispute is necessary to be provided under the rules for proper functioning of the market committees. We have already observed and expressed our hope for bringing into existence such machinery in one form or the other. But it is not correct to say that in absence of such a machinery no market fee can be levied or collected. If a dispute arises then in the first instance the market committee itself or any sub-committee appointed by it can give its finding which will be subjected to challenge in any Court of law when steps are taken for enforcement of the provisions for realisation of the market fee."

19. It is evident from the above that this Court had specifically rejected the contention that in the absence of any machinery under the Act and the Rules no market fee could be levied or collected. That being so, it not necessary for us to either re-examine that aspect or to take a contrary view contrary at this stage.

20. Mr. Sudhir Chandra, learned senior counsel appearing for the appellant-company, however, contended that the hope expressed by this Court that a comprehensive machinery provision shall be made for adjudication of disputes has been belied by the inaction of the respondents for over 30 years which calls for suitable directions and/or guidelines to the State as also to the authorities under the Act to make necessary machinery provisions especially when serious disputes involving substantial sums of money towards market fee are arising for adjudication without there being a semblance of an adjudicatory mechanism or judicial approach in the matter of

adjudication of such disputes. Elaborating his submissions Mr. Chandra contended that while the Market Committee examines the question of refund of the fee paid by the seller of any produce, any dispute touching the correctness of any such adjudication or assessment by the committee is examinable by the Board in terms of Section 32 of the Act. Since the Board is a multi-member body any exercise in the nature of review or revision of the order passed by the Committee on the claim for refund cannot be undertaken by the Board itself, the practice that is followed is that such revisions are heard and decided by the Director to whom the revisional powers of the Board are delegated in terms of Section 33 of the Act. What according to Mr. Chandra is surprising is that even the Director does not hear the matters himself. The actual disposal of the revision is left to a junior officer to whom the Director may assign the case for disposal. Hearing by any such junior officer who is neither by training nor by qualification suited for such determination of complicated issues regarding the liability of the purchaser or seller of goods within a market area makes the entire process of determination farcical. A machinery for adjudication of disputes can be said to have been provided for only if the same ensures a fair and objective adjudication of the matters in disputes at the hands of the authority who is either by reasons of his training, experience or qualification fit to determine the controversy. So long as such a provision is absent in the scheme of the Act, the requirement of machinery for adjudication of disputes must be deemed to be absent, argued Mr. Chandra.

21. Section 32 of the Act empowers the Board to call for and examine the proceedings of the Committee for the purpose of satisfying itself as to the legality or propriety of any decision or order passed by a Committee and to pass such orders thereon as it may deem fit including an order modifying, annulling or reversing any such decision or order of the Committee. Dealers aggrieved of an order of assessment or an order declining refund of the fee paid by them are entitled

to question the correctness of any such demand in terms of the said provision which is in the nature of a revisional power vested in the Board. It is common ground that the dealers in the present case had invoked the said power of the Board under Section 32. It is also common ground that the revisions so filed have been entertained and dealt with on merits. What is unsatisfactory according to the dealers is the fact that the revisions have been dealt with by an officer authorised by the Director. Mr. Chandra did not dispute the proposition that the power vested in the Board including that under Section 32 of the Act could be exercised by the Director as a delegate of the Board keeping in view the provisions of Section 33 of the Act which permits such delegation. Sections 32 and 33 read as under:

> "32. **Powers of the [Board] to call for the proceedings of a Committee and pass orders thereon. -** The [Board] may, for the purpose of satisfying itself as to the legality or propriety of any decision of, or order passed by, a Committee, at any time call and examine the proceedings of the Committee, and, where it is of the opinion that the decision or order of the Committee should be modified, annulled or reversed, pass such orders thereon as it may deem fit.
>
> 33. **Delegation of powers. –** The Board may, by regulations, delegate subject to such conditions and restrictions and in such manner, as may be specified therein, any of its powers to the Director."

22. What, according to the learned counsel for the appellants, was unacceptable is the fact that the revisions could be heard and disposed of even by an officer authorised by the Director. This, argued Mr. Chandra, resulted in dilution of the sanctity and efficacy of the revisional exercise not because it was *dehors* the statute but because the exercise of quasi-judicial powers were entrusted to an officer at the lower rung of the hierarchy.

23. Section 2(h) defines the term 'Director' as under:

> "'Director' means an officer appointed by the State Government as Director of Mandis and includes any other officer authorised by the Director to perform all or any of his functions under this Act."

24. It is manifest from a plain reading of the above that the expression 'Director' wherever used in the Act including Section 33 thereof includes an officer authorised by the Director to perform all or any of his functions under the Act. Significantly enough neither before the High Court nor before us was it contended that the officer who had handled and disposed of the revision petitions filed by the dealers, was not duly authorised in terms of Section 2(h) or that the power of the Board under Section 32 of the Act was not duly delegated to the Director. It is not, therefore, a case of inherent lack of jurisdiction. All that the appellants propose is that the revisions could either be heard by the Board itself or made over for disposal to a Committee of officers senior enough to decide issues of fact and law involving substantial financial stakes of the parties. Now it is true that the stakes involved in the present batch of cases are substantial and those called upon to satisfy the demands raised against them would like their cases to be heard by a senior officer or a Committee of officers to be nominated by the Board. But in the absence of any data as to the number of cases that arise for consideration involving a challenge to the demands raised by the Market Committee and the nature of the disputes that generally fall for determination in such cases, it will not be possible for this Court to step in and direct an alteration in the mechanism that is currently in place. The power to decide the revisions vests with the Board who also enjoys the power to delegate that function to the Director. So long as there is statutory sanction for the Director to exercise the revisional power vested in the Board, any argument that such a delegation is either impermissible or does not serve the purpose of providing a suitable machinery for

adjudication of the disputes shall have to be rejected. It is noteworthy that Rule 133-A of the Rules framed under the Act regulates the filing and disposal of the revision petitions under Section 32 thereof. This provision was inserted with effect from 11th May, 2008 and empowers the Board either to decide the revision petition itself or to nominate an officer for doing so. It also provides for grant of an opportunity of being heard to the person concerned and a time bound disposal of the revision. Rule 133-A is, therefore, a step in the direction of providing a machinery under the Act for adjudication of disputes that may arise between dealers on the one hand and the market committee on the other. That being so, the Act is not completely bereft of a machinery nor can it be said that the observations made by this Court in *Ram Chandra Kailash Kumar's* case (supra) have gone unheeded. All that we need to add is that in order to make the Board's revisional power more effective and its exercise more transparent and credible, the Board would do well to delegate the power of hearing and disposal of the revision petitions to a senior and experienced officer who is well-versed in dealing with legal issues concerning assessment and/or determination of the liability under the Act. Beyond that it is neither necessary nor proper for us to say anything. Question No.1 is answered accordingly.

Re: Question No.2

25. Explanation to Section 17(iii) of the Act raises a presumption to the effect that any specified agricultural produce taken out of or proposed to be taken out of a market area by or on behalf of a licensed trader has been sold within such area; the price of the produce so presumed to be sold is then determinable in the manner prescribed. The Explanation reads:

> **Explanation.-** For the purpose of clause (iii), unless the contrary is proved, any specified agricultural produce taken out or proposed to be taken out of a market area by or on behalf of a licensed trader shall be presumed to have been sold within such area and in such case, the price of such

produce presumed to be sold shall be deemed to be such reasonable price as may be ascertained in the manner prescribed."

26. It is fairly evident that the presumption is rebuttable in nature; for it holds good only till the contrary is not proved by the dealer. The question is what is the standard of proof required to rebut the statutory presumption; and whether the Market Committee, the Director or the High Court applied the correct legal standard for holding that the presumption was not effectively rebutted.

27. Relying upon the decision of this Court in *Sodhi Transport Co. & Ors. v. State of U.P. & Ors.* (1986) 2 SCC 486, Mr. Sudhir Chandra contended that the standard of proof applicable was that applied in civil actions which are decided on the preponderance of probability and not the higher standard of "proof beyond reasonable doubt" applied in criminal cases. The appellants had according to the learned counsel discharged the burden of rebutting the presumption by adducing evidence which tended to show that the *ghee* manufactured by them had not been sold within the market area to attract the levy of market fee on the price thereof. He urged that the produce had been removed out of the market area on transfer of stock basis without any element of sale in such transfers. Reliance was in support placed by Mr. Chandra upon an agreement which Heinz had executed with its Clearing and Forwarding (C&F) Agent in the State of Rajasthan apart from other material adduced before the Market Committee, in a bid to prove that the stocks in question had not been sold within the market area.

28. Appearing for the Market Committee Mr. Rakesh Dwivedi argued that the mere production of some evidence howsoever feeble was not enough to rebut the presumption which would continue to hold the field till such time the trader adduced evidence to prove the contrary. It was only "proof to the contrary" that could rebut the presumption and for doing so just any material or evidence was not enough. It must, argued

Mr. Dwivedi, be evidence that would clearly establish that there was indeed no sale effected within the market area as presumed in terms of the Explanation. The appellant-companies had failed to do so as before the Market Committee and the Director and even before the High Court.

29. Black's Law Dictionary 5th Edition, 1979, defines 'Presumption' as under:

> "A presumption is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted."

30. The same dictionary defines 'Rebut' as under:

> "In pleading and evidence, to defeat, refute, or take away the effect of something. When a plaintiff in an action produces evidence which raises a presumption of the defendant's liability, and the defendant adduces evidence which shows that the presumption is ill-founded, he is said to "rebut it."

31. Both in England and America, law permits raising of presumptions both conclusive and rebuttable. There is considerable judicial authority in both jurisprudential systems, dealing with the question of the standard of proof required to rebut a presumption whether statutory or at common law. In England, the civil standard of proof is defined by Lord Denning in *Miller v. Minister of Pensions* [1947] 2 All ER 372, thus:

> *"…….It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the*

least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice."

32. Three years later came *Bater v. Bater* [1950] 2 All ER 458, in which the civil standard of proof to an extent modified, was seen by some jurists as somewhat confusing the concept so clearly stated in *Miller's* case (supra). In *Bater* (supra) the Court declared that neither civil nor criminal standard of proof was an absolute standard. A 'civil case' may be proved by a preponderance of probability, explained, Denning J.,

"……but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a the degree of probability required should be commensurate with the occasion."

33. Then came *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247, where the Court held that in a civil action where fraud or other matter which is or may be a crime is alleged against a party or against persons not parties to the action, the standard of proof to be applied is that applicable in civil actions generally, namely, proof on the balance of probability, and not the higher standard of proof beyond all reasonable doubt required in criminal matters; but there is no absolute standard of proof, and no great gulf between proof in criminal and civil matters; for in all cases the degree of probability must be commensurate with the occasion and proportionate to the subject-matter. The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities. The law in England, therefore, is that degree of probability must be commensurate with the subject-matter. This implies that graver the charge in

a civil action, higher the degree of proof required. A civil case may be proved by preponderance of probability, but the degree of probability would depend upon the nature of the subject-matter.

34. In the American system of justice, the Courts have adopted a somewhat different approach, though the essence, may appear to be the same as is accepted by the Courts in England. In America, standard of proof depends upon the degree of confidence which the American society thinks the fact finder should have in the correctness of factual conclusions for a particular type of adjudication. [See *Addington v. Texas,* 441 U.S. 418, 423 (1979)]. Proof may be required by a preponderance of the evidence, by clear and convincing evidence or by proof that is beyond reasonable doubt. Proof by 'clear and convincing evidence' lies between standard of 'preponderance of the evidence' at one end and 'beyond a reasonable doubt' at the other. Clear and convincing evidence has been described as evidence that produces in the mind of the trier of the fact an abiding conviction that the truth of the factual contentions is highly probable. [See *32A Corpus Juris Secundum Evidence § 1624*].

35. We may at this stage refer to a few decisions of this Court on the subject. In *Izhar Ahmad Khan v. Union of India and Ors.* (AIR 1962 SC 1052), this Court was examining the provisions of Schedule III Rule 3 of the Citizenship Rules, 1956 which made it obligatory on the enquiring authority to infer the acquisition of citizenship of a foreign country from the fact that the passport of foreign country has been obtained by an Indian citizen. The question was whether a rule about irrebuttable presumption is a rule of evidence or not. The question had arisen in the context of rule-making power of the Central Government under Section 9(2) of the Citizenship Act, 1955 according to which the Central Government could prescribe rules of evidence subject to which the competent authority could hold an inquiry. The contention urged was that instead of

prescribing a rule of evidence the Central Government had by enacting Rule 3 and raising a conclusive presumption regarding the acquisition of citizenship of another country, framed a rule of substantive law and not a rule of evidence.

36. This Court held that while answering any such question it is not correct to assume that all rules prescribing irrebuttable presumption are rules of substantive law. Any such question, declared this Court, has to be answered after examining the rule and its impact on the proof of the fact in issue. Explaining the juristic basis of a rebuttable presumption and the approach to be adopted in applying such presumptions to different situations this Court observed:

> **"25.** It is conceded, and we think, rightly, that a rule prescribing a rebuttable presumption is a rule of evidence. It is necessary to analyse what the rule about the rebuttable presumption really means. A fact A which has relevance in the proof of fact B and inherently has some degree of probative or persuasive value in that behalf may be weighed by a judicial mind after it is proved and before a conclusion is reached as to whether fact B is proved or not. When the law of evidence makes a rule providing for a rebuttable presumption that on proof of fact A, fact B shall be deemed to be proved unless the contrary is established, what the rule purports to do is to regulate the judicial process of appreciating evidence and to provide that the said appreciation will draw the inference from the proof of fact A that fact B has also been proved unless the contrary is established. In other words, the rule takes away judicial discretion either to attach the due probative value to fact A or not and requires prima facie the due probative value to be attached in the matter of the inference as to the existence of fact B, subject, of course, to the said presumption being rebutted by proof to the contrary.
>
> xxx xxx xxx

> xxx xxx xxx
>
> Thus, the rule of rebuttable presumption adds statutory force to the natural and inherent probative value of fact A in relation to the proof of the existence of fact B and in adding his statutory value to the probative force of fact A, the rule, it is conceded, makes a provision within the scope and function of the law of evidence. If that is so, how does it make a difference in principle if the rule adds conclusive strength to the probative value of the said fact A in relation to the proof of the existence of fact B? In regard to the category of facts in respect of which an irrebuttable presumption is prescribed by a rule of evidence, the position is that the inherent probative value of fact A in that behalf is very great and it is very likely that when it is proved in a judicial proceeding, the judicial mind would normally attach great importance to it in relation to the proof of fact B. The rule steps in with regard to such facts and provides that the judicial mind should attach to the said fact conclusiveness in the matter of its probative value. It would be noticed that as in the case of a rebuttable presumption, so in the case of an irrebuttable presumption, the rule purports to assist the judicial mind in appreciating the existence of facts. In one case the probative value is statutorily strengthened but yet left open to rebuttal, in the other case, it is statutorily strengthened and placed beyond the pale of rebuttal. Considered from this point of view, it seems rather difficult to accept the theory that whereas a rebuttable presumption is within the domain of the law of evidence, irrebuttable presumption is outside the domain of that law and forms part of the substantive law."

37. In *Harbhajan Singh v. State of Punjab & Anr.* (AIR 1966 SC 97), this Court was examining the nature and scope of onus of proof which an accused person had to discharge in seeking protection of the Exception 9 to Section 499 IPC. This Court held that onus to prove its case lies on the prosecution

no matter what the charge or where the trial is held. The principle that prosecution must prove the guilt of the prisoner is part of the common law of England and also part of the criminal law of this country. Having said so, the Court further declared that if an exception is taken by an accused person he is not required to justify his plea beyond a reasonable doubt and that the degree and character of proof which he is expected to furnish in support of his plea cannot be equated with the degree and character of proof that is expected of the prosecution. This Court with approval quoted the English decision in *R. v. Clark* (1921 61 SCR 608), which was approved by Lord Hailsham in *Sodeman v. R* [1936] 2 All ER 1138 to the following effect:

> "……the necessity for excluding doubt contained in the rule as to the onus upon the prosecution in criminal cases might be regarded as an exception founded upon considerations of public policy. There can be no consideration of public policy calling for similar stringency in the case of an accused person endeavouring to displace a rebuttable presumption."

38. We may also refer to the decision of this Court in *Sodhi Transport Co.* (supra) upon which heavy reliance was placed by learned counsel for the appellant in support of the plea that the standard of proof required of the person against whom statutory presumption is raised is a simple preponderance of probability and no more. In *Sodhi Transport Co.* (supra) this Court was examining the provisions of Section 28-B of Uttar Pradesh Sales Tax Act, 1948 which was alleged to be ultra vires of the Constitution inasmuch as it permitted the authorities to raise a rebuttable presumption regarding the sale of goods having taken place inside the State of U.P. if the transit pass is not handed over to an officer at the check-post or the barrier near the place of exit from the State. Such a presumption with an object of preventing evasion of tax, it was contended, as regards the proof of a set of circumstances which would make a transaction liable to tax was tantamount to conferring on the

authority concerned the power to levy a tax which the legislature could not otherwise levy. Repelling the contention this Court held that a rebuttable presumption has the effect of shifting the burden of proof, for the authority concerned, before levying sales tax arrives at the conclusion about the exigibility of the tax by a judicial process and only upon his satisfaction that the goods have been sold inside the State. In doing so, the authority no doubt relies upon the statutory rules and presumption contained in Section 28-B of the Act. But such presumption can be rebutted by the person against whom action is taken under Section 28-B when the person concerned has the opportunity to displace the presumption by leading evidence. That being so, provision of Section 28-B inasmuch as the same raises a rebuttable presumption did not suffer from any vice of unconstitutionality. This Court observed:

> **"14.** A presumption is not in itself evidence but only makes a prima facie case for party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances."

39. Mr. Chandra, however, laid considerable emphasis on the words "tending to show that the real fact is not as presumed", to argue that the test applied by this Court in rebuttable presumptions had been the test of 'preponderance

of probability'. We do not think so. It is well-settled that a decision is an authority for the point it decides. It is equally well-settled that the text of the decision cannot be read as if it were a statute. That apart the expression used by this Court is "evidence fairly and reasonably tending to show", which signifies that it is not just any evidence, howsoever shaky and nebulous that would satisfy the test of preponderance of probability to rebut the statutory presumption but evidence that can by proper and judicial application of mind be said to be fairly and reasonably showing that the real fact is not as presumed. In other words the evidence required to rebut a statutory presumption ought to be clear and convincing, no matter the degree of proof may not be as high as proving the fact to the contrary beyond a reasonable doubt. The heightened standard of proof required to rebut a presumption raised under the statute at hand is in our view applicable for two distinct reasons. The first and foremost is that the presumption is raised in relation to a fiscal statute. While the amount payable is not a tax it is nevertheless a statutory levy which is attracted the moment the transaction of sale takes place within the market area. Goods, admittedly produced within the market area and not consumed within such area are presumed to be leaving pursuant to a transaction of sale unless the contrary is proved. That the goods are produced within the market area is not in dispute in the instant case. That they left the market area is also admitted. In the ordinary course, therefore, the presumption would be that the goods left pursuant to a sale unless the appellants are in a position to prove the contrary.

40. The second reason for applying a higher standard of proof than mere preponderance of probability is that the nature of transaction pursuant to which the goods are removed from the market area is within the exclusive knowledge of the appellants or the persons to whom such goods are being dispatched. In other words, the circumstances in which the transactions, which the statute presumes to be sales, but which the appellants claim are simple transfer of stocks are within the

exclusive knowledge of the appellants. The entire evidence relevant to the transactions, being available only with the appellants and the true nature of the transactions being within their special knowledge, there is no reason why the rebuttal evidence should not satisfy the higher standard of proof and clearly and convincingly establish that the fact presumed is not the actual fact. Our answer to Question No.2 accordingly is that the evidence intended to rebut the statutory presumption under Section 17 of the Adhiniyam ought to be clear and convincing evidence showing that what is presumed under the provision is not the real fact.

Re: Question No.3

41. The Market Committee and the Director have recorded concurrent findings of fact to the effect that the petitioners had failed to establish that no sale of the stocks of *Ghee* had taken place within the Mandi limits at Aligarh. The statutory presumption that any transfer of stocks from within the Mandi area, was pursuant to a sale was thus held to have remained unrebutted. A challenge to the above finding would necessarily raise the question as to the scope of judicial review of such findings. We need to sail smooth over that aspect before examining the validity of the orders within the permissible parameters of judicial review.

42. The power of judicial review is neither unqualified nor unlimited. It has its own limitations. The scope and extent of the power that is so very often invoked has been the subject-matter of several judicial pronouncements within and outside the country. When one talks of 'judicial review' one is instantly reminded of the classic and oft quoted passage from *Council of Civil Service Unions (CCSU) v. Minister for the Civil Service* [1984] 3 All ER 935, where Lord Diplock summed up the permissible grounds of judicial review thus:

"*Judicial Review has I think developed to a stage today when, without reiterating any analysis of the steps by*

which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer or else there would be something badly wrong with our judicial system… …

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

43. The above principles have been accepted even by this Court in a long line of decisions handed down from time to time.

We may, however, refer only to some of those decisions where the development of law on the subject has been extensively examined and the principles applicable clearly enunciated. In *Tata Cellular v. Union of India* (1994) 6 SCC 651, this Court identified the grounds of judicial review of administrative action in the following words :

"The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety."

44. Reference may also be made to the decision of this Court in *State of Punjab v. Gurdial Singh* (1980) 2 SCC 471 where Krishna Iyer, J. noticed the limitations of judicial review and declared that the power vested in the Superior Courts ought to be exercised with great circumspection and that interference may be permissible only where the exercise of the power seems to have been vitiated or is otherwise void on well established grounds. The Court observed:

> "*The court is handcuffed in this jurisdiction and cannot raise its hand against what it thinks is a foolish choice. Wisdom in administrative action is the property of the executive and judicial circumspection keeps the court lock-jawed save where the power has been polluted by oblique ends or is otherwise void on well-established grounds. The constitutional balance cannot be upset.*"

45. There is almost complete unanimity on the principle that judicial review is not so much concerned with the decision itself as much with the decision-making process. (See *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141). As a matter of fact, the juristic basis for such limitation on the exercise of the power of judicial review is that unless the restrictions on the power of the Court are observed, the Courts may themselves under the guise of preventing abuse of power, be guilty of usurping that power. Justice Frankfurter's note of caution in *Trop v. Dulles* 356 U.S. 86 (1958) is in this regard apposite when he said:

> "*All power is, in Madison's phrase, 'of an encroaching nature'. Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint.*"

46. That the Court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the

province of either, and that the Court does not supplant 'the feel of the expert' by its own review, is also fairly well-settled by the decisions of this Court. In all such cases judicial examination is confined to finding out whether the findings of fact have a reasonable basis on evidence and whether such findings are consistent with the laws of the land. [*See Union of India v. S.B. Vohra,* (2004) 2 SCC 150, *Shri Sitaram Sugar Co. Ltd. v. Union of India,* (1990) 3 SCC 223, and *Thansingh Nathmal and Ors. v. Supdt. of Taxes and Ors., Dhubri,* AIR 1964 SC 1419].

47. In *Dharangadhra Chemical Works Ltd. v. State of Saurashtra and Ors.,* AIR 1957 SC 264, this Court held that decision of a Tribunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under Article 226 of the Constitution unless it is shown to be totally unsupported by any evidence.

48. To the same effect is the view taken by this Court in *Thansingh Nathmal's* case (supra) where this Court held that the High Court does not generally determine questions which require an elaborate examination of evidence to establish the right to enforce which the writ is claimed.

49. We may while parting with the discussion on the legal dimensions of judicial review refer to the following passage from *Reid v. Secretary of State for Scotland* [1999] 1 All ER 481, which succinctly sums up the legal proposition that judicial review does not allow the Court of review to examine the evidence with a view to forming its own opinion about the substantial merits of the case.

> "*Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It*

may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence."

50. In its order dated 13th September, 1995 the Mandi Samiti, Aligarh, has upon examination of the evidence adduced before it recorded a finding that the same did not inspire confidence for a variety of reasons. The Samiti has found that the appellants had failed to produce any evidence as to when and where any transaction regarding sale and purchase of *ghee* manufactured within Mandi area was finalised. No evidence was adduced by the appellants to show as to who had been instrumental in finalising such sale transactions out of its officers and employees. If the product was being sold under the directions of the officers of the Company it should have been possible for the company to firmly establish the identity of such officers and furnish details as to when and where the sale transaction of different stocks of *ghee* sent out from the market area was finalised. The Samiti was of the view that although the appellant had claimed that there were separate C&F agreements with various agents appointed by it at several

destinations outside the mandi area the appellant had produced only two of such agreements in support of its case that such C&F agents existed at all such destinations. The Mandi Samiti noticed that 25 consignments relevant to the order passed by the Samiti on 13th September, 1995 were sent out of the Mandi area but the appellant-company had not adduced evidence pertaining to all such consignments. Even in regard to consignments where such evidence had been adduced the Samiti noticed shortcomings that adversely affected the credibility of the evidence. For instance, there were no Book Numbers on the sales invoice-cum-challans relied upon by the company. The evidence was in the form of loose papers, hence not reliable. It was noticed that although payments were mentioned on the documents submitted, no particulars as to who made the payment and to whom, were available. The Samiti also noticed that signatures of the vendor of the goods on the sale invoice-cum-challan were absent. It was, therefore, not clear whether the person making the sale was an individual from the company or one representing the C&F agent. The Samiti found information furnished by the appellant incomplete and discrepant in regard to the sales made in Jodhpur, Jaipur and Indore. The Samiti on the basis of the above observations took the view that the so called C&F agents were the actual purchasers of the *ghee* from the company and the C&F agreements, two of which were placed on record, were only meant to avoid payment of market fee.

51. In its order dated 3rd July, 1997 the Mandi Parishad which heard the revision against the above order of the Mandi Samiti did not find any error in the appreciation of the evidence *per se* to warrant a different view. It took the view that no evidence was produced to show as to why a particular quantity of ghee was to be delivered to a particular place. The transport *biltis* did not mention as to who shall pay the freight for the transportation of the *ghee*. This is because if the transport of *ghee* outside Aligarh, was a stock transfer and not pursuant to

a sale made within the market area, the payment of freight would have been the responsibility of the company for there is no transfer of the ownership in that case to any third party. The company should have in that case firmly established that the transport charges payable in regard to the transport of the stocks of *ghee* out of the mandi area were paid by it and by no one else. Keeping in view the fact that the company is doing business worth crores of rupees and maintains regular accounts book, both in the ordinary course of its business as also for tax purposes, there was no reason why the company should have failed to establish that the transport charges were paid by it. The Director exercising powers of the Mandi Parishad also held that there was a break in the chain of reasons in as much as the appellants did not bring forth the link evidence giving details of the sale transactions pursuant to which C&F agents had made the delivery of the goods.

52. The orders passed by the Mandi Samiti and the Director exercising powers of the Mandi Parishad thus clearly show that there was no clear and convincing evidence to establish that the presumption arising under Section 17(iii) of the Act stood rebutted and that the actual was not, what was presumed under the said provision.

53. To the same effect are the findings recorded by the Mandi Samiti in its order dated 7th July, 1998 with minor variations here and there. The Mandi Samiti, *inter alia*, noticed that while some of the transport consignment note showed that the same would be billed at Bombay, some others showed that they would be billed at Aligarh. The amount of freight was also not mentioned nor details regarding the payment of these consignments notes produced. It was not established whether the payment was to be made by the appellants or the recipients of the goods. Hence, the same were insufficient to prove that no sale had taken place inside the mandi area.

54. There was also no evidence to prove that the rent of godown was being paid by the appellant-company nor was

there any evidence to show the procedure followed for the sale of the products at Indore and Jaipur. Twenty one of the invoices made for Jaipur had no signature of the recipient of the goods nor it was clear as to who received the payment and what was the mode of making of such payments. The Samiti noted that these invoices were not in book form but were in the form of loose papers and did not bear any book number. No evidence was, according to the Mandi Samiti, produced by the appellant regarding the decision of the company's marketing department in connection with the stock transfer and in connection with the directions given to the Aligarh office for transfer of a particular consignment sent to a particular destination and in a particular quantity.

55. The Samiti also noted that the appellants had not produced any evidence to show that the C&F agents were not authorized to settle the bargain for sale of goods and were supposed to simply follow the directions of the company as regards the delivery of specified quantity to a specified party upon receipt of payment. No evidence regarding instructions to the C&F agents was adduced before the Mandi Samiti to prove that the company continued to exercise complete dominion over its stocks and also the power to sell the goods and to receive payments kept in the custody of the C&F agent.

56. Suffice it to say that the Mandi Samiti appreciated each piece of evidence and found the same to be insufficient to hold that the sale transactions had, in fact, taken place outside the mandi area so that the presumption arising under Section 17(iii) of the Act stood rebutted. The Director exercising powers of the Mandi Parishad has in its order dated 25th September, 2004 once again evaluated the evidence and concurred with the view taken by the Mandi Samiti.

57. In the light of the legal position stated in the earlier part of this order, it is neither feasible for us to embark upon an exercise of re-appreciating the entire material or to substitute our own findings for those recorded by the Mandi Samiti and

the Director/Mandi Parishad. So long as the finding recorded by the Mandi Samiti and the Mandi Parishad are not irrational or perverse, and so long as the view taken by them is a reasonably possible view, this Court would not interfere.

58. In course of arguments at the Bar, we repeatedly asked Mr. Chandra as to why the appellants had failed to adduce the material which would throw a flood of light as to the true nature of the transaction within or outside the mandi area. Mr. Chandra's reply was that the material was available and could be produced if so required. Some of this material which was with the appellant but was not produced was sought to be introduced even at the stage of hearing before us, while the rest could, argued Mr. Chandra be laid before the Samiti, if an opportunity to do so could be granted to the appellant.

59. We regret our inability to accede to any such request. We do not think that a party who has had ample opportunity before the authorities below, to substantiate its claim can have the luxury of either producing material for the first time in the Supreme Court or ask for a remand to enable it to do what it ought to have done at the appropriate stage. It was not the contention of the appellants that they were not given a fair opportunity to prove their case before the authorities below. As a matter of fact, orders passed by the Mandi Samiti and the Mandi Parishad show that sufficient opportunity was indeed afforded to the appellants and the matter had remained pending for a number of years before those authorities.

60. Mr. Chandra contended that the appellants had been requesting the authorities to indicate as to what kind of material would satisfy them but since the authorities had failed to respond to that query the appellant had not produced the bulk of the material which was relevant and available with them. We do not think that such a procedure was legally permissible or even called for in the facts and circumstances of the case. As to what material would be sufficient to prove the case of the party who goes to the Court for relief is a matter for the party

or those in charge of its legal affairs to determine. No litigant can ask for guidelines from the Court or statutory body as to the evidence which the party should adduce to substantiate its claim. The query made by the appellants as to what material if adduced would satisfy the authorities was, therefore, misplaced and a red herring to say the least. This is particularly so when the appellants were in no way handicapped on account of lack of resources or capacity to get the best of legal advice. Companies with such tremendous resources as the appellants before us cannot find a shortcut to the discharge of their obligations under the law by asking the Court or the authority concerned to indicate as to what kind of evidence would be sufficient in its opinion to entitle them to the refund of the amount paid or payable towards market fee.

61. So also, no remand ought to be made only to enable a party to produce additional material. A remand is neither mechanical nor a routine affair. If there is nothing wrong in the orders under challenge, there is no question of interference with the same. There is no reason for this Court to set the clock back and start a process which would take the parties another decade or so to come to terms with the problem.

62. In the result these appeals as also W.P. (C) No.144/2005 fail and are hereby dismissed with cost assessed at Rs.15,000/- in each case.

R.P. Matters dismissed.

KRISHI UTPADAN MANDI SAMITI & ANR.
v.
VED RAM
(Civil Appeal No. 9589 of 2010)

MARCH 23, 2012

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

Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964: s.17(iii)(b), Explanation – Movement of goods from mandi area to places outside such area pursuant to sale but without obtaining gate-passes – Levy of market fee – Held: There is presumption under Explanation to s.17(iii)(b) that movement of goods from mandi area to places outside such area is pursuant to sale effected within the said area – Obtaining of gate passes after producing evidence to rebut the presumption is necessary – Absence of gate passes tantamount to removal of the goods in breach of the relevant rules – A dealer adopting such dubious procedure and means cannot complain of failure of opportunity to produce material in support of its claim that no sale was involved – In the instant case, the Mandi Samiti and Revisional authority concurrently held that the respondent-dealer was not able to rebut the presumption u/s.17 – Therefore, there was no reason to interfere with that finding especially when the appraisal of the evidence by the said authorities was not shown to be in any way perverse to warrant interference with the same.

Judicial discipline: Precedent – Supreme Court judgments – Levy of market fee on the movement of goods from mandi area to places outside such area pursuant to sale but without obtaining gate-passes – Procedure prescribed in two judgments rendered by Supreme Court and the said procedure working effectively for years – High Court overlooking the effect of the judgments of Supreme Court and bringing in a new mechanism – Correctness of – Held: Not

correct – The matter was fully covered by the decisions of the Supreme Court and further repair of the procedure and the mechanism so provided could only be under the orders of Supreme Court – High Court ought to have left it to Supreme Court to determine as to whether the mechanism and procedure provided by the orders of Supreme Court required any modification, and if so, in what form and to what extent – Instead of doing that, High Court embarked upon an exercise which was not necessary especially when the same did no service to judicial discipline.

The respondent-company was engaged in the business of manufacture and sale of milk products including d*esi ghee*. The company had set up a manufacturing unit at Sahibabad, District Ghaziabad, which fell within the market area of Krishi Utpadan Mandi Samiti, Ghaziabad. A declaration was given by the respondent-company that consignment note dated 14th May, 2004 dispatching 5250 Kgs. of *desi ghee* to AS Corporation at Ahmedabad was a stock transfer which did not require any gate pass for its movement outside the market area. A show-cause notice was issued by the appellant-Samiti calling upon the respondent-company to produce all relevant documents with regard to the production, sale-purchase, movement and storage of its product for the relevant period. On receipt of the notice, the respondent-company filed a reply explaining that transfer of stocks to its godowns outside the mandi area was on "stock transfer basis" and not pursuant to any sale effected within the mandi area. The Mandi Samiti held that obtaining of gate passes after producing evidence to rebut the presumption arising under Explanation to Section 17(iii)(b) of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 was necessary and the respondent-company had not adduced sufficient evidence to rebut the presumption that the movement of goods from the mandi area to places outside such area

was pursuant to a sale effected within the said area. The Samiti accordingly levied a market fee under Section 17(iii)(b) of the Adhiniyam. Aggrieved, the respondent-company filed a revision under Section 32 of the Adhiniyam before the Deputy Director which was dismissed. The respondent-company then filed writ petition before the High Court. The High Court allowed the said petition and remanded the matter back to the Samiti for a fresh assessment in accordance with law. While doing so, the High Court not only found fault with the approach adopted by the Samiti and the Deputy Director but also commented adversely upon the capacity of the officers making the orders in deciding the questions of law and fact that arise in connection with such transactions. According to the High Court the entire approach adopted by the Samiti and the Deputy Director was arbitrary and based on a misreading of the legal provisions. The High Court evolved a new procedure for examination of the issues involved in such cases while providing for safeguards by way of securing the amount claimed by the Mandi Samiti towards market fee. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1.1. In **Shree Mahalaxmi Sugar Works*, **this Court noticed the Explanation under Section 17 of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 and declared that the Samiti was entitled to raise demands against the dealers before passes for removal of the goods could be issued to them. This Court held that if there was a valid rebuttal to the statutory presumption that a sale had taken place within the notified market area, the dealers will be entitled to the passes, otherwise not. If the dealers are compelled to pay market fee as demanded, it shall be open to the aggrieved to challenge the same in the manner provided under the Act. Pursuant**

to the said pronouncements, the Mandi Samiti started issuing gate passes on payment of mandi fee demanded by them at the time of issue of gate pass. A change in the procedure came about as a result of the decision of this Court in ***M/s Saraswati Cane Crusher*. In that case the dealers had argued that the procedure being followed pursuant in *Shree Mahalaxmi Sugar Works* was not satisfactory inasmuch as the requirement of hearing and of an adjudication was not being satisfied unless an aggrieved dealer was in a position to challenge the assessment in the manner provided under the Act. A three-Judge Bench of this Court found merit in that contention and held that the order passed in *Shree Mahalaxmi Sugar Works* required some repair work. The orders passed by this Court in *Shree Mahalaxmi Sugar Works* was interpreted to mean that a provisional assessment would be made against the trader before he could ask for a transit pass for removal of the goods outside the market area. In the course of the said provisional assessment, the trader would be entitled to tender a valid rebuttal to the statutory presumption under Section 17 of the Adhiniyam and argue that no sale having taken place within the notified area, it was not liable to pay any market fee on the movement of goods. If the explanation offered by the trader was accepted the gate pass would be issued without insisting upon any payment of the fee. But if the evidence laid by the trader is not *prima facie* accepted by the Mandi Samiti the trader or the dealer can be compelled to pay market fee before issue of gate pass to him. The Court further held that if the trader makes the payment without demand the matter ends and the issue finalised. In case, however, he raises a protest then the assessment shall be taken to be provisional in nature making it obligatory for the trader to pay the fee before obtaining the requisite gate pass. After protest has been lodged the provisional assessment shall be followed by a final assessment

within a time frame. The Court prescribed a period of two months in respect of each such transaction enabling the aggrieved party to challenge the same under the Act or under the general law of the land before the appropriate fora. The procedure has been working effectively for the past decade and a half and ought to have been effective in the instant case also. The unfortunate part, however, was that the respondent-company did not respect the procedure stipulated under the orders of the Supreme Court. It did not apply for and obtain gate passes for removal of its goods. The Samiti, therefore, had no occasion to pass any provisional or final order based on the material adduced before it. It was only when the respondent-company filed a declaration that the removal of the stocks pursuant to consignment note dated 14th May, 2004 in favour of AS Corporation at Ahmedabad was a stock transfer and did not require a gate pass that the Samiti issued a show-cause notice asking the respondent-company to furnish the documents with regard to the production, sale, purchase, movement and storage of the goods. Based on the figures furnished pursuant to the said show-cause notice, the Samiti determined the market fee and the development fee and raised a demand for payment thereof with a direction to the company to follow the prescribed procedure for removal of goods from the mandi area. The revisional authority upheld the assessment of the fee and the consequential directions issued by the Samiti. The High Court, however, completely overlooked the effect of the orders passed by this Court in the two cases and brought in a new mechanism which could in its opinion be more effective, in dealing with the situation that arose so very often between the Samiti on the one hand and the traders on the other. The High Court failed to appreciate that it was not on virgin ground. The matter was fully covered by the decisions of this Court. Further repair of the procedure and the mechanism so provided could only be

under the orders of this Court. The High Court ought to have left it to this Court to determine as to whether the mechanism and procedure provided by the orders of this Court required any modification, and if so, in what form and to what extent. Instead of doing that, the High Court embarked upon an exercise which was not necessary especially when the same did no service to judicial discipline. [Para 4-7] [958-F-G; 959-F-H; 960-A, 961-D-H; 962-A-H; 963-A]

1.2. The High Court was also in error in holding that even when the movement of goods without gate passes may have been in violation of the rules regulating the issue of such passes, any such violation could only call for a penalty under the said rules. Assessment of market fee on the removal of such goods from the mandi area was, according to the High Court, a different matter unrelated to the breach of the rules requiring the traders to remove goods only on the authority of validly issued gate passes. The High Court overlooked the fact that if gate passes are required to be obtained under the rules, removal of stocks without applying for such gate passes and without furnishing prima facie evidence of proof that there was no sale of the goods involved, was a reason enough for the Mandi Samiti to demand payment of the market fee on the stocks that were removed. The absence of gate passes tantamount to removal of the goods in breach of the relevant rules and also in breach of the directions issued by this Court in the two cases of this Court. A dealer who adopted such dubious procedure and means could not complain of a failure of opportunity to produce material in support of its claim that no sale was involved. No opportunity could be granted to a dealer who was acting in defiance of the rules and removing the goods without any intimation and permission of the Samiti. As a matter of fact, the goods having been taken away without gate passes and without any material to

show that there was no sale, the Samiti could demand payment of the market fee and leave it open to the respondent-trader to claim refund by rebutting the presumption that the removal was pursuant to a sale. At any rate, the Samiti and the Deputy Director had concurrently held that the respondent-company was not able to rebut the presumption under Section 17 of the Adhiniyam. There is no reason to interfere with that finding especially when the appraisal of the evidence by the said two authorities was not shown to be in any way perverse to warrant interference with the same. [Para 8] [963-B-H]

Krishi Utpadan Mandi Samiti and Ors. v. Shree Mahalaxmi Sugar Works and Ors.* **1995 Supp (3) SCC 433; ***Krishi Utpadan Mandi Samiti v. M/s Saraswati Cane Crusher & Co. & Ors.* **(Civil Appeal Nos. 1769-1773 of 1998) decided on 25th March, 1998 – relied on.**

Case Law Reference:

1995 Supp (3) SCC 433	**relied on**	**Paras 3-6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9589 of 2010.

From the Judgment & Order dated 29.02.2008 of the High Court of Judicature at Allahabad in Civil Misc. Petition 58900 of 2007.

Rakesh Dwivedi, Pradeep Misra, Daleep Kumar Dhyani, Manoj Kumar Sharma, Suraj Singh for the Appellants.

Sudhir Chandra, Manoj Swarup, Preshit Surshe, Ajay Kumar for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave calls in question the correctness of an order passed by the High Court

of Judicature at Allahabad whereby Civil Misc. Writ Petition No. 58900 of 2007 filed by the respondent-company has been allowed, the order passed by the Krishi Utpadan Mandi Samiti, Ghaziabad and that passed by the Deputy Director, Rajya Krishi Utpadan Mandi Parishad, Meerut in revision set aside. The High Court has further directed the Krishi Utpadan Mandi Samiti, Ghaziabad to make a fresh assessment of the market fee for the period in question after providing an opportunity of being heard to the writ-petitioner or his authorised agent. The challenge arises in the following factual backdrop.

The respondent-company is engaged in the business of manufacture and sale of milk products including *desi ghee* which it markets under the brand name 'Paras'. The company has set up a manufacturing unit at Sahibabad, District Ghaziabad, which falls within the market area of Krishi Utpadan Mandi Samiti, Ghaziabad ('KUMS' for short). The company's case is that it sells the milk products manufactured by it through its consignee agents located at several places in different parts of the country. A list of 15 consignee agents spread over the States of West Bengal, Gujarat, Goa, Orissa, Maharashtra, Rajasthan and New Delhi was in that regard enclosed by the respondent with the writ petition filed by it before the High Court. These consignee agents, according to the respondent-company, provide to the company services like, unloading of goods from the trucks, storage in the depots of the company, dispatch of the stocks by trucks to redistribution stockists as per sale orders, raising sale invoices on behalf of the company and collecting payments for the stocks sold.

In terms of a show-cause notice issued by the appellant-Samiti, the respondent-company was called upon to produce all relevant documents with regard to the production, sale-purchase, movement and storage of its product for the relevant period. This notice was triggered by a declaration received from the respondent-company that consignment note No.94 dated 14th May, 2004 dispatching 5250 Kgs. of *desi ghee* to Anand Sales Corporation at Ahmedabad was a stock transfer which

did not require any gate pass for its movement outside the market area.

On receipt of the notice the respondent-company filed a reply explaining the nature of the transaction and claiming that transfer of stocks to its godowns outside the mandi area was on "stock transfer basis" and not pursuant to any sale effected within the mandi area. The Mandi Samiti remained dissatisfied with that explanation with the result that by an order dated 27th April, 2005 the Samiti held that obtaining of gate passes after producing evidence to rebut the presumption arising under Explanation to Section 17(iii)(b) of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 was necessary. The Samiti further held that the respondent-company had not adduced sufficient evidence to rebut the presumption that the movement of goods from the mandi area to places outside such area was pursuant to a sale effected within the said area. The Samiti accordingly levied a market fee of Rs.9,39,200/- and development fee of Rs.2,34,800/- totalling Rs.11,74,000/- for 3906.80 quintals of d*esi ghee* taken out from the market area of KUMS, Ghaziabad under Section 17(iii)(b) of the Adhiniyam mentioned above. It was further directed that in future the respondent-company shall produce the details of its business and obtain gate passes whenever it removes *ghee* from the market area of KUMS, Ghaziabad.

Aggrieved by the order passed by the Samiti, the respondent-company filed a revision under Section 32 of the Adhiniyam before the Regional Deputy Director, Rajya Krishi Utpadan Mandi Parishad, U.P. which was dismissed by the Deputy Director by its order dated 31st October, 2007. The Deputy Director while affirming the order passed by the Samiti held that the transactions in question were not by way of stock transfers but sales within the market area of KUMS Ghaziabad, hence exigible to market fee.

The respondent-company then filed Writ Petition No.58900 of 2007 before the High Court of Judicature at Allahabad,

challenging the orders passed by the Samiti and the Deputy Director on several grounds. The High Court has, by the order impugned in the present appeal, allowed the said petition set aside the orders of the Samiti and the Deputy Director and remanded the matter back to the Samiti for a fresh assessment in accordance with law. While doing so, the High Court has not only found fault with the approach adopted by the Samiti and the Deputy Director but also commented adversely about the capacity of the officers making the orders in deciding the questions of law and fact that arise in connection with such transactions. According to the High Court the entire approach adopted by the Samiti and the Deputy Director was biased, arbitrary, and authoritative and based on a misreading of the legal provisions and the judgments of this Court. The High Court felt that all this happened because the officers who were handling the issue of such importance were not equipped with the requisite knowledge about the legal principles and procedure applicable while dealing with complex questions of law and fact. More importantly, the High Court evolved a new and somewhat novel procedure for examination of the issues involved in such cases while providing for safeguards by way of securing the amount claimed by the Mandi Samiti towards market fee. The High Court observed:

> "The market fee is levied on the sale of agricultural produce in the market area. The Explanation only raises a rule of presumption which may be rebutted by manufacturing trader or the trader as the case may be. The Court cannot presume that the movement of goods cannot be occasioned unless the sale is affected. The nature of evidence to be produced at the time of gate pass is a contentious matter which has not been resolved in the last three decades. A number of attempts made by the courts have not succeeded in proper understanding of law by the officers and employees of the market committees and Mandi Parishad. In the circumstances, in addition to the directions, which have been given by the judgments cited

above, the Court directs that the Petitioner will furnish to Secretary, KUMS Ghaziabad, a 'revolving bank guarantee' of the amount of market fees on yearly basis based on the average of the historical sales and payments of the market fees in the last three years. The bank guarantee will be furnished on the first of April and unless revoked, it shall be revalidated every year. The market committee will issue gate passes on a declaration made by the petitioners that the goods are moving by way of stock transfer and have not been sold. They will produce the consignment note, and the proof of dispatch giving names and addresses of stockists. These documents will constitute sufficient proof of rebuttal at the stage of a request for gate pass. The market committee will assess the market fee on yearly basis after 31st March of the next year and consider documents furnished by way of rebuttal of the presumption of sale in respect of each and every transactions separately. It will not be sufficient to say that the gate pass was not obtained or obtained without payment of market fees or that documents are not sufficient. The order would show application of mind and reasoning for both accepting or rejecting the proofs on the furnished in respect of each and every transactions separately."

2. On behalf of the appellant-Samiti it was argued by Mr. Rakesh Dwivedi, learned senior counsel, that the observations made by the High Court regarding the capacity of the officers to understand and effectively determine the contentious issues that arose for determination was wholly unjustified. He submitted that instead of finding fault with the capacity of the officers to understand the issues, the High Court would have done better in pointing out the errors committed by the authorities below in either appreciating the law or applying the same to the facts of the case at hand. He urged that the officers had appreciated the evidence adduced by the respondent properly and were well within their powers to reject the same

for reasons which they had set out in their respective orders. So long as there was no perversity in the approach adopted by the Samiti and the Deputy Director in appreciating evidence and/or the application of principles of law to the facts of the case, the mere fact that those officers were not formally trained in law was no reason to dub them as incompetent or incapable, especially when any such training was no guarantee against commission of mistakes.

3. It was further argued that the High Court had completely overlooked the fact that the respondent-company had, in complete breach of the directions and procedure sanctioned by the orders passed by this Court, removed the stock of *ghee* without the requisite gate passes necessary for such removal. The High Court had also committed an error in evolving a procedure which was different from the one that was stipulated by this Court in *Krishi Utpadan Mandi Samiti and Ors. v. Shree Mahalaxmi Sugar Works and Ors. 1995 Supp (3) 433* and *Krishi Utpadan Mandi Samiti v. M/s Saraswati Cane Crusher & Co. & Ors.* (Civil Appeal Nos. 1769-1773 of 1998) *decided on 25th March, 1998*. Mr. Sudhir Chandra appearing for the respondent supported the order passed by the High Court and prayed for dismissal of this appeal.

4. In *Shree Mahalaxmi Sugar Works* (supra) this Court noticed the Explanation under Section 17 of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 and declared that the Samiti was entitled to raise demands against the dealers before passes for removal of the goods could be issued to them. This Court held that if there was a valid rebuttal to the statutory presumption that a sale had taken place within the notified market area, the dealers will be entitled to the passes, otherwise not. If the dealers are compelled to pay market fee as demanded, it shall be open to the aggrieved to challenge the same in the manner provided under the Act. The order passed by this Court being a short order may be extracted *in extenso*:

"1. Leave granted.

2. The Explanation to Section 17 of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 reads as follows:

> "Explanation.— For the purpose of clause (iii), unless the contrary is proved, any specified agricultural produce taken out or proposed to be taken out of a market area by or on behalf of a licensed trader shall be presumed to have been sold within such area and in such case, the price of such produce presumed to be sold shall be deemed to be such reasonable price as may be ascertained in the manner prescribed."

From this it is clear that there is a presumption against the dealers. In view of that presumption, it is open to the appellants-Krishi Utpadan Mandi Samiti to raise demands against the dealers before passes could be issued. If there is a valid rebuttal in that the sale did not take place within the notified market area, the dealers will be entitled to the passes, otherwise not. Of course, even the dealers are compelled to pay the market fee as demanded. It is open to them to challenge it in the manner provided under the Act.

3. The appeals are disposed of in the above terms."

5. Pursuant to the above pronouncements the Mandi Samiti appears to have started issuing gate passes on payment of mandi fee demanded by them at the time of issue of gate pass. A change in the procedure came about as a result of the decision of this Court in *M/s Saraswati Cane Crusher* (supra). In that case the dealers had argued that the procedure being followed pursuant in *Shree Mahalaxmi Sugar Works* (supra) was not satisfactory inasmuch as the requirement of hearing and of an adjudication was not being satisfied unless an aggrieved dealer was in a position to challenge the

assessment in the manner provided under the Act. A three-Judge Bench of this Court found merit in that contention and held that the order passed in *Shree Mahalaxmi Sugar Works* (supra) required some repair work. The Court observed:

> "We are satisfied that the orders of this Court afore-referred to would need some repair work. We treat the said order to be conceiving of a provisional assessment where after doors are opened for a final assessment. We conceive that when demands are raised by the Krishi Utpadan Mandi Samiti against a trader before he could ask for transit of goods outside the market area, the trader would be entitled to tender a valid rebuttal to say that no sale had taken place within the notified area and that if the explanation is accepted there and then by the Mandi Samiti, no question of payment would arise as also of withholding the gate passes. If prima facie evidence led by the trader is not accepted by the Mandi Samiti, the trader or the dealer can be compelled to pay the market fee as demanded before issuance of gate pass. If the trader makes the payment without demur, the matter ends and the assessment finalized. But in case he does so and raises protest, then the assessment shall be taken to be provisional in nature making it obligatory on the trader to pay the fee before obtaining the requite gate pass. After protest has been lodged and the provisional assessment has been made, a time frame would be needed to devise making the final assessment. We, therefore, conceive that it innately be read in the order of this Court that a final assessment has to be made within a period of two months after provisional assessment so that the entire transaction in that respect is over enabling the aggrieved party, if any, to challenge the final assessment in the manner provided under the afore Act or under the general law of the land in appropriate fora. Having added this concept in this manner in the two Judge Bench decision of this Court, we declare that what repair has been done instantly would add to the

order of the High Court and the instant corrective decision shall be the governing rule. The Civil Appeals would thus stand disposed of.

Since the assessment thus far made against the traders, who are involved in the instant appeals, would have to be treated as provisional awaiting final assessment, we permit the concerned traders to move the respective Mandi Samiti within two months from today to hear their objections and proceedings onwards be regulated in accordance with procedure devised hereinbefore. Nonetheless we add that should the basis of provisional assessment be knocked off, the Samiti would refund the market fee to the traders/dealers within two months thereafter."

6. It appears from the above that the orders passed by this Court in *Shree Mahalaxmi Sugar Works* (supra) was interpreted to mean that a provisional assessment would be made against the trader before he could ask for a transit pass for removal of the goods outside the market area. In the course of the said provisional assessment the trader would be entitled to tender a valid rebuttal to the statutory presumption under Section 17 of the Adhiniyam and argue that no sale having taken place within the notified area, it was not liable to pay any market fee on the movement of goods. If the explanation offered by the trader was accepted the gate pass would be issued without insisting upon any payment of the fee. But if the evidence laid by the trader is not prima facie accepted by the Mandi Samiti the trader or the dealer can be compelled to pay market fee before issue of gate pass to him. The Court further held that if the trader makes the payment without demand the matter ends and the issue finalised. In case, however, he raises a protest then the assessment shall be taken to be provisional in nature making it obligatory for the trader to pay the fee before obtaining the requisite gate pass. After protest has been lodged the provisional assessment shall be followed by a final

assessment within a time frame. The Court prescribed a period of two months in respect of each such transaction enabling the aggrieved party to challenge the same under the Act or under the general law of the land before the appropriate fora.

7. The above procedure has been working effectively for the past decade and a half and ought to have been effective in the instant case also. The unfortunate part, however, was that the respondent-company did not respect the procedure stipulated under the above orders of this Court. It did not apply for and obtain gate passes for removal of its goods. The Samiti, therefore, had no occasion to pass any provisional or final order based on the material adduced before it. It is only when the respondent-company filed a declaration that the removal of the stocks pursuant to consignment note No.94 dated 14th May, 2004 in favour of Anand Sales Corporation at Ahmedabad was a stock transfer and did not require a gate pass that the Samiti issued a show-cause notice asking the respondent-company to furnish the documents with regard to the production, sale, purchase, movement and storage of the goods. Based on the figures furnished pursuant to the said show-cause notice the Samiti determined the market fee and the development fee and raised a demand for payment thereof with a direction to the company to follow the prescribed procedure for removal of goods from the mandi area. The revisional authority, as seen above, upheld the assessment of the fee and the consequential directions issued by the Samiti. The High Court, however, completely overlooked the effect of the orders passed by this Court in the two cases mentioned earlier and brought in a new mechanism which could in its opinion be more effective, in dealing with the situation that arose so very often between the Samiti on the one hand and the traders on the other. The High Court failed to appreciate that it was not on virgin ground. The matter was fully covered by the decisions of this Court. Further repair of the procedure and the mechanism so provided could only be under the orders of this Court. The High Court ought to have left it to this Court to determine as to whether the

mechanism and procedure provided by our orders required any modification, and if so, in what form and to what extent. Instead of doing that, the High Court embarked upon an exercise which was not necessary especially when the same did no service to judicial discipline.

8. The High Court was also in error in holding that even when the movement of goods without gate passes may have been in violation of the rules regulating the issue of such passes, any such violation could only call for a penalty under the said rules. Assessment of market fee on the removal of such goods from the mandi area was, according to the High Court, a different matter unrelated to the breach of the rules requiring the traders to remove goods only on the authority of validly issued gate passes. The High Court appears to have overlooked the fact that if gate passes are required to be obtained under the rules, removal of stocks without applying for such gate passes and without furnishing prima facie evidence of proof that there was no sale of the goods involved, was a reason enough for the Mandi Samiti to demand payment of the market fee on the stocks that were removed. The absence of gate passes was tantamount to removal of the goods in breach of the relevant rules and also in breach of the directions issued by this Court in the two cases mentioned above. A dealer who adopted such dubious procedure and means could not complain of a failure of opportunity to produce material in support of its claim that no sale was involved. No opportunity to a dealer who was acting in defiance of the rules and removing the goods without any intimation and permission of the Samiti could be granted for the occasion to grant such an opportunity would arise only when the trader applied for the issue of a gate pass. As a matter of fact, the goods having been taken away without gate passes and without any material to show that there was no sale, the Samiti could demand payment of the market fee and leave it open to the respondent-trader to claim refund by rebutting the presumption that the removal was pursuant to a sale. At any rate, the Samiti and the Deputy

Director have concurrently held that the respondent-company has not been able to rebut the presumption under Section 17 of the Adhiniyam. We see no reason to interfere with that finding especially when the appraisal of the evidence by the said two authorities has not been shown to us to be in any way perverse to warrant interference with the same.

9. In the result, we allow this appeal, set aside the order passed by the High Court and restore that passed by the Samiti and the Deputy Director in revision. The parties are left to bear their own costs.

D.G. Appeal allowed.

MINERALS & METALS TRADING CORPORATION OF INDIA LTD.

v.

OCEAN KNIGH MARITIME CO. LTD. AND OTHERS

(Civil Appeal No. 4360 of 2006)

MARCH 29, 2012

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

Arbitration Act, 1940 – ss.5, 11, 12 and 37 – Time barred arbitration petition – By a Charter Party, respondent No.1 had let its vessel to appellant for carriage of cargo – Disputes between appellant and respondent No. 1 – Arbitration clause in Charter Party invoked – Respondent no.1 appointed respondent no.2 as its arbitrator whereas appellant appointed respondent No.3 as its arbitrator – Time for giving the award by the arbitrators was up to March 31, 1993 – Arbitral award could not be passed for want of consensus between the arbitrators – On July 3, 1999, respondent No.1 filed application u/ss.5,11 and 12 of the Act seeking removal of respondent No. 3 as co-arbitrator and for declaration that respondent No.2 was the sole arbitrator and in the alternative seeking revocation of authority of respondent No.3 as co-arbitrator and appointment of a new arbitrator in his place – High Court allowed the application and after revoking the authority of both the arbitrators appointed a former retired Judge of that Court as a sole arbitrator – Whether application u/ss.5,11 and 12 of the Act filed on July 3, 1999 by respondent No.1 was within limitation – Held: S.37 of the Act makes provisions of Limitation Act applicable to arbitrations – The Limitation Act does not expressly provide for limitation for an application u/ss.5,11 and 12 of the Act – Article 137 is a residuary provision which prescribes the period of three years for an application for which no period of limitation is provided elsewhere in the Limitation Act – Period of three years commences when the right to apply accrues – In the instant

case, right to apply for removal of respondent No.3 as co-arbitrator or for revocation of his authority accrued on expiry of March 31, 1993 when the two arbitrators became functus officio – It was thus, on April 1, 1993 that respondent No.1 became entitled to apply for the reliefs claimed in the application u/ss. 5,11 and 12 of the Act – Such application could have been made by respondent No.1 within three years from April 1, 1993 and not thereafter – Application u/ss. 5,11 and 12 of the Act filed by respondent No.1 was clearly time barred and deserved to be dismissed as such – Limitation Act, 1963 – Article 137.

By a Charter Party, respondent No.1 had let its vessel to appellant for carriage of cargo. Disputes arose between the parties in respect of demurrage charges. Clause 56 of the Charter Party contained arbitration clause. Respondent No.1 invoked the above arbitration clause and vide a letter communicated the appointment of respondent No. 2 as its arbitrator whereas the appellant appointed respondent No. 3 as its arbitrator. The time for giving the award by the arbitrators was up to March 31, 1993. Arbitral award, however, could not be passed for want of consensus between the arbitrators. On July 3, 1999, respondent No.1 filed application under Sections 5, 11 and 12 of the Arbitration Act, 1940 seeking removal of respondent No.3 as co-arbitrator and for declaration that respondent No. 2 was the sole arbitrator and in the alternative seeking revocation of the authority of respondent No.3 as co-arbitrator and appointment of a new arbitrator in his place. The appellant raised objection that the application was beyond the prescribed period of limitation and, was liable to be dismissed on that ground alone. By the impugned order, the High Court allowed the application filed by respondent No.1 under Sections 5,11 and 12 of the 1940 Act and after revoking the authority of both the arbitrators appointed a former Judge of that Court Justice Usha Mehra (retired) as a sole

arbitrator to decide the disputes between appellant and respondent No.1.

In the instant appeal, the question that arose for consideration was whether the application under Sections 5,11 and 12 of the 1940 Act filed on July 3, 1999 by respondent No.1 was within limitation.

Allowing the appeal, the Court

HELD: 1. Section 37 of the Arbitration Act, 1940 makes the provisions of Limitation Act, 1963 applicable to the arbitrations. The Limitation Act does not expressly provide for limitation for an application under Sections 5,11 and 12 of the 1940 Act. In this view of the matter, Part II, Third Division of the Schedule gets attracted. This part has title "Other Applications" and it has only one Article namely Article 137. [Paras 15, 16] [970-G; 972-B]

2. Article 137 is a residuary provision in respect of the applications. It prescribes the period of three years for an application for which no period of limitation is provided elsewhere in the Limitation Act. The period of three years commences when the right to apply accrues. One, therefore, has to see as to when did respondent No. 1 become entitled to apply for the relief claimed in the application under Sections 5,11 and 12 of the 1940 Act. It is from such date that limitation under Article 137 would begin to run. [Para 17] [972-D-E]

3. In the instant case, the parties extended the time for passing the award by the arbitrators till March 31, 1993. No extension of time was sought after March 31, 1993. In the backdrop of the factual position, the right to apply for removal of respondent No. 3 as co-arbitrator or for revocation of his authority accrued on expiry of March 31, 1993 when the two arbitrators became *functus officio*. It was thus, on April 1, 1993 that the respondent No. 1 became entitled to apply for the reliefs claimed in the

application under Sections 5,11 and 12 of the 1940 Act. Such application could have been made by respondent No. 1 within three years from April 1, 1993 and not thereafter. The limitation for making application under Sections 5,11 and 12 of the 1940 Act, thus, expired on March 31, 1996. Respondent No.1 made the application under above provisions on July 3, 1999. The application under Sections 5,11 and 12 of the 1940 Act filed by the respondent No. 1 was clearly time barred and deserved to be dismissed as such. The High Court was in error in allowing that application which was filed after the prescribed period of limitation. [Paras 19, 21] [972-H; 973-D-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4360 of 2006.

From the Judgment & Order dated 04.02.2005 of the High Court of Delhi at New Delhi in OMP No. 193 of 1999.

Jay Savla, Renuka Sahu for the Appellant.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The present appeal by special leave arises from the order dated February 4, 2005 passed by the Delhi High Court whereby the Single Judge of that court allowed the petition filed by the present respondent No.1 under Sections 5,11 and 12 of the Arbitration Act, 1940 (for short "the 1940 Act") and appointed a former Judge of that Court Justice Usha Mehra (retired) as a sole arbitrator to decide the disputes between the appellant and respondent No.1.

2. Bereft of unnecessary details, suffice it to notice for the purposes of the present appeal that by a Charter Party dated October 14, 1987, the respondent No. 1 let its vessel 'MV Ocean Knight' to the appellant for carriage of a cargo of Rock Phosphate in bulk. The disputes arose between the parties in respect of demurrage charges. Clause 56 of the Charter Party

which contains arbitration clause, reads as follows:

> "Clause 56: All disputes arising under this Charter shall be settled in India in accordance with the provisions of the Arbitration Act, 1940 in India, each party appointing an Arbitrator from out of the panel of Arbitrators maintained by the Indian Council of Arbitration, New Delhi and the two Arbitrators appointing an Umpire whose decision, in the event of disagreement between the Arbitrators, shall be final and binding upon both parties hereto. The Arbitrators and the Umpire shall be commercial men."

3. The respondent No.1 invoked the above arbitration clause and vide its letter dated May 30, 1989 communicated the appointment of Shri K.P. Patel (respondent No. 2) as its arbitrator.

4. On August 14, 1989, the appellant appointed Captain D.K. Verma (respondent No. 3) as its arbitrator.

5. The above arbitrators jointly appointed Shri R.S. Cooper as the Umpire.

6. On October 13, 1989, the respondent No. 1 filed a statement of claim claiming US$ 1,12,136.28 along with interest @ 18% p.a. The appellant traversed the claim of respondent No. 1 and raised diverse pleas in opposition thereto.

7. The two arbitrators concluded the hearing on May 12, 1992. It appears that the draft of the award was prepared by one of the arbitrators and sent to the other but for want of consensus, the award could not be given by them. It is an admitted position that the time for giving the award by the arbitrators was up to March 31, 1993. The fact, therefore, is that the arbitrators became *functus officio* w.e.f. April 1, 1993.

8. On July 3, 1999, the respondent No. 1 filed a Petition (application) under Sections 5,11 and 12 of the 1940 Act seeking removal of respondent No. 3- Captain D.K. Verma as

co-arbitrator and for declaration that respondent No. 2 – K.P. Patel was the sole arbitrator for deciding the disputes between the appellant and respondent No. 1 and in the alternative revoking the authority of respondent No. 3 as co-arbitrator and for appointment of a new arbitrator in his place.

9. The appellant contested the above petition filed by the respondent No. 1 by filing an affidavit-in-reply. Inter alia an objection was raised by the appellant that the petition was beyond the prescribed period of limitation and, was liable to be dismissed on that ground alone.

10. On November 26, 2001, the petition filed by the respondent No. 1 was dismissed in default but later on, it was restored.

11. By the impugned order, the Single Judge revoked the authority of both the arbitrators and appointed a former Judge of that Court Justice Usha Mehra (retired) as the sole arbitrator.

12. Despite service of notice, the respondent No. 1 has not chosen to appear.

13. We have heard Mr. Jay Savla, learned counsel for the appellant.

14. The sole question that requires consideration by us is whether the application under Sections 5,11 and 12 of the 1940 Act filed on July 3, 1999 by the respondent No.1 was within limitation.

15. Section 37 of the 1940 Act makes the provisions of Limitation Act, 1963 (for short " the Limitation Act") applicable to the arbitrations. It reads as follows:

> "37. Limitations.
>
> (1) All the provisions of the Indian Limitation Act, 1908 , (9 of 1908 .) shall apply to arbitrations as they apply to proceedings in Court.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(3) For the purposes of this section and of the Indian Limitation Act, 1908 , (9 of 1908 .) an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) with respect to the difference referred."

16. The Limitation Act does not expressly provide for limitation for an application under Sections 5,11 and 12 of the 1940 Act. In this view of the matter, Part II, Third Division of the Schedule gets attracted. This part has title "Other Applications" and it has only one Article namely; Article 137 which reads as follows:

PART II – OTHER APPLICATIONS

137	Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues.

17. The above Article is a residuary provision in respect of the applications. It prescribes the period of three years for an application for which no period of limitation is provided elsewhere in the Limitation Act. The period of three years commences when the right to apply accrues. We have, therefore, to see as to when did the respondent No. 1 become entitled to apply for the relief claimed in the application under Sections 5,11 and 12 of the 1940 Act. It is from such date that limitation under Article 137 would begin to run.

18. The High Court in the impugned order has noted that the arbitration proceedings could not reach the desired destination and the two arbitrators became *functus officio* due to the reason that the time granted for publishing the award had expired. The High Court, further noted that there had been a dead-lock since 1992 when last hearing was held.

19. As noted above, the parties extended the time for passing the award by the arbitrators till March 31, 1993. No extension of time was sought after March 31, 1993. As a matter of fact, respondent No. 3 (one of the arbitrators), in his affidavit-in-reply to the Petition under Sections 5,11 and 12 of the 1940

Act before the High Court, categorically stated that the arbitrators became *functus officio* on March 31,1993.

20. Section 5 of the 1940 Act postulates that the authority of an appointed arbitrator or umpire shall not be revoked without the leave of the Court unless arbitration arbitration agreement indicates contrary intention. Section 11 empowers the Court to remove arbitrator or umpire in the circumstances incorporated therein. Section 12 confers consequential power on the Court where it grants leave and revokes the authority of the appointed arbitrator or umpire under Section 5 or removes the arbitrator/umpire in exercise of its power under Section 11.

21. Insofar as the present case is concerned, in the backdrop of the factual position noted above, the right to apply for removal of respondent No. 3 as co-arbitrator or for revocation of his authority accrued on expiry of March 31, 1993 when the two arbitrators became *functus officio*. It was thus, on April 1, 1993 that the respondent No. 1 became entitled to apply for the reliefs claimed in the application under Sections 5,11 and 12 of the 1940 Act. Such application could have been made by respondent No. 1 within three years from April 1, 1993 and not thereafter. The limitation for making application under Sections 5,11 and 12 of the 1940 Act, thus, expired on March 31, 1996. The respondent No. 1 made the application under above provisions on July 3, 1999. The application under Sections 5,11 and and 12 of the 1940 Act filed by the respondent No. 1 was clearly time barred and deserved to be dismissed as such. In our opinion, the High Court was in error in allowing that application which was filed after the prescribed period of limitation.

20. Civil Appeal is, accordingly, allowed. The impugned order dated February 4, 2005 passed by the High Court is set-aside. The Arbitration Petition (O.M.P. No. 193 of 1999) filed by the respondent No. 1 is dismissed as time barred. As the respondent No. 1 has not chosen to appear, parties shall bear their own costs.

B.B.B. Appeal allowed.

R. MOHAJAN & ORS.

v.

SHEFALI SENGUPTA & ORS.

(Civil Appeal No. 3297 of 2012)

MARCH 30, 2012

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

Service law – Promotion – Seniority list challenged by respondents – Certain directions issued by the Tribunal to the appellants-department, however, non-implementation of the said directions by the appellants – Tribunal in the contempt petition filed before it directing the appellants to be present before the court to receive the charges of contempt – On appeal, held: Though the Tribunal expressed that its order was not complied with, the appellants pointed out that as per the order the promotion was granted to the respondents from the earliest date which is admissible as per rules and as provided by the Railway Board; that the Tribunal had ignored the fact that the consequential benefits at par with juniors have been complied with – Also the seniority of the respondents has been protected and granting promotion to a grade to which they had not yet obtained in their parent department would not only deprive promotional benefit to those who have been serving in the department but would involve the promotion policy being revised – While considering the seniority or promotion, the court cannot go into and examine the same contrary to the Rules/Policy applicable to the persons concerned framed by the Government – Thus, the direction of the Tribunal in the contempt petition is unsustainable and set aside – Since the appellants have complied with the earlier order of the Tribunal, contempt petition dismissed.

Constitution of India, 1950 – Article 136 – Order passed by the Tribunal in a contempt proceedings before it – Appeal

by way of special leave before the Supreme Court against the order of the Tribunal, without exercising the remedy before the High Court – Maintainability of – Held: Appeal by way of special leave is maintainable and is the appropriate remedy – Any order or decision of the Tribunal punishing for contempt is appealable u/s. 19 of the 1971 Act to the Supreme Court only – Contempt of Courts Act, 1971 – s. 19 – Administrative Tribunals Act, 1985 – 17.

Respondents filed an application before the Central Administrative Tribunal challenging their seniority lists. By order dated 09.05.2005, the Tribunal allowed the application with a direction to the appellants-Department to grant the respondents seniority from the date of their appointment on their respective posts prior to their transfers to the Railways with all consequential benefits. The appellants did not implement the directions of the Tribunal, as such the respondents filed contempt petition before the Tribunal. The Tribunal passed an order dated 11.06.2010 directing the contemnors/appellants to be present in the court on the next date of hearing for receiving the charges of contempt and adjourned the matter. Therefore, the appellants filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. After the order dated 09.05.2005 passed by the Tribunal the respondents, who are the beneficiaries of that order, filed a petition before the Central Administrative Tribunal contending that the order has not been implemented in full by the appellants. After considering its earlier order dated 09.05.2005 and the relief granted to the personnel, the Tribunal in the contempt proceedings, by the impugned order, directed the contemnors (appellants) to be present in Court on the next date of hearing and to receive the charges of contempt. In such circumstances, the aggrieved parties are at liberty to approach this Court without exercising

the remedy before the High Court, as observed in *L. Chandra Kumar's* case. It is clear from the direction in *L Chandra Kumar's* case that no appeal from the decision of the Tribunal will directly lie before this Court under Article 136 of the Constitution of India, but instead, the aggrieved party has to move the High Court under Articles 226/227 of the Constitution and thereafter from the decision of the Division Bench of the High Court, the aggrieved parties are free to approach this Court. In view of the said direction, though the counsel for the respondents was right in contending the same, however, the Constitution Bench had no occasion to consider the order/orders passed by the CAT in contempt proceedings. [Para 7, 8] [981-D-F; 983-A-C]

1.2. In view of the clarification by the three-Judge Bench of this Court in *T. Sudhakar Prasad's* case that any order or decision of the Tribunal punishing for contempt is appealable under Section 19 of the Contempt of Courts Act to the Supreme Court only. The Supreme Court in the case of *L. Chandra Kumar* nowhere stated that orders of the Tribunal holding the contemner guilty and punishing for contempt shall also be subject to judicial scrutiny of the High Court under Articles 226/227 of the Constitution in spite of remedy of statutory appeal provided by Section 19 of the Contempt of Courts Act being available, the objection as to the maintainability of the instant appeal is rejected and is held as maintainable. [Paras 8 and 9] [986-B-C-F]

1.3. Since according to the respondents, the directions of the order dated 09.05.2005 by the Tribunal, have not been complied with, they filed contempt petition before the CAT. Pursuant to the representations made by the respondents in terms of the directions of the CAT dated 09.05.2005, S.E. Railways, who is the relevant authority, by communication dated 20.06.2005 intimated

certain information to all the respondents. Though the CAT expressed that the said compliance was not in tune with its order dated 09.05.2005 as rightly pointed out by the appellant that as per the order, promotion was granted to the respondents from the earliest date which is admissible as per rules and as provided by the Railway Board; and the Tribunal ignored the fact that the consequential benefits at par with juniors have been complied with properly. The appellants also pointed out that the Tribunal wrongly misunderstood that the claim of respondent Nos. 1 & 2 for further promotion with 'ST' who was promoted as Sr. Clerk which is unsustainable as he had been promoted to the higher grade of Head Clerk prior to their joining the department and those particulars are available in the office records; and that the seniority of the respondents was protected and granting promotion to a grade to which they had not yet obtained in their parent department would not only deprive promotional benefit to those who have been serving in the department but would involve the promotion policy being revised. While considering the seniority or promotion, the Court cannot go into and examine the same contrary to the Rules/Policy applicable to the persons concerned framed by the Government. [Paras 10, 11 and 12] [987-D; 989-H; 990-A; 991-B-D]

1.4. The impugned direction of the Tribunal in the order dated 11.06.2010 cannot be sustained and is set aside. Inasmuch as the appellants have complied with the earlier order of the Tribunal dated 09.05.2005, the contempt petition is dismissed. [Para 13] [991-E-F]

L. Chandra Kumar vs. Union of India & Ors. **(1997) 3 SCC 261: 1997 (2) SCR 1186;** *T. Sudhakar Prasad vs. Government of A.P. and Ors.* **(2001) 1 SCC 516: 2000 (5) Suppl. SCR 610 – referred to.**

Case Law Reference:

1997 (2) SCR 1186	**Referred to.**	**Para 5, 7 8**
2000 (5) Suppl. SCR 610	**Referred to.**	**Para 5, 8, 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3297 of 2012.

From the Judgment & Order dated 11.06.2010 of the Central Administrative Tribunal, Calcutta Bench in CPC No. 113 of 2005 (O.A. No. 203 of 1997).

Mohan Jain, ASG, D.K. Thakur, C.S. Khan, Sheetal Menon, B.K. Prasad, Dr. Chaudhary Shamsuddin Khan, Arvind Kumar Sharma for the Appellants.

R.K. Gupta, S.K. Gupta, M.K. Singh, Shekhar Kumar for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is filed against the order dated 11.06.2010 passed by the Central Administrative Tribunal, Calcutta Bench in CPC No. 113 of 2005 (O.A. No. 203 of 1997) whereby the Tribunal passed an order directing the appellants herein to be present in court on the next date of hearing for receiving the charges of contempt and adjourned the matter to 30.07.2010.

3. **Brief facts:**

(a) The respondents herein were initially employed on the post of L.D.C. in DGS&D, Calcutta on various dates. Respondent Nos. 1 & 2 herein were further promoted as UDC in DGS&D. Their services were being utilized in purchase department for procurement against the ad hoc indents of the indenting Ministries/Departments. A decision was taken by the Central Government that the work relating to procurement could

be transferred to the concerned department and in this view, the respondents were transferred vide order dated 08.04.1992 to the Office of General Manager, Eastern Railway, S.E. Railway, C.L.W. and Metro Railway. They were placed under the disposal of the Controller of Stores, S.E. Railway in their existing capacity, pay and grade w.e.f. 24.04.1992.

(b) On 18.10.1994, the Railway Board issued an order regarding the absorbed persons, who came to be transferred from DGS&D to Zonal Railways and Production Units wherein it has been mentioned that these employees may be absorbed in the Railways to which they have been transferred and assigned seniority on the basis of date of their regular promotion/appointment in the relevant grade. In terms of the order passed by the Railway Board, their absorption and seniority list was issued vide Office Order dated 10.02.1995. Based on the seniority list, they were given promotion to the next post of Head Clerk and Senior Clerk vide Office Orders dated 23.06.1995 and 31.10.1995 respectively. Subsequently their seniority was published in the grade of Head Clerk and Senior Clerk vide orders dated 28.07.2000, 12.07.2001, 29.10.2003, and 27.01.1994 placing at their appropriate place as per their original seniority assigned vide Office Order dated 10.02.1995.

(c) Questioning the said order of seniority, the respondents herein made several verbal representations to the authorities for promotion retrospectively, but no steps have been taken by them. Challenging the seniority list, the respondents filed O.A. No. 203 of 1997 before the Central Administrative Tribunal, Calcutta Bench, Kolkata. By order dated 09.05.2005, the Tribunal allowed the application filed by the respondents herein with a direction to the Department (appellants herein) to grant them their due seniority from the date of their appointment on their respective posts in DGS&D prior to their transfers to the Railways and they shall also be entitled to the benefits of next below rule with all consequential benefits except any arrear that may be payable shall be restricted to from the date of filing of

the application and gave three months time to comply with the order. By office order dated 20.06.2005, the Chief Personnel Officer informed the respondents herein that their names do not come under the zone of consideration as per the seniority list published on 27.01.2004 and, therefore, they are not considered for the post of O.S. Grade II on restructuring basis.

(d) Not satisfied with the order passed by the Chief Personnel Officer, the respondents filed CPC No. 113 of 2005 (OA No.203 of 1997) before the Tribunal. The Tribunal, by order dated 07.04.2008 observed that there is difference of three years in the matter of promotion and granted two months' time to the Department to comply with the directions and directed to list the matter on 17.06.2008 for orders. As the appellants herein were not fully implementing the orders, the Tribunal, vide order dated 23.03.2010, directed for issuance of Rule 8 notice to the contemnors/appellants herein returnable after two months and directed to list the matter for orders on 03.05.2010. On 30.03.2010, counsel for the contemnors/appellants herein appeared before the Tribunal and placed on record various documents to show that the orders were, in fact, complied with. Not satisfied with the report filed by the Department, the Tribunal passed the impugned order dated 11.06.2010 directing the contemnors/appellants herein to present before it to receive charges of contempt and adjourned the matter for 30.07.2010.

(e) Against the said order, the appellants/Contemnors preferred this appeal by way of special leave before this Court.

4. Heard Mr. Mohan Jain, learned Additional Solicitor General for the appellants and Mr. R.K. Gupta, learned counsel for the respondents.

5. At the outset, Mr. R.K. Gupta, learned counsel for the respondents raised a preliminary objection as to the maintainability of the present appeal by the appellants before this Court without exercising the remedy before the High Court for which he relied on the decision of the Constitution Bench

of this Court in *L. Chandra Kumar vs. Union of India & Ors.,* (1997) 3 SCC 261. On the other hand, Mr. Mohan Jain, learned Additional Solicitor General, by drawing our attention to Section 19 of the Contempt of Courts Act, 1971, submitted that the present appeal by way of special leave is maintainable and is the appropriate remedy for the appellants. In this regard, he heavily relied on a three-Judge Bench decision of this Court in *T. Sudhakar Prasad vs. Government of A.P. & Ors.,* (2001) 1 SCC 516 which interpreted the decision of the Constitution Bench of this Court rendered in *L. Chandra Kumar* (supra).

6. Before going into the merits of the impugned order of the Tribunal, let us resolve the maintainability of the present appeal.

7. After the order dated 09.05.2005 passed by the Tribunal in O.A. No. 203 of 1997, the respondents, who are the beneficiaries of that order, filed C.P.C. No. 113 of 2005 before the Central Administrative Tribunal, Calcutta Bench contending that the order has not been implemented in full by the appellants herein. After considering its earlier order dated 09.05.2005 and the relief granted to the personnel, the Tribunal, by the impugned order, directed the contemnors (appellants herein) to be present in Court on the next date of hearing and to receive the charges of contempt. It is clear from the above direction that the said order came to be passed in a contempt proceeding. In such circumstances, the aggrieved parties are at liberty to approach this Court without exercising the remedy before the High Court, as observed in *L. Chandra Kumar* (supra).

8. In *L. Chandra Kumar* (supra), the Constitution Bench with regard to approaching the High Court against the order of the CAT has held as under:

> "91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the

> parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of the Tribunals under Article 227 of the Constitution. In R.K. Jain case, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforestated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.
>
> 92. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move

this Court under Article 136 of the Constitution."

It is clear from the above dictum that no appeal from the decision of the Tribunal will directly lie before this Court under Article 136 of the Constitution of India, but instead, the aggrieved party has to move the High Court under Articles 226/227 of the Constitution and thereafter from the decision of the Division Bench of the High Court, the aggrieved parties are free to approach this Court. In view of the above direction, though the learned counsel for the respondents is right in contending the same, however, the Constitution Bench had no occasion to consider the order/orders passed by the CAT in contempt proceedings. This aspect has been considered by the subsequent three-Judge Bench decision of this Court in *T. Sudhakar Prasad* (supra). The question posed before the Court was that whether the Administrative Tribunals set up under the provisions of the Administrative Tribunals Act, 1985, do they or do they not have power to punish for their contempt? After going into the decision in *L. Chandra Kumar* (supra) in detail, this Court has concluded as under:

"17. It is thus clear that the Constitution Bench has not declared the provisions of Article 323-A(2)(b) or Article 323-B(3)(d) or Section 17 of the Act ultra vires the Constitution. The High Court has, in its judgment under appeal, noted with emphasis the Tribunal having been compared to like "courts of first instance" and then proceeded to hold that the status of Administrative Tribunals having been held to be equivalent to courts or Tribunals subordinate to the High Court the jurisdiction to hear their own contempt was lost by the Administrative Tribunals and the only course available to them was either to make a reference to the High Court or to file a complaint under Sections 193, 219 and 228 IPC as provided by Section 30 of the Act. The High Court has proceeded on the reasoning that the Tribunal having been held to be subordinate to the High Court for the purpose of Articles 226/227 of the Constitution and its decisions having been

subjected to judicial review jurisdiction of the High Court under Articles 226/227 of the Constitution, the right to file an appeal to the Supreme Court against an order passed by the Tribunal punishing for contempt under Section 17 of the Act was defeated and on these twin grounds Section 17 of the Act became unworkable and unconstitutional. We do not find any basis for such conclusion or inference being drawn from the judgments of this Court in the cases of *Supreme Court Bar Assn. or L. Chandra Kumar* or any other decision of this Court. The Constitution Bench has in so many words said that the jurisdiction conferred on the High Courts under Articles 226/227 could not be taken away by conferring the same on any court or Tribunal and jurisdiction hitherto exercised by the High Court now legislatively conferred on Tribunals to the exclusion of the High Court on specified matters, did not amount to assigning Tribunals a status of substitute for the High Court but such jurisdiction was capable of being conferred *additionally* or *supplementally* on any court or Tribunal which is not a concept strange to the scheme of the Constitution more so in view of Articles 323-A and 323-B. Clause (2)(b) of Article 323-A specifically empowers Parliament to enact a law specifying the jurisdiction and powers, including the power to punish for contempt, being conferred on the Administrative Tribunals constituted under Article 323-A. Section 17 of the Act derives its legislative sanctity therefrom. The power of the High Court to punish for contempt of itself under Article 215 of the Constitution remains intact but the jurisdiction, power and authority to hear and decide the matters covered by sub-section (1) of Section 14 of the Act having been conferred on the Administrative Tribunals the jurisdiction of the High Court to that extent has been taken away and hence the same jurisdiction which vested in the High Court to punish for contempt of itself in the matters now falling within the jurisdiction of Tribunals if those matters would have continued to be heard by the High Court has now been

conferred on the Administrative Tribunals under Section 17 of the Act. The jurisdiction is the same as vesting in the High Courts under Article 215 of the Constitution read with the provisions of the Contempt of Courts Act, 1971. The need for enacting Section 17 arose, firstly, to avoid doubts, and secondly, because the Tribunals are not "courts of record". While holding the proceedings under Section 17 of the Act the Tribunal remains a Tribunal and so would be amenable to the jurisdiction of the High Court under Articles 226/227 of the Constitution subject to the well-established rules of self-restraint governing the discretion of the High Court to interfere with the pending proceedings and upset the interim or interlocutory orders of the Tribunals. However any order or decision of the Tribunal punishing for contempt shall be appealable only to the Supreme Court within 60 days from the date of the order appealed against in view of the specific provision contained in Section 19 of the Contempt of Courts Act, 1971 read with Section 17 of the Administrative Tribunals Act, 1985. Section 17 of the Administrative Tribunals Act is a piece of legislation by reference. The provisions of the Contempt of Courts Act are not as if lifted and incorporated in the text of the Administrative Tribunals Act (as is in the case of legislation by incorporation); they remain there where they are, yet while reading the provisions of the Contempt of Courts Act in the context of Tribunals, the same will be so read as to read the word "Tribunal" in place of the word "High Court" wherever it occurs, subject to the modifications set out in Section 17 of the Administrative Tribunals Act. Section 19 of the Contempt of Courts Act, 1971 provides for appeals. In its text also by virtue of Section 17 of the Administrative Tribunals Act, 1985 the word "High Court" shall be read as "Tribunal". Here, by way of abundant caution, we make it clear that the concept of intra-Tribunal appeals i.e. appeal from an order or decision of a Member of a Tribunal sitting singly to a Bench of not less than two Members of the Tribunal is alien to the Administrative Tribunals Act, 1985.

The question of any order made under the provisions of the Contempt of Courts Act, 1971 by a Member of the Tribunal sitting singly, if the rules of business framed by the Tribunal or the appropriate Government permit such hearing, being subjected to an appeal before a Bench of two or more Members of the Tribunal therefore does not arise. Any order or decision of the Tribunal punishing for contempt is appealable under Section 19 of the Act to the Supreme Court only. *The Supreme Court in the case of L. Chandra Kumar has nowhere said that orders of the Tribunal holding the contemner guilty and punishing for contempt shall also be subject to judicial scrutiny of the High Court under Articles 226/227 of the Constitution in spite of remedy of statutory appeal provided by Section 19 of the Contempt of Courts Act being available.* The distinction between orders passed by the Administrative Tribunal on matters covered by Section 14(1) of the Administrative Tribunals Act and orders punishing for contempt under Section 19 of the Contempt of Courts Act read with Section 17 of the Administrative Tribunals Act, is this: as against the former there is no remedy of appeal statutorily provided, but as against the latter statutory remedy of appeal is provided by Section 19 of the Contempt of Courts Act itself." (Emphasis supplied)

9. In view of the clarification by the three-Judge Bench of this Court in *T. Sudhakar Prasad* (supra), we reject the objection as to the maintainability of the present appeal and hold the same as maintainable.

10. Now let us consider the merits of the impugned order. Since we are concerned about the question as to whether the directions of the CAT have been implemented or not, there is no need to refer all the factual details once again. The operative part of the directions of the order dated 09.05.2005 of the CAT reads as under:

"6. In this view of what has been said and discussed above,

this original application is allowed with a direction to the respondents to grant them their due seniority from the date of their appointment on their respective posts in DGS&D prior to their transfers to the present organization and they shall also be entitled to the benefits of next below rule with all consequential benefits except any arrear that may be payable shall be restricted to from the date of filing of this original application. However, in case the applicants have already been granted the due benefits, the details of the same shall be furnished to the applicants. This order shall be complied within a period of three months from the date of the receipt of a copy of this order. However, there shall be no order as to costs."

Since according to the respondents, the said directions have not been complied with, they filed contempt petition being C.P.C. No. 113 of 2005 before the CAT. It is useful to refer that pursuant to the representations made by the respondents herein, in terms of the directions of the CAT dated 09.05.2005, S.E. Railways, who is the relevant authority, by communication dated 20.06.2005 intimated the following information to all the respondents herein. The same are as follows:

"SOUTH EASTERN RAILWAY
CPO'S OFFICE/GRC
Date: 20.6.2005

No. P/Stores/CAT/CAL/OA 203-97

To

1. Smt. Shefali Sengupta, Head Clerk/COS's Office/ GRC
2. Sri Probir Kumar Nath, Head Clerk/COS's Office/ GRC
3. Sri Apurba Kumar Mukherjee. Sr. Clerk/COS's Office GRC

(THROUGH Sr. MATERIAL MANAGER (M&P)/GRC Ref :

1) COS/GRC's letter No. S/58/A/14/Pt.III/Gr.C/78 dated 27.5.2005

2) CAT/CAL's order dated 9.5.05 in OA No. 203/1997

In response to representation dated 8.6.2005 submitted by the above Applicants and in compliance of Hon'ble CAT/KOL's order dated 9.5.2005 in OA No. 203/ 1997 the following information/compliance report is furnished to the representationist for their appraisal.

That in terms of this office order No. OP/Stores/39A dated 10.2.95 their absorption and seniority case had been settled according to Rly. Board's guidelines communicated to this Rly. Vide their letter No. E(NG) I/92/TR/7 dated 18.10.94 assigning their seniority from the date of regular promotion/appointment to the relevant grade they were holding at the time of transfer to this Railway as follows:

S. No.	Name	Designation & Scale	Date of appointment	Date of promotion to the next grade
1	Smt. Shefali Sengupta	Sr. Clerk (1200-2040)	30.5.1975	27.2.82
2	Sr. Probir Kr. Nath	-do-	6.2.1976	1.1.1983
3	Sri Apurba Kr. Mukherjee	Jr. Clerk (950-1500)	17.11.1982	
4	Kum. Khama Banerjee	Peon (750-940)	31.3.1983	

Based on the assignment of seniority, they were given promotion to the next post of Hd. Clerk and Sr. Clerk vide OO No. P/Stores/197 dated 23.6.95 and P/Stores/315 dt. 31.10.95 respectively.

Subsequently their seniority was published in the

grade of Head Clerk and Senior Clerk vide order No. P/Stores/Revised Seniority/2000 dated 28.07.2000, P/Stores/Seniority/COS dated 12.07.2001 and P/Stores/Seniority list/COS 29.10.2003, P/Stores/Seniority List/COS dated 27.01.1994 placing at their appropriate place as per their original seniority assigned vide Office Order dated 10.02.1995.

Thus it is clear from the above position that their date of promotion in their earlier cadre of DGS&D has been protected and they have been assigned seniority in Railway considering length of service in the grade of DGS&D.

In the seniority list dated 27.1.2004, Smt. Sengupta and Sri Nath are at S.Nos. 20 & 21 in the present selection staff in general seniority upto 9 has been called 5 persons senior to them in the general seniority are also not called because in the present selection of SO Gr.II, COS's office in scale Rs.5500-9000/- (RSRP) their name do not come under the zone of consideration as per the seniority list published in the year mentioned above. Hence they are not considered for the post of OS Gr. II on restructuring basis.

The representationists may be informed accordingly serving one copy of this letter to each.

Sd/-
(B.N. SOREN)
Sr. Personnel Officer (W)

Copy to: COS/GRC for information and necessary action.

Sd/-
For Chief Personnel Officer"

11. Though the CAT has expressed that the said compliance is not in tune with its order dated 09.05.2005, as rightly pointed out by Mr. Mohan Jain, learned ASG, that as per the order, promotion was granted to the respondents from the

earliest date which is admissible as per rules and as provided by the Railway Board. As pointed out by the appellants, the Tribunal has ignored the fact that the consequential benefits at par with juniors have been complied with properly. This was explained as under:

"There was difference of 3 years in the matter of promotion for Respondent Nos. 1 & 2. In terms of Railway Boards Lr. No. E(NG) 1/9/2Tr/7 dated 18.10.1994 Smt. Shefali Sengupta and Prabir Kumar Nath were granted seniority of the post of Sr. Clerk w.e.f. 1.1.83 and Sri Apurba Kumar Mukherjee was granted seniority of the post of Jr. Clerk w.e.f. 27.11.82 i.e. the date of promotion/appointment at DGS&D.

In terms of Railway Board's Lr. No. E(NG) I-96/SRG/22 dated 30.10.96 the seniority assigned to DGS&D transferors on absorption in terms of Board's letter dated 18.10.1994 would be operative in respect of promotions made/to be made after the date of their absorption and that the same would not affect the promotions already ordered on regular basis prior to the date of such absorption.

Since Smt. Shefali Sengupta and Prabir Kumar Nath joined as Sr. Clerk on 24.4.92 are not entitled for a promotion prior to 24.4.92 and accordingly they were given promotional benefits at par with their Junior Sri Subrata Saha who was Sr. Clerk on the date of their joining on 24.4.92. Accordingly, they were promoted to the post of Head Clerk at par with their Junior Sri Saha w.e.f. 30.9.92. Since Sri S.K. Talukdar had already been promoted as OS-II prior to their joining the consequential benefit of promotion would not be extended in terms of Board's Lr. Dated 30.10.96. Similarly Maniral Islam whose date of appointment to Sr. Clerk on 1.2.88 S.E. Rly was 3.5.84 promoted to Sr. Clerk on 1.2.88 prior to joining of Apurba Kr. Mukherjee on 24.4.92. Hence Sri Mukherjee will not get

the benefit at par with Maniral Islam as per Board's letter dated 30.10.96, thus the order has been fully complied with and there is no difference in promotion for respondent Nos. 1 & 2."

12. In addition to the same, the appellants have also pointed out that the Tribunal wrongly misunderstood that the claim of respondent Nos. 1 & 2 for further promotion with Sri Talukdar, who was promoted as Sr. Clerk on 14.02.83 which is unsustainable as he had been promoted to the higher grade of Head Clerk prior to their joining the department and those particulars are available in the office records. It is also pointed out that the seniority of the respondents has been protected and granting promotion to a grade to which they had not yet obtained in their parent department would not only deprive promotional benefit to those who have been serving in the department but would involve the promotion policy being revised. While considering the seniority or promotion, the Court cannot go into and examine the same contrary to the Rules/Policy applicable to the persons concerned framed by the Government.

13. In the light of the above discussion and of the factual information furnished, we are unable to sustain the impugned direction of the Tribunal in the order dated 11.06.2010, consequently the same is set aside. Inasmuch as the appellants have complied with the earlier order of the Tribunal dated 09.05.2005, the contempt petition is dismissed. The appeal is allowed. No order as to costs.

N.J. Appeal allowed.

RAMESHKUMAR AGARWAL

v.

RAJMALA EXPORTS PVT. LTD. & ORS

(Civil Appeal No. 3295 of 2012)

MARCH 30, 2012

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

Code of Civil Procedure, 1908 – Or.VI, r.17 – Amendment of pleadings –Suit by respondent for specific performance of agreement of sale of immovable property – Subsequent prayer by plaintiff-respondent for amendment of the plaint – Plea of defendant-appellant that the proposed amendment altered the cause of action – Held: Not tenable – The amendment application was filed immediately after filing of the suit and before commencement of the trial – The proposed amendment merely introduced facts/evidence in support of the contention already pleaded, viz., that the entire consideration under the agreement had been paid – In the original plaint, the details of payment of consideration were not stated and by the amendment, the plaintiff wanted to explain how money consideration was paid – There was thus no inconsistency in the case of the plaintiff – By the proposed amendment, the plaintiff was not altering the cause of action and in any way prejudice the defendants – The amendment sought for was also not barred by limitation.

Code of Civil Procedure, 1908 – Or.VI, r.17 – Amendment of pleadings – Object and scope of – Factors to be taken into consideration while dealing with application for amendments – Held: While deciding application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments – Purpose and object of Order VI Rule 17 of CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be

just – Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach – Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs – Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

Respondent no.1 filed suit for specific performance of agreement of sale of immovable property before the High Court. Later, respondent no.1-plaintiff took out Chamber Summons in the suit for amendment of the plaint. A Single Judge of the High Court partly allowed the Chamber Summons. Against the order, the appellant-defendant filed appeal before the Division Bench of the High Court which dismissed the same. Hence the present appeal.

Dismissing the appeal, the Court

HELD:1. After filing a suit for specific performance in the year 2007, the plaintiff filed Chamber Summons for amendment of plaint for impleadment of two parties as plaintiff Nos. 2 & 3 and three parties as defendant Nos. 3,4 & 5 apart from the fact that he wants to explain how money consideration under the agreement of sale was paid. A perusal of the amendment application shows that plaintiff by this amendment seeks to incorporate certain facts, which according to him, establish that an aggregate amount of Rs. 2,05,00,000/- was paid by him and the proposed plaintiffs prior to the suit agreement; that defendant No.1 confirmed having received the payment from the plaintiffs in the name of his nominees, namely, proposed defendant Nos. 3-5 and the receipt of the amount was reflected in the accounts of proposed defendant Nos. 3-5. It is also projected that the proposed amendment is limited to the extent of contending that defendant Nos. 1 and 2 and the proposed defendants

treated the payment made by the plaintiffs to defendant Nos.3 to 5 as payment having been made to defendant No.1. Though the appellant herein-defendant No.1 therein, contended that the proposed amendment altered the cause of action, after perusal of the entire averments, this Court is of the view that it merely introduce facts/evidence in support of the contention already pleaded, viz., that the entire consideration under the agreement has been paid. In the original plaint, the details of payment of consideration have not been stated and by the present amendment, the plaintiff wants to explain how money was paid. Accordingly, there is no inconsistency in the case of the plaintiff. The claim that the present amendment being barred by limitation is also rightly rejected by the Courts below. [Para 5] [998-E-H; 999-A-B]

2. Order VI Rule 17 of CPC enables the parties to make amendment of the plaint. It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations. [Paras 7, 11] [999-F; 1001-H; 1002-A-C]

Rajkumar Gurawara (Dead) Through L.Rs vs. S.K. Sarwagi & Company Private Limited & Anr. **(2008) 14 SCC 364: 2008 (8) SCR 700 and** *Revajeetu Builders & Developers vs. Narayanaswamy & Sons & Ors.* **(2009) 10 SCC 84: 2009 (15) SCR 103 – referred to.**

3. In the instant case, in view of the fact that the amendment application came to be filed immediately after filing of the suit (suit came to be filed in 2007 and the amendment application was in 2008) i.e. before commencement of the trial and taking note of the fact that the single Judge confined the relief only to a certain extent and also that in the proposed amendment the plaintiff wants to explain how the money was paid, though necessary averments in the form of foundation have already been laid in the original plaint, it is held that by this process the plaintiff is not altering the cause of action and in any way prejudice defendants. [Para 12] [1002-D-E]

4. By the present amendment, the plaintiff furnished more details about the mode of payment of consideration. Accordingly, it is held that there is no inconsistency and the amendment sought for is not barred by limitation. [Para 13] [1002-F]

Case Law Reference:

2008 (8) SCR 700	**referred to**	**Para 9**
2009 (15) SCR 103	**referred to**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3295 of 2012.

From the Judgment & Order dated 8.6.2010 of the High Court of Judicature at Bombay in Appeal No. 40 of 2010 in Chamber Summons No. 1233 of 2008 in Suit No. 2374 of 2007.

Shekhar Naphade, Amit Kumar Sharma, E.C. Agrawala for the Appellant.

Vinay Navare, Abha R. Sharma, Gaurav Agrawal for the Respondents.

The Judgment of the Court was delivered by

P.SATHASIVAM, J. 1.Leave granted.

2. This appeal is directed against the final judgment and order dated 08.06.2010 passed by the High Court of Judicature at Bombay in Appeal No. 40 of 2010 in Chamber Summons No. 1233 of 2008 in Suit No. 2374 of 2007 whereby the High Court disposed of the appeal filed by the appellant herein by partly allowing Chamber Summons No. 1233 of 2008 filed by respondent No.1 herein for amendment in the plaint.

3. **Brief facts:**

(a) The property (Bungalow) in question was constructed by the late Ganpatrai Agarwal, father of the appellant herein. Vipin Kumar Agarwal, respondent No.4 is the brother of the appellant. The land on which the said bungalow is constructed is a leasehold property and belongs to Hatkesh Co-operative Housing Society Limited (hereinafter referred to as "the Society"). The Society granted leasehold rights in respect of the said plot by indenture of lease dated 22.02.1976. The mother of the appellant passed away in 1991 and his father also passed away in 2002. After the death of the parents, the appellant holds 50% share in the suit property and his brother, respondent No.4 herein, also holds remaining 50% share in the suit property.

(b) According to the appellant, in the year 2002, for setting up a new business, he was in need of substantial finance and for that purpose, he approached respondent No.1-Company through its Director Mr. Rajendra Kumar Aggarwal, who is his co-brother. Respondent No.2 agreed to finance the proposed projects on the condition that some documents are required to be executed as security. In 2006, the appellant signed an agreement with the Company promising to give his share in the bungalow as a security for the loan. The said agreement was to be acted only when the Company will give an advance loan

of Rs.1,85,00,000/- and further upon failure of the appellant to repay the same within a period of two years from the date of disbursement of the full amount of loan with interest @ 12% p.a. Even before getting the loan amount, the appellant herein signed the agreement. Due to adverse market conditions, the appellant did not go ahead with the proposed project and did not take any kind of financial assistance from respondent No.1 – Company and respondent No.2 – co-brother of the appellant.

(c) According to respondent No.2, the appellant signed an agreement for sale on 02.02.2006 for selling 50% of his undivided right, title and interest in the suit property. On 16.08.2007, respondent No.1-Company filed a suit for specific performance being Suit No.2374 of 2007 before the High Court of Bombay alleging that the appellant herein had agreed to sell his 50% share in the suit property to the Company for a consideration of Rs.1,85,00,000/- and also alleged that the appellant ensured that respondent No.4 – the brother of the appellant would sell his 50% undivided share in the property to the Company for Rs.3,00,00,000/- and represented him as an agent of respondent No.4. On 06.09.2007, respondent No.1 – Company took out Notice of Motion No.3241 of 2007 in which an ex-parte ad interim order was passed in their favour.

(d) The appellant herein sent a letter dated 10.09.2007 through his advocate to respondent Nos. 1 & 2 for seeking details of the consideration of Rs.1,85,00,000/- and also for inspection of various documents referred to and relied on by them in the plaint as well as in the Notice of Motion. After inspecting the documents, the appellant filed a reply and prayed for vacating of the ex-parte ad interim order dated 06.09.2007. After hearing the parties, the High Court, by order dated 26.11.2007, vacated the ex-parte ad interim order. On 20.08.2008, respondent No.1-Company took out Chamber Summons No. 1233 of 2008 in Suit No. 2374 of 2007 with a prayer to amend the plaint by impleading other parties. The appellant herein opposed the same. However, by order dated

21.11.2009, learned Single Judge of the High Court partly allowed the Chamber Summons.

(e) Against the order dated 21.11.2009, the appellant herein preferred an appeal before the Division Bench being Appeal No. 40 of 2009 in Chamber Summons No. 1233 of 2008 in Suit No. 2374 of 2007. By the impugned order dated 08.06.2010, the Division Bench of the High Court dismissed the appeal.

(f) Aggrieved by the said order of the High Court, the appellant has filed this appeal by way of special leave before this Court.

4. Heard Mr. Shekhar Naphade, learned senior counsel for the appellant, Mr. Gaurav Agrawal, learned counsel for respondent Nos. 1-3 and Mr. Vinay Navare, learned counsel for respondent No.4.

5. After filing a suit for specific performance in the year 2007, the plaintiff filed Chamber Summons No. 1233 of 2008 for amendment of plaint for impleadment of two parties as plaintiff Nos. 2 & 3 and three parties as defendant Nos. 3,4 & 5 apart from the fact that he wants to explain how money was paid. A perusal of the amendment application shows that plaintiff by this amendment seeks to incorporate certain facts, which according to him, establish that an aggregate amount of Rs. 2,05,00,000/- was paid by him and the proposed plaintiffs prior to the suit agreement; that defendant No.1 confirmed having received the payment from the plaintiffs in the name of his nominees, namely, proposed defendant Nos. 3-5 and the receipt of the amount was reflected in the accounts of proposed defendant Nos. 3-5. It is also projected that the proposed amendment is limited to the extent of contending that defendant Nos. 1 and 2 and the proposed defendants treated the payment made by the plaintiffs to defendant Nos.3 to 5 as payment having been made to defendant No.1. Though the appellant herein – defendant No.1 therein, contended that the proposed

amendment altered the cause of action, after perusal of the entire averments, we are of the view that it merely introduce facts/evidence in support of the contention already pleaded, viz., that the entire consideration under the agreement has been paid. In the original plaint, the details of payment of consideration have not been stated and by the present amendment, the plaintiff wants to explain how money was paid. Accordingly, there is no inconsistency in the case of the plaintiff. The claim that the present amendment being barred by limitation is also rightly rejected by the Courts below. In fact, the learned single Judge allowed the Chamber summons only to the extent of prayers (a) and (b) subject to clarification made in paragraph 14 of his order.

6. Order VI Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") makes it clear that every pleading shall contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence but not the evidence by which they are to be proved. Sub-rule (2) of Rule 2 makes it clear that every pleading shall be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph. Sub-rule (3) of Rule 2 mandates that dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

7. Order VI Rule 17 of the Code enables the parties to make amendment of the plaint which reads as under;

> *"17. Amendment of pleadings* – The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

8. Order I Rule 1 of the Code speaks about who may be joined in a suit as plaintiffs. Mr. Shekhar Naphade, learned senior counsel for the appellant, after taking us through the agreement for sale dated 02.02.2006, pointed out that the parties to the said agreement being only Rameshkumar Agarwal, the present appellant and Rajmala Exports Pvt. Ltd., respondent No.1 herein and the other proposed parties, particularly, Plaintiff Nos. 2 & 3 have nothing to do with the contract, and according to him, the Courts below have committed an error in entertaining the amendment application. In the light of the said contention, we have carefully perused the agreement for sale dated 02.02.2006, parties to the same and the relevant provisions from the Code. We have already pointed out that the learned single Judge himself has agreed with the objection as to proposed defendant Nos. 3-5 and found that they are not necessary parties to the suit, however, inasmuch as the main object of the amendment sought for by the plaintiff is to explain how the money was paid, permitted the other reliefs including impleadment of plaintiff Nos. 2 & 3 as parties to the suit.

9.In *Rajkumar Gurawara (Dead) Through L.Rs vs. S.K. Sarwagi & Company Private Limited & Anr.* (2008) 14 SCC 364, this Court considered the scope of amendment of pleadings before or after the commencement of the trial. In paragraph 18, this Court held as under:-

> "…….It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation……."

10. In *Revajeetu Builders & Developers vs. Narayanaswamy & Sons & Ors.* (2009) 10 SCC 84, this Court once again considered the scope of amendment of pleadings. In paragraph 63, it concluded as follows:

"Factors to be taken into consideration while dealing with applications for amendments

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

11. It is clear that while deciding the application for

amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

12. In view of the fact that the amendment application came to be filed immediately after filing of the suit (suit came to be filed in 2007 and the amendment application was in 2008) i.e. before commencement of the trial and taking note of the fact that the learned single Judge confined the relief only to a certain extent and also that in the proposed amendment the plaintiff wants to explain how the money was paid, though necessary averments in the form of foundation have already been laid in the original plaint, we hold that by this process the plaintiff is not altering the cause of action and in any way prejudice defendants.

13. By the present amendment, the plaintiff furnished more details about the mode of payment of consideration. Accordingly, we hold that there is no inconsistency and the amendment sought for is not barred by limitation. We fully agree with the conclusion arrived at by the learned single Judge and the Division Bench of the High Court.

14. In the light of what we have stated above, we do not find any merit in the appeal, consequently, the same is dismissed. No order as to costs.

B.B.B. Appeal dismissed.

JEGANNATHAN

v.

RAJU SIGAMANI & ANR.

(Civil Appeal Nos. 3347-3348 of 2012)

APRIL 2, 2012

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

Code of Civil Procedure, 1908:

O. 43, r.1(u) r/w O.41, r.23-A and s.100 – Miscellaneous civil appeal filed before High Court against order of remand passed in a first appeal under O.41 – Held: Is maintainable – Order of remand passed under O. 41, r.23-A is amenable to appeal under O. 43, r.1(u) – However, the constraints of s.100 continue to be attached to such an appeal – There is a difference between maintainability of an appeal and the scope of hearing of an appeal – Order of High Court holding the civil miscellaneous appeal as not maintainable set aside.

The appellant-plaintiff No. 2 along with two others filed a suit against the defendant-respondent No.1 for declaration and permanent-mandatory injunction. The suit was decreed for permanent injunction. On respondent No. 1 filing a first appeal, the judgment of the trial court was set-aside and the suit was remanded back to the trial court for decision afresh on merits. The civil miscellaneous appeal filed by the appellant and respondent No. 2 under O. 43, r. 1(u) of the Code of Civil Procedure 1908 was held by High Court as not maintainable. The review petition was also dismissed.

Allowing the appeals, the Court

HELD: 1.1. Order 41 of the Code of Civil Procedure, 1908 provides for appeals from original decrees. The Code empowers the appellate court to order remand in

three situations. These three situations are covered by O. 41, r. 23, O. 41, r. 23A and O. 41 r. 25. [para 9] [1006-E]

1.2. In the instant case, the trial court had disposed of the suit on merits and not on a preliminary issue. The first appellate court set aside the judgment and decree of the trial court and directed it to decide the suit afresh after giving parties an opportunity to lead evidence – oral as well as documentary. The nature of the order passed by the appellate court leaves no manner of doubt that such order has been passed by it in exercise of its power under O. 41, r. 23A of the Code. [para 13] [1008-D-E]

1.3. Clause (u) of r.1 of O.43 was amended consequent upon insertion of r.23A in O. 41 w.e.f. 1.2.1977. It is clear from the above provision that an order of remand passed under O. 41 r. 23A is amenable to appeal under O. 43, r.1 (u) of the Code. [para 14-15] [1008-F; 1009-A]

1.4. The constraints of s.100 continue to be attached to an appeal under O. 43, r.1(u). The appeal under O. 43, r.1(u) can only be heard on the grounds a second appeal is heard u/s 100. There is a difference between maintainability of an appeal and the scope of hearing of an appeal. The High Court failed to keep in view this distinction and wrongly applied the case of *Narayanan* in holding that miscellaneous appeal preferred by the appellant was not maintainable. The order of the High Court is set aside. The C.M.A. No. 1227 of 2002 is restored to the file of the High Court, for hearing and dispos al in accordance with law. [para 15,17 and 18] [1009-C-F]

Narayanan Vs. Kumaran & Ors. **2004 (3)SCR 11 = (2004) 4 SCC 26- explained.**

Case Law Reference:

2004 (3) SCR 11	**explained**	**para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3347-3348 of 2012.

From the Judgment & Order dated 26.09.2008 of the High Court of Madurai Bench of Madras High Court in C.M.A. No. 1227 of 2002 and order dated 12.11.2009 in Review Application No. 67 of 2009 in C.M.A. No. 1227 of 2002.

V. Mohana for the Appellant.

S. Aravindh, Senthil Jagadeesan for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J.

Delay condoned.

1. Leave granted.

2. The appellant herein is plaintiff No. 2. He, along with two others, namely, Gnanasoundari and George filed a Suit against the present respondent No.1 for declaration, permanent injunction and mandatory injunction.

3. The respondent No. 1 contested the Suit on diverse grounds.

4. After recording evidence and on hearing the parties, the trial Court on September 16, 1999 decreed plaintiffs' Suit for the grant of permanent injunction.

5. Aggrieved by the judgment and decree dated September 16, 1999, the respondent No.1 preferred first appeal which came up for hearing before the Subordinate Judge, Tiruchirapalli. On hearing the parties, the first appellate Court, allowed the appeal, set aside the judgment of the trial Court and remanded the Suit back to the trial Court with a direction to give an opportunity to both the parties to let in

evidence –oral and documentary— and then decide the Suit afresh on merits.

6. The order of remand dated April 8, 2002 was challenged by the present appellant and present respondent No. 2 by filing a Miscellaneous Appeal before the High Court under Order 43 Rule 1(u) of the Code of Civil Procedure, 1908 (for short 'the Code').

7. The High Court, by its order dated 26th September, 2008, held that the Civil Miscellaneous Appeal was not maintainable and dismissed the appeal on that ground.

8. The appellant and the respondent No. 2 then filed a petition before the High Court seeking review of the order dated September 26, 2008. However, the Review Petition was also dismissed on November 12, 2009. It is from these two orders that the present appeal has arisen.

9. Order 41 of the Code provides for appeals from original decrees. The Code empowers the appellate Court to order remand in three situations. These three situations are covered by Order 41 Rule 23, Order 41 Rule 23A and Order 41 Rule 25 which read as under:

23. Remand of case by Appellate Court —

Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23A. Remand in other cases —

Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from —

Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred and in such case shall direct such court to take the additional evidence required; and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons there for within such time as may be fixed by the Appellate Court or extended by it from time to time.

10. Order 41 Rule 23 is invocable by the appellate Court where the appeal has arisen from the decree passed on a preliminary point. In other words, where the entire suit has been disposed of by the trial Court on a preliminary point and such decree is reversed in appeal and the appellate Court thinks proper to remand the case for fresh disposal. While doing so, the appellate Court may issue further direction for trial of certain issues.

11. Order 41 Rule 23A has been inserted in the Code by Act No. 104 of 1976 w.e.f. February 1, 1977. According to Order 41 Rule 23A of the Code, the appellate Court may remand the suit to the trial Court even though such suit has been disposed of on merits. It provides that where the trial Court has

disposed of the Suit on merits and the decree is reversed in appeal and the appellate Court considers that retrial is necessary, the appellate Court may remand the suit to the trial Court.

12. Insofar as Order 41 Rule 25 of the Code is concerned, the appellate Court continues to be in seisin of the matter; it calls upon the trial Court to record the finding on some issue or issues and send that finding to the appellate Court. The power under Order 41 Rule 25 is invoked by the appellate Court where it holds that the trial Court that passed the decree omitted to frame or try any issue or determine any question of fact essential to decide the matter finally. The appellate Court while remitting some issue or issues, may direct the trial Court to take additional evidence on such issue/s.

13. Insofar as the present case is concerned, the trial Court had disposed of the suit on merits and not on a preliminary issue. The first appellate Court set aside the judgment and decree of the trial Court and directed the trial Court to decide the suit afresh after giving parties an opportunity to lead evidence — oral as well as documentary. The nature of the order passed by the appellate Court leaves no manner of doubt that such order has been passed by the appellate Court in exercise of its power under Order 41 Rule 23A of the Code.

14. Order 43 of the Code provides for appeals from orders. Clause (u) of Rule 1 Order 43 was amended consequent upon insertion of Rule 23A in Order 41 w.e.f. February 1, 1977. It reads as under:

An appeal shall lie from the following orders under the provisions of Section 104, namely:—

x x x x x

(u) an order under rule 23 or rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

x x x x x

15. It is clear from the above provision that an order of remand passed under Order 41 Rule 23A is amenable to appeal under Order 43 Rule 1 (u) of the Code.

The High Court relied upon a decision of this Court in the case *Narayanan Vs. Kumaran & Ors.* (2004) 4 SCC 26 in holding that Civil Miscellaneous Appeal from the order of remand was not maintainable. The High Court was clearly in error. What has been held by this Court in *Narayanan* is that an appeal under Order 43 Rule 1 Clause (u) should be heard only on the ground enumerated in Section 100 of the Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u) can only be heard on the grounds a second appeal is heard under Section 100. There is a difference between maintainability of an appeal and the scope of hearing of an appeal. The High Court failed to keep in view this distinction and wrongly applied the case of *Narayanan* in holding that miscellaneous appeal preferred by the appellant was not maintainable.

16. The appeals are accordingly allowed.

17. The impugned order of the High Court is set aside.

18. The C.M.A. No. 1227 of 2002 titled as *Jagannathan and Others Vs. Raju Sigamani* is restored to the file of the Madras High Court, Madurai Bench for hearing and disposal in accordance with law.

No order as to costs.

R.P. Appeals allowed.

KESRI COMMISSARIAT & OTHERS
v.
MINISTRY OF FOOD AND CIVIL SUPPLIES, GOVT. OF MAHARASHTRA, MUMBAI & ANR.
(Civil Appeal Nos. 3356-3357/2012)

APRIL 03, 2012.

[DALVEER BHANDARI AND DIPAK MISRA, JJ.]

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947:

s.4(1) – Exemption – Held: The provision applies to premises and not to parties or their relationship.

Maharashtra Rent Control Act, 1999:

s.3(1)(b) – Exemption – Premises belonging to trust – Let out to New India Assurance Company in 1954 – Tenant subletting the premises to State Government in 1959 – Suit for recovery of possession – Tenant and sub-tenant claiming exemption – Held: Clause (b) of sub-s.(1) of s.3 makes it clear that the Act does not apply to any premises let or sub-let to a bank, public sector undertaking or certain other categories of tenants – Insurance Company is covered u/s 3(1)(b) – Therefore, the Act does not apply to the tenant, New India Assurance Company – Thus, the tenant is not protected – When the Act does not cover the tenant, as basically, the exemption applies only to premises and not to any relationship, the sub-tenant cannot enjoy better protection – Order passed by High Court set aside and the judgment and decree of eviction against both the defendants passed by the appellate court restored – Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 – ss.4(1) and 15.

The plaintiffs-appellants, being the trustees of the

Parsee Girls' School Association, filed a suit against the defendants-respondents for recovery of the suit properties and for mesne profits. The case of the plaintiffs was that the Parsee Girls' School Association was a public trust and was running a Girls High School in its building. In the year 1954, the plaintiffs let out two floors of the said building to defendant No. 1, the New India Assurance Company Ltd. The said company, in the year 1959, without thy knowledge and consent of the plaintiffs, inducted defendant no. 2, the Ministry of Food and Civil Supplies, Government of Maharashtra, as a sub-tenant. It was the stance of the plaintiffs that they, being in need of the suit property for the School, asked the defendants to deliver the possession and on their failure to do so issued notice on 19.11.2001 terminating the tenancy of defendant No. 1. The trial court decreed the suit against defendant no. 1 but held that defendant no. 2 was proved as a lawful sub-tenant and, as such, was protected under the provisions of Maharashtra Rent Control Act, 1999 and, therefore, decree for possession in respect of the said defendant could not be granted. However, the appellate court decreed the suit for recovery of possession against both the defendants and directed for mesne profits. The writ petition filed by defendant no. 2 was allowed by the High Court holding that it enjoyed the protection of the 1999 Act.

Allowing the appeals, the Court

HELD: 1.1. The provision of s.4(1) of The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 applies to premises and not to parties or their relationship. [Para 22] [1029-G]

Bhatia Co-operative Housing Society Ltd. v. *D.C. Patel* **(1953) 4 SCR 185;** *Nagji Vallabhji and Company* v. *Meghji Vijpar and Company and Another* **1988 (3) SCR 906 = (1988) 3 SCC 68; and** *Parwati Bai* v. *Radhika* **2003 (3)**

SCR 1073 =AIR 2003 SC 3995– relied on

Rudler v. *Franks* **(1947) 1 K.B. 530; and** *Percy G. Moore, Ltd*. v. *Stretch* **(1951) 1 All ER 228; *and*** *Cow* v. *Casey* **(1949) 1 K.B. 474 – referred to**

1.2. Section 3 of the 1999 Act uses the term 'premises'. The provision commences with the non-obstante clause that the Act does not apply to any premises belonging to the Government or a local authority. Clause (b) of sub-s. (1) of s.3 makes it clear that the Act does not apply to any premises let or sub-let to a bank, public sector undertaking or certain other categories of tenants. The Insurance Company is covered u/s 3(1)(b). Thus, as a logical corollary, the Act does not apply to the premises held by the New India Assurance Company, who is a tenant. When the Act does not cover the tenant, as basically the exemption applies only to premises and not to any relationship, the sub-tenant who becomes a deemed tenant cannot enjoy a better protection or privilege by ostracizing the concept of premises which is the spine of the provision. The order passed by the High Court is set aside and that of the appellate court restored. [para 22-24] [1029-G-H; 1030-A-B-D]

Leelabai Gajanan Pansare and Others v. *Oriental Insurance Company Limited and Others* **2008 (12) SCR 248 = (2008) 9 SCC 720; and** *Malpe Vishwanath Acharya & ors.* v. *State of Maharashtra & Anr* **1997 (6) Suppl. SCR 717 = (1998) 2 SCC 1 – relied on.**

Case Law Reference:

(1953) 4 SCR 185	**relied on**	**para 11**
(1947) 1 K.B. 530	**referred to**	**para 13**
(1951) 1 All ER 228	**referred to**	**para 14**

(1949) 1 K.B. 474	**referred to**	**para 15**
1988 (3) SCR 906	**relied on**	**para 16**
2003 (3) SCR 1073	**relied on**	**para 17**
2008 (12) SCR 248	**relied on**	**para 20**
1997 (6) Suppl. SCR 717	**relied on**	**para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3356-3357 of 2012.

From the Judgment & Order dated 05.03.2010 of the High Court of Judicature at Bombay in Writ Petition No. 1171 of 2009 and order dated 17.09.2010 in Review Petition No. 160 of 2010 in Writ Petition No. 1171 of 2009.

T.R. Andhiyarujina, Shiv Kumar Suri, Saswat Patnaik, Soumik Ghosal for the Appellants.

Chinmoy A. Khaladkar, Sanjay V. Kharde, Asha Gopalan Nair, A. K. Raina, A.K. Kaul, Dr. Kailash Chand for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The plaintiffs, trustees of the Parsee Girls' School Association, being aggrieved by the judgment and order dated 5th March, 2010 in Writ Petition No. 1171 of 2009 and the order dated 17.9.2010 in Review Petition No. 160 of 2010 passed by the High Court of Judicature at Bombay whereby the Writ Court has overturned the judgment and order dated 29.8.2008 of the Appellate Court of Small Causes at Bombay in Appeal No. 123 of 2005 wherein the Appellate Court had reversed the judgment and decree passed by the Court of Small Causes at Bombay in T.E. & R. Suit No. 241 of 2002 wherein the said court had decreed the suit against defendant No. 1 and dismissed the suit against defendant No. 2 for recovery of possession, and decreed the suit in toto and directed recovery of possession with a further direction of an enquiry as regards the future mesne profits under Order 20 Rule 12(1)(c) of the Code of Civil Procedure (for short 'the Code'); have preferred the present appeals by special leave under Article 136 of the Constitution.

3. Shorn of unnecessary details, the facts which are essential to be exposited are that the appellants/plaintiffs (hereinafter referred to as 'the plaintiffs') filed a suit against defendant Nos. 1 and 2 for recovery of the suit properties situate at 4th and 5th Floor of Bengallee Girls High School, 42, Sir Vithaldas Thackersey Marg, New Marine Lines, Mumbai and for other reliefs. The case of the plaintiffs before the court of first instance was that the Parsee Girls' School Association is a public trust and owns the suit building where the B.S. Bengallee Girls High School is run. In the year 1954, the plaintiffs had permitted defendant No. 1, the New India Assurance Company Ltd., to occupy the 4th and 5th floors of the suit building on payment of rent of Rs.6114/- per month. The said company, in the year 1959, without the knowledge and consent of the plaintiffs, inducted defendant No. 2, the Ministry of Food and Civil Supplies, Government of Maharashtra, as a subtenant. It was pleaded that the plaintiffs had the privity of contract only with defendant No. 1 and had no relationship whatsoever with defendant No. 2 and, therefore, defendant No. 2 was in unlawful possession of the premises in question. It was the stance of the plaintiffs that they, being in need of the suit property for the School, requested the defendants to deliver the possession but as sphinx like silence was maintained to the request, being compelled, they issued notice on 19.11.2001 terminating the tenancy of defendant No. 1 and instituted the suit for recovery of possession. It was contended by the plaintiffs that the defendants were not protected under the provisions of Section 3(1)(b) of the Maharashtra Rent Control Act, 1999 (for brevity 'the 1999 Act') and were liable for eviction. A claim for mesne profit was put forth and the same

was assessed by the plaintiffs at Rs.11,45,583/- per month as per the market value.

4. Defendant No. 1, the New India Assurance Company, filed its written statement setting forth the stance that the suit was misconceived and not maintainable as the proper remedy on the part of the plaintiffs was to take recourse to Section 16 of the 1999 Act. It was also asserted that there was no cause of action for eviction. The further stand of defendant No. 1 was that the plaintiffs had not obtained permission from the Charity Commissioner under the Bombay Public Trust Act, 1950. It was asseverated that defendant No. 1 being a Government Company was not exempted under the provisions of the 1999 Act. It was the further stand that with the knowledge and consent of the trustees, the predecessors of the plaintiffs, had given the suit premises to defendant No. 2 in the year 1959 and the present trustees were aware about these facts. The allegation that defendant No. 2 was in unlawful occupation was strongly refuted. The bona fide requirement of the plaintiffs was vehemently controverted. The claim of mesne profits was seriously resisted by the said defendant.

5. Defendant No. 2 filed a separate written statement stating, inter alia, that the suit was not maintainable; that it was barred by limitation; that no notice under Section 80 of the Code was served on it; that the Insurance Company had already shifted its premises to its own building and sublet the suit premises to defendant No. 2 and they are in peaceful occupation of the same with the knowledge of the plaintiffs; and that it being a protected tenant under the 1999 Act, the relief of eviction was untenable.

6. The learned trial Judge framed number of issues and came to hold that the tenancy of defendant No. 1 had been validly and legally terminated; that the suit is not flawed for want of permission of the Charity Commissioner or want of notice under Section 80 of the Code; that the plaintiffs are the validly

appointed trustees; that the plaintiffs are entitled to a decree for possession in respect of the suit premises as far as defendant No. 1 is concerned; and that defendant No. 2 had proved that being a lawful subtenant, it is protected under the provisions of the 1999 Act and, therefore, decree for possession in respect of the said defendant could not be granted. The learned trial Judge, to arrive at the conclusion that the provisions of the 1999 Act would not apply to the Insurance Company, relied on the evidence on record, namely, the manner in which it has come into existence and the paid-up capital is more than rupees one crore and that it is not a Government Company. As far as defendant No. 2 is concerned, an opinion was expressed that the 1999 Act is applicable as the premises in question has been given on licence to a Government Department. After so holding, as is perceptible, the learned trial Judge proceeded to state that defendant No. 2 is in exclusive possession of the suit property since 1959 and, therefore, it had acquired the status of a deemed tenant by virtue of Section 15(a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 as amended in 1987 (for short 'the 1947 Act'). He also recorded a finding that after coming into force of the 1999 Act, the status of deemed tenant of defendant No. 2 is not affected and, therefore, it would get protection as provided under the 1999 Act. Being of this view, he decreed the suit in part as has been indicated hereinabove.

7. On an appeal being preferred, the Appellate Court, after concurring with the findings recorded by the learned trial Judge and analysing the ambit, purpose and scope of Section 3 (1) (b) of the 1999 Act, came to hold that Section 3(1)(b) of the 1999 Act is applicable to both the defendants in respect of the suit premises and, therefore, defendant No. 2 could not become a lawful tenant of the landlord and claim protection under the provisions of the 1999 Act. On the basis of the aforesaid reasoning, the Appellate Court decreed the suit for recovery of possession against both the defendants and directed for mesne profits.

8. The reversal of the decree led defendant No. 2, the Ministry of Food and Civil Supplies, Government of Maharashtra, to prefer a writ petition under Article 227 of the Constitution of India in the High Court at Bombay. It was contended before the learned Single Judge that the second defendant was inducted as a subtenant in the year 1959 and by virtue of the provisions of the 1947 Act, it had acquired the status of deemed tenant with effect from 1st February, 1973 in view of the language employed in sub-section (2) of Section 15 of the said Act and, therefore, it was entitled to protection. The said submission was combatted by the respondents therein contending that the suit was governed under the provisions of Transfer of Property Act and the conclusion arrived at by the Appellate Court was absolutely impeccable. The Writ Court, analysing the evidence and findings recorded by the courts below, came to hold that the writ petitioner was inducted by the Insurance Company in the year 1959 as a subtenant and if the amendment brought in Section 15 of the 1947 Act by Maharashtra Act No. VIII of 1987 is conjointly read with sub-section (11) of Section 5 of the 1947 Act, it would be clear that a subtenant who is inducted by the tenant before 1st February, 1973 becomes the tenant within the meaning of Section 5(11) of the 1947 Act and hence, the irresistible conclusion would be that the second defendant became a tenant. The Writ Court further opined that the 1999 Act came into force on 1st April, 2000 and by that time, by virtue of sub-section (1) of Section 4 of the 1947 Act, defendant No. 2, being a Government Department, had become a tenant and, as a logical corollary, Clause (a) of Section 3(1) of the 1999 Act would apply to the premises in question and, therefore, defendant No. 2 enjoyed the protection of the 1999 Act. Being of this view, the Writ Court unsettled the judgment and decree for eviction.

9. We have heard Mr. T.R. Andhiyarujina, learned senior counsel for the appellants, Mr. Chinmoy A. Khaladkar, learned counsel for respondent No. 1, and Mr. A.K. Raina, learned counsel for respondent No. 2.

10. The singular seminal issue that has emanated for consideration is whether defendant No. 2, which is respondent No. 2 herein, would be a protected tenant under the provisions of the 1999 Act. The learned Single Judge has treated defendant No. 2 as a deemed tenant and thereby opined that he is entitled to protection under the 1999 Act. He has placed reliance on the amended definition of 'tenant' and the language employed in Section 15 of the 1947 Act to come to the conclusion that defendant No. 2 is a protected tenant under the 1999 Act. To understand the scheme of the 1947 Act, it is apposite to refer to Section 4 of the said enactment. It deals with exemptions. Section 4(1), being relevant, is reproduced below: -

> "**4. Exemptions**. – (1) This Act shall not apply to any premises belonging to the Government or a local authority or apply as against the Government to any tenancy, licence or other like relationship created by a grant from or a licence given by the Government in respect of premises requisitioned or taken on lease or on licence by the Government, including any premises taken on behalf of the Government on the basis of tenancy or of licence or other like relationship by, or in the name of any officer subordinate to the Government authorised in this behalf; but it shall apply in respect of premises let, or given on licence, to the Government or a local authority or taken on behalf of the Government on such basis by, or in the name of such officer."

11. At this juncture, it is apt to state that Section 4(1) of the 1947 Act in its original frame had come up for consideration before this Court in *Bhatia Co-operative Housing Society Ltd. v. D.C. Patel*[1]. This Court was considering the applicability of the 1947 Act to a local authority, regard being had to the provisions contained in Section 4 of the Act. The crucial point that arose before the Court was to determine the question of

1. (1953) 4 SCR 185.

jurisdiction of the city civil court to entertain the suit keeping in view the language in which Section 4 of the 1947 Act was couched. The applicability of the provision was the core issue. It was observed, if it applied, the city civil court had no jurisdiction but if it did not, then it had such jurisdiction. After so observing, the four-Judge Bench proceeded to deal with the fact whether the Act applied to the demised premises and, accordingly, proceeded as to what would be the true construction of Section 4(1) of the 1947 Act. This Court scanned the anatomy of the provisions of Section 4 (1) into three parts, namely, (i) the Act shall not apply to premises belonging to the Government or a local authority, (ii) the Act shall not apply as against the Government to any tenancy or other like relationship created by grant from the Government in respect of premises taken on lease or requisitioned by the Government, and (iii) the Act shall apply in respect of premises let out to the Government or a local authority. After reproducing the contentions, the Court proceeded to state as follows: -

> "Section 4(1) provides for an exemption from or exception to that general object. The purpose of the first two parts of section 4(1) is to exempt two cases of relationship of landlord and tenant from the operation of the Act, namely, (1) where the Government or a local authority lets out premises belonging to it, and (2) where the Government lets out premises taken on lease or requisitioned by it. It will be observed that the second part of section 4(1) quite clearly exempts "any tenancy or other like relationship" created by the Government but the first part makes no reference to any tenancy or other like relationship at all but exempts the premises belonging to the Government or a local authority. If the intention of the first part were as formulated in item (1), then the first part of section 4(1), like the second part, would have run thus :-
>
> > This Act shall not apply to any tenancy or other like relationship created by Government or local

> > authority in respect of premises belonging to it.
>
> The Legislature was familiar with this form of expression, for it adopted it in the second part and yet it did not use that form in the first. *The conclusion is, therefore, irresistible that the Legislature did not by the first part intend to exempt the relationship of landlord and tenant but intended to confer on the premises belonging to Government an immunity from the operation of the Act."*
>
> [Emphasis added]

Thereafter, the Bench proceeded to state as follows: -

> "It is said that if the first part of the section is so construed as to exempt the premises from the operation of the Act, not only as between the Government or a local authority on the one hand and its lessee on the other, but also as between that lessee and his sub-tenant, then the whole purpose of the Act will be frustrated, for it is well known that most of the lands in Greater Bombay belong to the Government or one or other local authority, e.g., Bombay Port Trust and Bombay Municipality and the greater number of tenants will not be able to avail themselves of the benefit and protection of the Act. In the first place, the preamble to the Act clearly shows that the object of the Act was to consolidate the law relating to the control of rents and repairs of *certain premises* and not of all premises. The Legislature may well have thought that an immunity given to premises belonging to the Government or a local authority will facilitate the speedy development of its lands by inducing lessees to take up building leases on terms advantageous to the Government or a local authority. Further, as pointed out by Romer L.J. in *Clark* v. *Downes* [1931] 145 L.T. 20, which case was approved by Lord Goddard C.J. in *Rudler* v. *Franks* [1947] 1 K.B. 530 such immunity will increase the value of the right

of reversion belonging to the Government or a local authority. The fact that the Government or a local authority may be trusted to act fairly and reasonably may have induced the Legislature all the more readily to give such immunity to premises belonging to the Government or a local authority but it cannot be overlooked that the primary object of giving this immunity was to protect the interests of the Government or a local authority. This protection requires that the immunity should be held to attach to the premises itself and the benefit of it should be available not only to the Government or a local authority but also to the lessee deriving title from it. If the benefit of the immunity was given only to the Government or a local authority and not to its lessee as suggested by learned counsel for the respondent and the Act applied to the premises as against the lessee, then it must follow that under section 15 of the Act it will not be lawful for the lessee to sublet the premises or any part of it. If such were the consequences, nobody will take a building lease from the Government or a local authority and the immunity given to the Government or a local authority will, for all practical purposes and in so far at any rate as the building leases are concerned, be wholly illusory and worthless and the underlying purpose for bestowing such immunity will be rendered wholly ineffective. *In our opinion, therefore, the consideration of the protection of the interests of the subtenants in premises belonging to the Government or a local authority cannot override the plain meaning of the preamble or the first part of section 4(1) and frustrate the real purpose of protecting and furthering the interests of the Government or a local authority by conferring on its property an immunity from the operation of the Act."*

[Underlining is ours]

Eventually, this Court opined that the demised premises, including the building, belonged to the local authority and are outside the operation of the Act. The Act being out of the way

the appellants were well within their rights to file the suit in ejectment in the City Civil Court and that Court had jurisdiction to entertain the suit and to pass the decree.

12. We have referred to the aforesaid dictum in *extenso* to highlight that the provision exempted the premises let out and a subtenant cannot claim protection in the premises belonging to the Government or a local authority as that would frustrate the real purpose of affording an immunity from the operation of the Act.

13. In a similar situation, the Court of Appeal in England in the case of *Rudler v. Franks*[2], speaking through Lord Goddard, C.J., has opined thus: -

"The reason why the Acts do not apply when the tenants of the Crown creates a sub-tenancy is first because, as I have just said, the Acts operate in rem and not in personam and so are never attached to the house at all."

14. In *Percy G. Moore, Ltd. v. Stretch*[3], it has been held that the Rent Act applies to property and not to a person or to a tenant or a subtenant. It is worth noting, in the said cases, the deliberation pertained to rent restriction.

15. Similarly, in *Cow v. Casey*[4], it has been laid down that a tenant of premises which are not protected by the Acts cannot create a sub-tenancy, of part of those premises which would be protected against the landlord.

16. In this regard, we may refer with profit to the decision in *Nagji Vallabhji and Company v. Meghji Vijpar and Company and Another*[5] wherein the question arose as regards the interpretation of Section 4(1) of the 1947 Act. Be it noted

2. (1947) 1 K.B. 530.
3. (19510 1 All ER 228.
4. (1949) 1 K.B. 474.
5. (1988) 3 SCC 68.

that sub-section (4)(a) to Section 4 was introduced by the Bombay Rent Act by the Act 4 of 1953. It was urged that they were lawful subtenants of the firm and were, therefore, entitled to protection under Section 4(1) of the 1947 Act. The Bombay City Civil Court decreed the suit for eviction. In appeal, the learned Single Judge of the High Court of Bombay remanded the matter on two issues. On remand, the City Civil Court recorded a finding that the tenancy of the appellant was not validly terminated. In appeal, the learned Single Judge came to hold that there was a valid notice and the provisions of the Rent Act did not apply to the premises in question. On a further appeal being preferred, the Division Bench dismissed the same. The Bench referred to the legislative history of the 1947 Act and the decision in *Bhatia Co-operative Housing Society Ltd*. (supra) and referred to Section 4(1) and sub-section (4)(a) to Section 4 and eventually came to hold as follows: -

> "It is significant that the exemption granted under the earlier part of sub-section (1) of Section 4 is in respect of the premises and not in respect of the relationship. In order to confer the protection of the provisions of the Bombay Rent Act to the sub-lessees occupying the premises in any building erected on Government land or on land belonging to a local authority irrespective of the question who has put up the building as against the lessees of the land but without affecting the immunity conferred to the Government or local authorities as contemplated by sub-section (1) of Section 4 of the Bombay Rent Act, we would have practically rewritten the provisions of Section 4 and it is not open to us to do that."

Thereafter, the Bench proceeded to state as follows: -

> "We can only observe that if the intention of the Legislature is that the protection should be given to the sub-lessee against the lessee in a building taken on lease by the lessee from the Government or a local authority, it is for the Legislature concerned to make appropriate

> amendments in the Bombay Rent Act and it is not open for us to re-write the provisions of Sub-section (4)(a) of Section 4 of the Bombay Rent Act."

17. In this regard, we may fruitfully refer to the decision in *Parwati Bai v. Radhika*[6]. In the said case, the appellant had filed a suit for eviction in the Civil Court. A plea was advanced by the defendants that the suit premises are governed by the provisions of the Madhya Pradesh Accomodation Control Act, 1961. The courts below accepted the stand of the defendant and dismissed the suit. The second appeal preferred by the plaintiff/landlord was dismissed. This Court referred to Section 3(1) of the 1961 Act and held as follows: -

> "It is well settled by a decision of this Court in *Bhatia Co-operative Housing Society Ltd. v. D.C. Patel* [(1953) 4 SCR 185), wherein pari materia provisions contained in the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 came up for consideration of this Court. It was held that the exemption is not conferred on the relationship of landlord and tenant but on the premises itself making it immune from the operation of the Act. In identical facts, as the present case is, the decision of this Court was followed by the High Court of Madhya Pradesh in *Radheylal Somsingh v. Ratansingh Kishansingh* [1977 MPLJ 335] and it was held that the immunity from operation of the Madhya Pradesh Accommodation Control Act, 1961 is in respect of the premises and not with respect to the parties. If a tenant in municipal premises lets out the premises to another, a suit by the tenant for ejectment of his tenant and arrears of rent would not be governed by the Act as the premises are exempt under Section 3(1)(b) of Act though the suit is not between the municipality as landlord and against its tenant. We find ourselves in agreement with the view taken by the High Court of Madhya Pradesh in Radheylal's case. It is

6. AIR 2003 SC 3995.

unfortunate that this decision binding in the State of Madhya Pradesh was not taken note of by the courts below as also by the High Court."

From the aforesaid pronouncements, it is luminescent that the provision applies to premises and not to parties or persons. The learned Single Judge has referred to the definition of 'tenant' which means 'any person or by whom or in whose account rent is payable and includes a tenant or subtenant as derived under a tenant before the first day of February, 1973' and has held that the Government becomes a protected tenant.

18. The thrust of the matter is whether the original tenant is a protected tenant or not and if not, what benefit would enure to a subtenant.

19. At this stage we think it appropriate to refer to Section 3 of the 1999 Act. The said provision also deals with exemption. For our purpose Clauses (a) and (b) of sub-Section (1) of Section 3, being relevant, are reproduced below: -

"**3. Exemption**. – (1) This Act shall not apply –

(a) to any premises belonging to the Government or a local authority or apply as against the Government to any tenancy, licence or other like relationship created by a grant from or a licence given by the Government in respect of premises requisitioned or taken on lease or on licence by the Government, including any premises taken on behalf of the Government on the basis of tenancy or of licence or other like relationship by, or in the name of any officer subordinate to the Government authorised in this behalf; but it shall apply in respect of premises let, or given on licence, to the Government or a local authority or taken on behalf of the Government on such basis by, or in the name of, such officer;

(b) to any premises let or sub-let to banks, or any

Public Sector Undertakings or any Corporation established by or under any Central or State Act, or foreign missions, international agencies, multinational companies, and private limited companies and public limited companies having a paid up share capital of rupees one crore or more."

From the aforesaid provisions, it is quite plain that the Act does not apply to Government or a local authority or to any premises let or sub-let to a bank or any public sector undertaking or any corporation established by or under any Central or State Act, public limited companies and some other categories. The exception that has been carved out is that it shall apply in respect of premises let or given in licence to the Government or a local authority or taken on behalf of the Government on such basis by or in the name of such officer. In the case on hand, the trust has let out the premises to the Insurance Company.

20. In *Leelabai Gajanan Pansare and Others v. Oriental Insurance Company Limited and Others*[7], question arose whether a Government Company falls within the compendious expression 'any public sector undertaking' or 'corporation' established by or under any Central or State Act enshrined under Section 7 (1) of the 1999 Act. The respondent in the said case who was noticed was Oriental Insurance Company Limited. It was contended before the two-Judge Bench that the concept of a Government Company is not a part of Section 3 (1) (a) and in the absence of the word 'Government' and the presence of other expressions in Section 3(1)(b), it is to be construed that the Government Companies are not entitled to receive the protection of the Rent Act. It was contended on behalf of the respondent company that a Government Company is *sui generis* in structure and in statutory treatment thereof and, therefore, it does not fall within the compendious expression and the exclusion clause which applies to public sector undertakings established by or under any Central or State Act

7. (2008) 9 SCC 720.

does not apply to a Government Company like Oriental Insurance Company.

21. After dealing with various contentions, the two-Judge Bench referred to the various provisions of the 1999 Act, the Companies Act and dealt with Section 4(1) of the 1947 Act and, placing reliance on *Malpe Vishwanath Acharya & ors. v. State of Maharashtra & Anr*[8], came to hold as follows: -

> "The above discussion is relevant because we must understand the reason why Section 3(1)(b) came to be enacted. As stated above, in our view, with the offer of an economic package to the landlords, the legislature has tried to maintain a balance. The provisions of the earlier Rent Act, as stated above, have become vulnerable, unreasonable and arbitrary with the passage of time as held by this Court in the above judgment. The legislature was aware of the said judgment. It is reflected in the report of the Joint Committee. In our view, the changes made in the present Rent Act by which landlords are permitted to charge premium, the provisions by which cash-rich entities are excluded from the protection of the Rent Act and the provision providing for annual increase at a nominal rate of 5% are structural changes brought about by the present Rent Act, 1999 vis-à-vis the 1947 Act. The Rent Act of 1999 is the sequel to the judgment of this Court in *Malpe Vishwanath Acharya*.
>
> The entire discussion hereinabove is, therefore, not only to go behind Section 3(1)(b) and ascertain the reasons for enactment of the said clause but also to enable this Court to give purposive interpretation to the said clause."

After so stating, the two-Judge Bench speaking, through S.H. Kapadia, J. (as His Lordship then was), observed as follows: -

8. (1998) 2 SCC 1.

> "73. Moreover, if we are to hold that PSUs do not include government companies, as held by the High Court, we would be disturbing the package offered by the legislature of allowing increase of rent annually at 5%, allowing the landlords to accept premium and exclusion of certain entities from the protection of the Rent Act under Section 3 (1) (b). On the other hand, acceptance of the arguments advanced on behalf of the respondents on the interpretation of Section 3(1)(b) would make the Act vulnerable to challenge as violative of Article 14 of the Constitution. Therefore, we are of the view that on a plain meaning of the word "PSUs" as understood by the legislature, it is clear that India's PSUs are in the form of statutory corporations, public sector companies, government companies and companies in which the public are substantially interested (see the Income Tax Act, 1961). When the word PSU is mentioned in Section 3 (1) (b), the State Legislature is presumed to know the recommendations of the various Parliamentary Committees on PSUs. These entities are basically cash-rich entities. They have positive net asset value. They have positive net worths. They can afford to pay rents at the market rate.
>
> 74. Thirdly, we are of the view that, in this case, the principle of *noscitur a sociis* is clearly applicable. According to this principle, when two or more words which are susceptible to analogous meanings are coupled together, the words can take their colour from each other. Applying this test, we hold that Section 3(1)(b) clearly applies to different categories of tenants, all of whom are capable of paying rent at market rates. Multinational companies, international agencies, statutory corporations, government companies, public sector companies can certainly afford to pay rent at the market rates. This thought is further highlighted by the last category in Section 3(1)(b). Private limited companies and public limited companies

having a paid-up share capital of more than Rs.1,00,00,000 are excluded from the protection of the Rent Act. This further supports the view which we have taken that each and every entity mentioned in Section 3(1)(b) can afford to pay rent at the market rates.

xxx xxx xxx

76. As stated above, Section 3(1)(b) strikes a balance between the interest of the landlords and the tenants; it is neither pro-landlords nor anti-tenants. It is pro-public interest. In this connection, one must keep in mind the fact that the said Rent Act, 1999 involves a structural change vis-?-vis the Bombay Rent Act, 1947. As stated above, with the passage of time, the 1947 Act became vulnerable to challenge as violative of Article 14. As stated above, the legislature has to strive to balance the twin objectives of Rent Act protection and rent restriction for those who cannot afford to pay rents at the market rates.

77. To accept the interpretation advanced on behalf of the respondents for excluding government companies from the meaning of the word "PSUs" in Section 3(1)(b) would amount to disturbing the neat balance struck by the legislature."

22. From the aforesaid it is graphically clear that an Insurance Company is not protected under the 1999 Act. Once it is held that defendant No. 1, the New India Assurance Company, the original tenant, is not protected, the question would be whether a subtenant can be protected under the Act. In the case of *Bhatia Co-operative Housing Society Ltd.* (supra), it has been clearly laid down that Section 4(1) of the 1947 Act applies to premises and not to parties or their relationship. Section 3 uses the term 'premises'. The provision commences with the non-obstante clause that the Act does not apply to any premises belonging to the Government or a local authority. Sub-section 3(1)(b) makes it clear that the Act does

not apply to any bank, public sector undertaking or certain other categories of tenants. The Insurance Company is covered under Section 3(1)(b). Thus, as a logical corollary, the Act does not apply to the premises held by the Insurance Company who is a tenant.

23. The learned Single Judge has allowed protection to the Government Department on the foundation that it has become a tenant. We are disposed to think that the analysis is fundamentally erroneous. When the Act does not cover the tenant, namely, the Insurance Company as basically the exemption applies only to premises and not to any relationship, the subtenant who becomes a deemed tenant cannot enjoy a better protection or privilege by ostracizing the concept of premises which is the spine of the provision.

22. In the ultimate analysis, we are obliged to allow the appeals, set aside the order passed by the High Court and restore that of the Appellate Court and, accordingly, it is so directed. The parties shall bear their respective costs.

R.P. Appeals allowed.

CHAUGULE
v.
BHAGWAT
(Civil Appeal No. 3373 of 2012)

APRIL 4, 2012

[ALTAMAS KABIR & SURINDER SINGH NIJJAR, JJ.]

Representation of the People Act, 1951 – s.110(3)(c) – Withdrawal of election petition – Right to be substituted in place of the original election petitioner – Election petition filed by 'Y' had been allowed to be withdrawn on an application filed by 'Y' – Substitution application filed by respondent in the said Election petition after it had already been allowed to be withdrawn – Allowed by High Court – Justification of – Held: Not justified – Clause (c) of s.110(3) permits "a person, who might himself have been a Petitioner", to apply for substitution as Petitioner in place of the party withdrawing – However the said expression has to fit in the facts of each case – The expression "a person who might himself have been a Petitioner", would not apply in a case like the present one, in which the right to be exercised did not concern the actions of the person elected on the grounds, as contemplated in ss.100(1) and 101 of the Act, which provide for grounds for declaring the elections to be void – In the instant case, the complaint in the Election Petition was that the nomination paper of the Election Petitioner 'Y' had been wrongly rejected by the Returning Officer – Respondent, who had been substituted in place of 'Y', did not have the same interest as 'Y' – The election Petition filed by 'Y' was an action in personam and, was, therefore, confined to his own situation – Had it been an action in rem, the High Court may have been justified in substituting the Respondent in place of the original Election Petitioner – Grievance of the original Election Petitioner 'Y' was not against the elected candidate, but

against the action of Returning Officer in rejecting his nomination paper – Once the Election Petitioner 'Y' decided not to pursue the matter, the Election Petition could not have been continued by the Respondent.

The appellant was elected to the Maharashtra Legislative Assembly. 'Y', an independent candidate, filed Election Petition contending that his nomination paper was wrongly rejected by the Returning Officer. While the Election Petition was pending hearing, 'Y' filed application for withdrawal of the Election Petition. The High Court allowed the application, particularly since no corrupt practice had been alleged in the election petition and the election petition was, therefore, disposed of as withdrawn. Within 14 days of the said order, Respondent filed application under Section 110(3)(c) of the Representation of the People Act, 1951, in the said Election Petition, which had been disposed of as withdrawn, for substituting his name as Election Petitioner in place of 'Y'. Respondent had neither filed any nomination paper, nor contested the election and did not even allege any corrupt practice against the Appellant. He filed the said application, only on the ground that he was entitled to continue with the Election Petition under Section 116 of the Act. The High Court held that on a conjoint reading of Section 78(b), Section 81(1) and Section 110(3)(c) of the Act, the respondent was entitled to be substituted in place of 'Y' for continuing the Election Petition, notwithstanding that the same had already been allowed to be withdrawn on the application filed by 'Y'. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. Section 81 of the of the Representation of the People Act, 1951 disqualifies the Respondent from maintaining an election petition, since he was not entitled

to invoke any of the grounds set out in Sections 100(1) and 101 of the Act. [Para 13] [1039-B]

1.2. Section 110 of the Act refers to the procedure for withdrawal of the Election Petition. Clause (c) of Section 110(3) permits a person, who might himself have been a Petitioner, to apply for substitution as Petitioner in place of the party withdrawing. However the said expression cannot be held to apply across the board in all cases, but has to fit in the facts of each case. In the instant case, the Election Petition filed by 'Y' was an action *in personam* and, was, therefore, confined to his own situation. Had it been an action *in rem*, the High Court may have been justified in substituting the Respondent in place of the original Election Petitioner. The complaint in the Election Petition was that the nomination paper of the Election Petitioner had been wrongly rejected by the Returning Officer. The Respondent, who had been substituted in place of 'Y', did not have the same interest as 'Y' and, accordingly, the High Court misconstrued the provisions of Section 110(3)(c) of the Act in applying the conditions literally, without even satisfying itself that the order fit in the facts of the case. [Paras 14, 15] [1039-C; 1040-B-E]

1.3. The expression "a person who might himself have been a Petitioner", would not apply in a case like the present one, in which the right to be exercised does not concern the actions of the person elected on the grounds, as contemplated in Sections 100(1) and 101 of the Act, which provide for the grounds for declaring the elections to be void. The grievance of the original Election Petitioner was not against the elected candidate, but against the action of Returning Officer in rejecting his nomination paper. Once the Election Petitioner decided not to pursue the matter, the Election Petition could not have been continued by a person, as contemplated in Section 110(3)(c) of the aforesaid Act. [Para 16] [1040-F-H]

Nandiesha Reddy v. Kavitha Mahesh **(2011) 7 SCC 721 – cited.**

Case Law Reference:

(2011) 7 SCC 721	**cited**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3373 of 2012.

From the Judgment & Order dated 28.11.2011 of the High Court of Judicature at Bombay Bench at Aurangabad in Civil Application No. 35 of 2010 in Election Petition No. 5 of 2009.

Anant Bhushan Kanade, K.V. Sreekumar for the Appellant.

Sudhanshu S. Choudhari for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The Appellant herein was elected to the Maharashtra Legislative Assembly from the 240-Omerga Legislative Assembly Constituency, which was reserved for a Scheduled Caste candidate. His election was challenged by one Shri Yadavrao, son of Bhimrao Suryawanshi, who was also a Scheduled Caste candidate. In order to contest the elections, the said Shri Yadavrao had filed three nomination forms which were all rejected by the Returning Officer on the ground that the proposer's name was not included in the voters' list. Accordingly, the Returning Officer found Shri Yadavrao to be ineligible to contest the said elections as a candidate.

3. On 26th September, 2009, Shri Yadavrao filed Writ Petition No.6474 of 2009, challenging the rejection of his nomination form which had been submitted by him as an independent candidate. On 1st October, 2009, the High Court allowed the Writ Petition and quashed the order of the Returning Officer. The order of the High Court was challenged

by the Election Commissioner before this Hon'ble Court, in which notice was issued and the impugned judgment was stayed. Consequently, Shri Yadavrao's name was not included in the ballot paper and he was unable to contest the elections.

4. The elections were conducted on 22nd October, 2009, and the Appellant herein was declared elected from the said Constituency. Shri Yadavrao challenged the Appellant's election by way of Election Petition No.5 of 2009 filed before the Aurangabad Bench of the Bombay High Court on 1st December, 2009. While the Election Petition was pending hearing, on 25th November, 2010, Shri Yadavrao filed an application for withdrawal of the Election Petition filed by him. After hearing Shri Yadavrao in person, the High Court recorded the fact that the Election Petitioner was no longer interested in the Election Petition and wanted to withdraw the same. On the said materials, the High Court allowed the application filed by Shri Yadvrao, particularly when no corrupt practice had been alleged in the Election Petition. The Election Petition was, therefore, disposed of as withdrawn. At that point of time, there was no pending application from any person wanting to be substituted in place of the Election Petitioner, Shri Yadavrao son of Bhimrao Suryawanshi.

5. Within 14 days of the said order having been passed, on 8th December, 2010, the present Respondent, Bhagwat, son of Maruti Danane, filed Civil Application No.35 of 2010 under Section 110(3)(c) of the Representation of the People Act, 1951, hereinafter referred to as the "1951 Act", in Election Petition No.5 of 2009, which had been disposed of as withdrawn, for substituting his name as Election Petitioner in place of Shri Yadavrao. Such application was filed by Shri Bhagwat for substituting his name as the Election Petitioner in place of Shri Yadavrao, despite the fact that he had neither filed any nomination paper, nor contested the election. Furthermore, he did not even allege any corrupt practice against the Appellant, but filed the said Application No.35 of 2010, only on

the ground that he was entitled to continue with the Election Petition under Section 116 of the 1951 Act.

6. After considering the submissions made on behalf of the respective parties regarding the right of the Respondent to be substituted in the Election Petition filed by Shri Yadavrao, the High Court held that on a conjoint reading of Section 78(b), Section 81(1) and Section 110(3)(c) of the 1951 Act, the Applicant, Shri Bhagwat, was entitled to be substituted in place of Shri Yadavrao for continuing the Election Petition, notwithstanding that the same had already been allowed to be withdrawn on the application filed by Shri Yadavrao under Section 110(3)(c) of the aforesaid Act. The present appeal is directed against the said order of the High Court allowing the application for substitution filed by Shri Bhagwat in the Election Petition which had been filed by Shri Yadavrao and had also been allowed to be withdrawn.

7. Appearing in support of the Appeal, Mr. Anant Bhushan Kanade, learned Senior Advocate, drew our attention to Section 81 of the 1951 Act, which deals with presentation of petitions. Section 81 provides that an Election Petition calling in question any election may be presented by any candidate at such election or any elector within the period specified. Mr. Kanade also drew out attention to Section 110 of the above Act, which indicates the procedure for withdrawal of Election Petitions which under Section 109 could be done only with the leave of the High Court. Placing reliance on clause (c) of Sub-Section (3) of Section 110, Mr. Kanade urged that it has been specifically indicated therein that a person who might himself have been a Petitioner, may within 14 days of the publication of the results, apply to be substituted as Petitioner in place of the party withdrawing, and upon compliance with the conditions, if any, as to security, would be entitled to be so substituted and to continue the proceedings upon such terms as the High Court might deem fit.

8. Attempting to draw a distinction between the provisions

of Section 110 and Section 116, which deals with abatement or substitution on death of the Respondent, Mr. Kanade pointed out that under Section 116 in the event of the death of the sole respondent, or giving notice that he did not intend to oppose the Petition or any of the Respondent dying or giving such notice that there is no Respondent who is opposing the Petition, the High Court is required to cause notice of such event to be published in the Official Gazette and thereupon any person who might have been a Petitioner (emphasis supplied) may, within 14 days of such publication, apply to be substituted in place of such respondent to oppose the Petition and would be entitled to continue the proceedings upon such terms as the High Court thought fit.

9. Mr. Kanade submitted that in the present case the provisions of Section 110 stood attracted and not 116, since this case involved withdrawal of the Election Petition by the Election Petitioner and is not a case of abatement or substitution on death of the Respondent. While in Section 110(3)(c) the expression "a person" has been used, in Section 116 the expression "any person" has been used. He urged that only a person who could have a similar interest as that of the Election Petitioner could, therefore, be permitted to be substituted in place of the Election Petitioner to continue the proceedings initiated by the Election Petitioner.

10. Mr. Kanade, therefore, urged that the Respondent herein, who had been allowed to be substituted in place of the Election Petitioner, had not filed any nomination paper in the election in question and the High Court had misconstrued the expression "who might himself have been a petitioner" (emphasis supplied) in its application to him. Mr. Kanade contended that the expression was not meant to apply to anybody or everybody. By allowing the substitution of the Respondent to enable him to continue with the proceedings, which had been withdrawn by the Election Petitioner, would be over-reaching the provisions of Section 110(3)(c) of the 1951

Act. Mr. Kanade submitted that the aforesaid expression would have to be logically interpreted to apply to a given situation and that the present situation was not one such situation where such substitution should have been allowed.

11. On behalf of the Respondent it was submitted by Mr. K.V. Viswanathan, learned Senior Advocate, that the language of Section 110(3)(c) was very clear and that the expression "a person" (emphasis supplied) used therein meant that any person who was eligible to be a Petitioner in an Election Petition, was entitled to be substituted in place of the original Election Petitioner to enable him to continue with the proceedings. Mr. Viswanathan contended that the aforesaid expression being general in nature, could not exclude the Respondent who was a registered voter and, therefore, was "an elector" within the meaning of Section 2(1)(e) the 1951 Act. Mr. Viswanathan submitted that the High Court had rightly interpreted the aforesaid expression and, since, the Respondent had an interest in the elections in which the Appellant had been elected, he had every right to be substituted in place of the original Election Petitioner in terms of Section 110(3)(c) of the 1951 Act. Reference was made to the decision of this Court in Nandiesha Reddy Vs. Kavitha Mahesh [(2011) 7 SCC 721], wherein it had been held that the nomination paper, even if defective, could not be rejected by the Returning Officer at the inception and that the Returning Officer was required to accept the petition and, thereafter, to give an opportunity to the candidate to remove the defects and upon removal of the defects, to accept the same. Mr. Viswanathan contended that in the instant case the same not having been done, the rejection of the nomination paper of the original Election Petitioner, Shri Yadavrao, was erroneous and the election, therefore, stood vitiated and the election of the Appellant was, therefore, liable to be set aside.

12. Having considered the submissions made on behalf of the respective parties, we are unable to sustain the judgment

of the High Court or to accept the submissions made by Mr. Viswanathan on behalf of the Respondent.

13. In the very beginning it may be stated that Section 81 of the 1951 Act disqualifies the Respondent from maintaining an election petition, since he was not entitled to invoke any of the grounds set out in Sections 100(1) and 101 of the 1951 Act.

14. As indicated hereinbefore, Section 110 refers to the procedure for withdrawal of the Election Petition and is extracted hereinbelow :

> **"110. Procedure for withdrawal of election petitions.-** (1) If there are more petitioners than one, no application to withdraw an election petition shall be made except with the consent of all the petitioners.
>
> (2) No application for withdrawal shall be granted if, in the opinion of the High Court, such application has been induced by any bargain or consideration which ought not to be allowed.
>
> (3) If the application is granted-
>
> (a) the petitioner shall be ordered to pay the costs of the respondents therefore incurred or such portion thereof as the High Court may think fit;
>
> (b) the High Court shall direct that the notice of withdrawal shall be published in the Official Gazette and in such other manner as it may specify and thereupon the notice shall be published accordingly;
>
> (c) a person who might himself have been a petitioner may, within fourteen days of such publication, apply to be substituted as petitioner in place of the party withdrawing, and upon compliance with the conditions, if any, as to security, shall be entitled to be so substituted and to continue the proceedings upon such terms as the High Court may deem fit."

15. As may be noticed, Clause (c) of Section 110(3) permits *a person, who might himself have been a Petitioner,* (emphasis supplied) to apply for substitution as Petitioner in place of the party withdrawing. However, as has been pointed out by Mr. Kanade, the said expression cannot be held to apply across the board in all cases, but has to fit in the facts of each case. In the instant case, the Election Petition filed by Shri Yadavrao was an action in personam and, was, therefore, confined to his own situation. Had it been an action in rem, the High Court may have been justified in substituting the Respondent in place of the original Election Petitioner. In the instant case, the complaint in the Election Petition was that the nomination paper of the Election Petitioner had been wrongly rejected by the Returning Officer. The Respondent herein, who had been substituted in place of Shri Yadavrao, did not have the same interest as Shri Yadavrao and, accordingly, the High Court, in our view, misconstrued the provisions of Section 110(3)(c) of the 1951 Act in applying the conditions literally, without even satisfying itself that the order fit in the facts of the case.

16. We are satisfied that the expression *"a person who might himself have been a Petitioner",* (emphasis supplied) would not apply in a case like the present one, in which the right to be exercised does not concern the actions of the person elected on the grounds, as contemplated in Sections 100(1) and 101 of the 1951 Act, which provide for the grounds for declaring the elections to be void. The grievance of the original Election Petitioner was not against the elected candidate, but against the action of Returning Officer in rejecting his nomination paper. Once the Election Petitioner decided not to pursue the matter, the Election Petition could not have been continued by a person, as contemplated in Section 110(3)(c) of the aforesaid Act.

17. We, therefore, have no hesitation in setting aside the judgment and order dated 28th November, 2011, passed by the Aurangabad Bench of the Bombay High Court in Election Petition No.5 of 2009 and Civil Application No.35 of 2010.

18. The appeal is, accordingly, allowed, but, there will be no order as to costs.

B.B.B. Appeal allowed.

PREMJI NATHU

v.

STATE OF GUJARAT AND ANOTHER

(Civil Appeal No. 3430 of 2012)

APRIL 09, 2012

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

LAND ACQUISITION ACT, 1894*: s.18 – Making of reference by Collector to the Court – Limitation period – Acquisition proceedings – Award of compensation – Notice issued by Collector to appellant-land owner u/s.12(2) on 22.2.1985 – Copy of award not annexed with the notice – Subsequently, certified copy of award obtained by land owners – On 8.4.1985, application u/s.18 filed before the Collector for making reference to Court for awarding higher compensation – Reference court declined to give relief on the ground that application u/s.18 was time barred – High Court upheld the decision of reference court – On appeal, held: If the land owner is not present or is not represented before the Collector at the time of making of award then the application for reference has to be made within six weeks of the receipt of notice u/s.12(2) or within six months from the date of the Collector's award, whichever period shall first expire – Along with the notice issued u/s.12(2), the land owner should be supplied with a copy thereof so that he may effectively exercise his right u/s.18(1) to seek reference to the Court – In the instant case, copy of the award was not sent to the appellant along with the notice and without that he could not have effectively made an application for seeking reference – Therefore, the award passed by reference court is liable to be set aside and the respondents are directed to pay enhanced compensation to the appellant @ Rs.450 per Are for the irrigated land and Rs.280 per Are for non-irrigated land with an additional*

amount of Rs.2 per sq.meter – Appellant shall also be entitled to other statutory benefits like solatium and interest – In exercise of power u/s.142 of the Constitution, Supreme Court directed the respondents to pay enhanced compensation, solatium etc. even to those land owners who did not file appeals before the High Court and/or have not approached Supreme Court by filing petitions u/Article 136 of the Constitution – Constitution of India, 1950 – Article 142.

Notification under Section 4(1) of the Land Acquisition Act, 1894 was issued on 4.3.1982 in respect of certain land including appellant's land and the declaration under Section 6(1) was published on 7.10.1982. The Special Land Acquisition Officer determined the amount of compensation at the rate of Rs.110/- per Are for irrigated land and Rs.80/- per Are for non-irrigated land. After passing of the award, the Collector issued notice to the appellant under Section 12(2), which was received by him on 22.2.1985. Similar notices were received by the other landowners on 22.2.1985 and 23.2.1985. As the copy of the award was not annexed with the notice, the appellant obtained certified copy thereof through his Advocate and then submitted an application dated 8.4.1985 to the Collector for making a reference to the Court for award of higher compensation with solatium and interest. In their claim petitions, the appellant and other landowners pleaded that their land had irrigation facilities; that they were taking crops of groundnut, wheat, fodder etc. and they are entitled to compensation at the rate of Rs.1500/- per Are. The Reference Court held that the landowners are entitled to Rs.450 per Are for the irrigated land and Rs.280 per Are for non-irrigated land with an additional amount of Rs.2 per square meter, but declined relief to the appellant and other landowners on the ground that the applications filed by them were beyond the time specified in Section 18(2)(b) of the Act. Aggrieved, the appellant

and three other landowners challenged the judgment of the Reference Court which was dismissed by the High Court.

The question which arose for consideration in the instant appeal was whether the application submitted by the appellant under Section 18(1) of the Act was barred by time and the Reference Court rightly refused to entertain his prayer for enhancement of the compensation determined by the Special Land Acquisition Officer.

Allowing the appeal, the Court

HELD: 1. An analysis of the provisions of the Land Acquisition Act shows that by virtue of Section 12(1), an award made by the Collector is treated final and conclusive evidence of the true area and value of the land and apportionment of the compensation among the persons interested. In terms of Section 12(2), the Collector is required to give notice of his award to the interested persons who are not present either personally or through their representatives at the time of making of award. Section 18(1) provides for making of reference by the Collector to the Court for the determination of the amount of compensation etc. Section 18(2) lays down that an application for reference shall be made within six weeks from the date of the Collector's award, if at the time of making of award the person seeking reference was present or was represented before the Collector. If the person is not present or is not represented before the Collector, then the application for reference has to be made within six weeks of the receipt of notice under Section 12(2) or within six months from the date of the Collector's award, whichever period shall first expire. The reason for providing six months from the date of the award for making an application seeking reference,

where the applicant did not receive a notice under Section 12(2) of the Act, while providing only six weeks from the date of receipt of notice under Section 12(2) of the Act for making an application for reference where the applicant has received a notice under Section 12(2) of the Act is obvious. When a notice under Section 12(2) of the Act is received, the landowner or person interested is made aware of all relevant particulars of the award which enables him to decide whether he should seek reference or not. On the other hand, if he only comes to know that an award has been made, he would require further time to make enquiries or secure copies so that he can ascertain the relevant particulars of the award. Along with the notice issued under Section 12(2) of the Act, the land owner who is not present or is not represented before the Collector at the time of making of award should be supplied with a copy thereof so that he may effectively exercise his right under Section 18(1) to seek reference to the Court. [Paras 10–11] [1051-H; 1052-A-G]

2. A careful reading of the averments contained in the application filed by the appellant under Section 18(1) shows that the notice issued by the Collector under Section 12(2) was served upon him on 22.2.1985. Thereafter, his advocate obtained certified copy of the award and filed application dated 8.4.1985 for making a reference to the Court. This implies that copy of the award had not been sent to the appellant along with the notice and without that he could not have effectively made an application for seeking reference. On behalf of the State Government, no evidence was produced before the Reference Court to show that copy of the award was sent to the appellant along with the notice. Unfortunately, this aspect was totally ignored by the Reference Court which mechanically concluded that the application filed on 8.4.1985 was beyond the time specified in Section 18(2)(b).

The High Court also committed serious error by approving the view taken by the Reference Court, albeit without considering the fact that the notice issued by the Collector under Section 12(2) was not accompanied by a copy of the award which was essential for effective exercise of right vested in the appellant to seek reference under Section 18(1). The impugned judgment and the award passed by the Reference Court are set aside and the respondents are directed to pay enhanced compensation to the appellant at the rate of Rs.450 per Are for the irrigated land and Rs.280 per Are for non-irrigated land with an additional amount of Rs.2 per square meter. The appellant is also held entitled to other statutory benefits like solatium and interest. Although, the other landowners were not shown to have prosecuted the matter further except that three of them filed appeals under Section 54 of the Act, Court while exercising its power under Article 142 of the Constitution directed the respondents to pay enhanced compensation, solatium etc. even to those who did not file appeals before the High Court and/or have not approached this Court by filing petitions under Article 136 of the Constitution. Therefore, the other landowners would also be paid enhanced compensation and other statutory benefits within three months. [paras 15–17] [1057-B-H; 1058-A]

Harish Chandra Raj Singh v. Land Acquisition Officer **AIR 1961 SC 1500: 1962 SCR 676;** *State of Punjab v. Qaisar Jehan Begum* **AIR 1963 SC 1604: 1964 SCR 971;** *Bhagwan Das v. State of Uttar Pradesh* **(2010) 3 SCC 545: 2010 (2) SCR 1145;** *B. N. Nagarajan v. State of Mysore* **(1966) 3 SCR 682;** *Bhupinderpal Singh and others v. State of Punjab and others* **(2000) 5 SCC 262;** *Nilabati Behera (Smt) Alias Lalita v. State of Orissa and others* **(1993) 2 SCC 746: 1993 (2) SCR 581;** *B. Prabhakar Rao and others v. State of Andhra Pradesh* **1985 (Supp) SCC 432 – relied on.**

Special Land Acquisition Officer, Himatnagar v. Nathaji Kacharaji, **2001(3) GLH 312 – referred to.**

Case Law Reference:

2001(3) GLH 312	**referred to**	**Para 6**
1962 SCR 676	**relied on**	**Para 12**
1964 SCR 971	**relied on**	**Para 13**
2010 (2) SCR 1145	**relied on**	**Para 14**
(1966) 3 SCR 682	**relied on**	**Para 17**
(2000) 5 SCC 262	**relied on**	**Para 17**
1993 (2) SCR 581	**relied on**	**Para 17**
1985 (Supp) SCC 432	**relied on**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3430 of 2012.

From the Judgment & Order dated 16.8.2011 of the High Court of Gujarat at Ahmedabad in First Appeal No. 3502 of 2009.

K.L. Dave, Rashmikumar Manilal Vithlani for the Appellant.

Preetesh Kapur, Jesal, Hemantika Wahi for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Whether the application submitted by the appellant under Section 18(1) of the Land Acquisition Act, 1894 (for short, 'the Act') was barred by time and Civil Judge (Senior Division), Junagadh (hereinafter described as the 'Reference Court') rightly refused to entertain his prayer for enhancement of the compensation determined by the Special Land Acquisition Officer is the question which arises for

consideration in this appeal filed against judgment dated 16.8.2011 of the learned Single Judge of the Gujarat High Court.

2. The appellant's land was acquired by the State Government along with other parcels of land for implementation of Mendarda – Amrapur Road Scheme. Notification under Section 4(1) was issued on 4.3.1982 and the declaration under Section 6(1) was published on 7.10.1982. The Special Land Acquisition Officer determined the amount of compensation at the rate of Rs.110/- per Are for irrigated land and Rs.80/- per Are for non-irrigated land.

3. After passing of the award, the Collector issued notice to the appellant under Section 12(2), which was received by him on 22.2.1985. Similar notices were received by the other landowners on 22.2.1985 and 23.2.1985. As the copy of the award was not annexed with the notice, the appellant obtained certified copy thereof through his Advocate and then submitted an application dated 8.4.1985 to the Collector for making a reference to the Court for award of higher compensation with solatium and interest. The reference made by the Collector in the appellant's case was registered as LR Case No.1/2000. The references made at the instance of the other landowners were registered as LR Cases Nos.2/2000 to 15/2000. In their claim petitions, the appellant and other landowners pleaded that their land had irrigation facilities; that they were taking crops of groundnut, wheat, fodder etc. and they are entitled to compensation at the rate of Rs.1500/- per Are. In the reply filed on behalf of the State Government, it was pleaded that the Special Land Acquisition Officer had correctly fixed market value of the acquired land after taking into consideration the location, type and fertility of the acquired land. It was also pleaded that the landowners are not entitled to higher compensation because they had accepted the award without any protest.

4. It is not clear from the record whether in the reply filed

on behalf of the State Government, an objection was taken to the maintainability of the applications filed by the appellant and other landowners on the ground that the same were barred by time but the Reference Court did frame an issue in that regard. This is evident from the tenor of the issues framed by the Reference Court, which are extracted below:

" (1) Whether applicant proves that the compensation awardedis inadequate ? How much ?

(2) What additional compensation, if any, he is entitled to ?

(3) Whether this application is in time ?

(4) Whether this court has jurisdiction to try this reference case ?

(5) Whether this reference case is barred by S. 25 of L.A. Act. ?

(6) Whether the applicants have accepted the awarded amount without raising any objection ? If yes, what is the effect ?

(7) Whether the applicant is entitled to get the amount of solatium & interest?

(8) What order ?"

5. After considering the oral and documentary evidence produced by the parties, the Reference Court concluded that the landowners are entitled to Rs.450 per Are for the irrigated land and Rs.280 per Are for non-irrigated land with an additional amount of Rs.2 per square meter, but declined relief to the appellant and other landowners on the ground that the applications filed by them were beyond the time specified in Section 18(2)(b) of the Act.

6. The appellant and three other landowners challenged

the judgment of the Reference Court by filing appeals under Section 54 of the Act which were dismissed by the learned Single Judge of the High Court vide judgment dated 16.8.2011, who relied upon the judgment of the Full Bench of the High Court in Special Land Acquisition Officer, Himatnagar v. Nathaji Kacharaji, 2001(3) GLH 312 and held that the applications filed by the appellant and other land owners were barred by time.

7. Learned counsel for the appellant argued that the application filed by his client was within the period prescribed under Section 18 (2)(b) of the Act and the Reference Court and the learned Single Judge of the High Court committed serious error by refusing to enhance the compensation by erroneously thinking that the application made on 8.4.1985 was barred by time. He submitted that 5th and 6th April, 1985 were holidays and, as such, the application filed by the appellant on 8.4.1985 could not have been treated as barred by time. Learned counsel further submitted that due to hyper-technical approach adopted by the Reference Court and the learned Single Judge, the landowners have been rendered remediless.

8. Shri Preetesh Kapur, learned counsel for the respondents produced copy of the calendar of Gujarat for 1985 to show that 5th April was holiday being Good Friday but 6th April was a working day and argued that if the period of six weeks is counted from the date of receipt of the notice issued under Section 12(2), the conclusion recorded by the Reference Court and the learned Single Judge that the applications filed by the appellant and other landowners were beyond the time prescribed under Section 18(2)(b) of the Act cannot be faulted.

9. We have considered the respective arguments and carefully perused the record. Sections 12 and 18 of the Act, which have bearing on the decision of this appeal read as under:

"12. Award of Collector when to be final. - (1) Such award shall be filed in the Collector's office and shall, except as

hereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested.

(2) The Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made.

18. Reference to Court.- (1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made,-

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire."

10. An analysis of the above reproduced provisions shows that by virtue of Section 12(1), an award made by the Collector is treated final and conclusive evidence of the true area and value of the land and apportionment of the compensation

among the persons interested. In terms of Section 12(2), the Collector is required to give notice of his award to the interested persons who are not present either personally or through their representatives at the time of making of award. Section 18(1) provides for making of reference by the Collector to the Court for the determination of the amount of compensation etc. Section 18(2) lays down that an application for reference shall be made within six weeks from the date of the Collector's award, if at the time of making of award the person seeking reference was present or was represented before the Collector. If the person is not present or is not represented before the Collector, then the application for reference has to be made within six weeks of the receipt of notice under Section 12(2) or within six months from the date of the Collector's award, whichever period shall first expire.

11. The reason for providing six months from the date of the award for making an application seeking reference, where the applicant did not receive a notice under Section 12(2) of the Act, while providing only six weeks from the date of receipt of notice under Section 12(2) of the Act for making an application for reference where the applicant has received a notice under Section 12(2) of the Act is obvious. When a notice under Section 12(2) of the Act is received, the landowner or person interested is made aware of all relevant particulars of the award which enables him to decide whether he should seek reference or not. On the other hand, if he only comes to know that an award has been made, he would require further time to make enquiries or secure copies so that he can ascertain the relevant particulars of the award. What needs to be emphasised is that along with the notice issued under Section 12(2) of the Act, the land owner who is not present or is not represented before the Collector at the time of making of award should be supplied with a copy thereof so that he may effectively exercise his right under Section 18(1) to seek reference to the Court.

12. In *Harish Chandra Raj Singh v. Land Acquisition*

Officer, AIR 1961 SC 1500, this Court was called upon to decide whether the expression 'date of award' is to be interpreted with reference to the time when the award is signed by the Collector or from the date the affected party comes to know about the same and held as under:

> "Therefore, if the award made by the Collector is in law no more than an offer made on behalf of the Government to the owner of the property then the making of the award as properly understood must involve the communication of the offer to the party concerned. That is the normal requirement under the contract law and its applicability to cases of award made under the Act cannot be reasonably excluded. Thus considered the date of the award cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office; it must involve the consideration of the question as to when it was known to the party concerned either actually or constructively. If that be the true position then the literal and mechanical construction of the words 'the date of the award' occurring in the relevant section would not be appropriate.
>
> There is yet another point which leads to the same conclusion. If the award is treated as an administrative decision taken by the Collector in the matter of the valuation of the property sought to be acquired it is clear that the said decision ultimately affects the rights of the owner of the property and in that sense, like all decisions which affect persons, it is essentially fair and just that the said decision should be communicated to the said party. The knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. *Thus considered the making of the award cannot consist merely in the physical act of writing the award or signing it or even filing it in the Office of the Collector; it must*

> *involve the communication of the said award to the party concerned either actually or constructively. I*f the award is pronounced in the presence of the party whose rights are affected by it it can be said to be made when pronounced. If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly if without notice of the date of its pronouncement an award is pronounced and a party is not present the award can be said to be made when it is communicated to the party later. The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice the expression 'the date of the award' used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words 'from the date of the Collector's award' used in the proviso to Section 18 in a literal or mechanical way."
>
> (emphasis supplied)

13. In *State of Punjab v. Qaisar Jehan Begum,* AIR 1963 SC 1604, the principle laid down in Harish Chandra's case was reiterated and it was held:

> "It seems clear to us that the ratio of the decision in Harish Chandra case is that the party affected by the award must know it, actually or constructively, and the period of six months will run from the date of that knowledge. *Now, knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award.* These contents may be known either actually or constructively. *If the award is communicated to a party*

under Section 12(2) of the Act, the party must be obviously fixed with knowledge of the contents of the award whether he reads it or not. Similarly when a party is present in court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award. Having regard to the scheme of the Act we think that knowledge of the award must mean knowledge of the essential contents of the award."

(emphasis supplied)

14. In *Bhagwan Das v. State of Uttar Pradesh* (2010) 3 SCC 545, this Court interpreted Section 18 and laid down the following propositions:

"(i) If the award is made in the presence of the person interested (or his authorised representative), he has to make the application within six weeks from the date of the Collector's award itself.

(ii) If the award is not made in the presence of the person interested (or his authorised representative), he has to make the application seeking reference within six weeks of the receipt of the notice from the Collector under Section 12(2).

(iii) If the person interested (or his representative) was not present when the award is made, and if he does not receive the notice under Section 12(2) from the Collector, he has to make the application within six months of the date on which he actually or constructively came to know about the contents of the award.

(iv) If a person interested receives a notice under Section 12(2) of the Act, after the expiry of six weeks from the date of receipt of such notice, he cannot claim the benefit of the provision for six months for making the application on the ground that the date of receipt of notice under Section

12(2) of the Act was the date of knowledge of the contents of the award."

The Court then held:

"When a person interested makes an application for reference seeking the benefit of six months' period from the date of knowledge, the initial onus is on him to prove that he (or his representative) was not present when the award was made, that he did not receive any notice under Section 12(2) of the Act, and that he did not have the knowledge of the contents of the award during a period of six months prior to the filing the application for reference. This onus is discharged by asserting these facts on oath. He is not expected to prove the negative. Once the initial onus is discharged by the claimant/person interested, it is for the Land Acquisition Collector to establish that the person interested was present either in person or through his representative when the award was made, or that he had received a notice under Section 12(2) of the Act, or that he had knowledge of the contents of the award.

Actual or constructive knowledge of the contents of the award can be established by the Collector by proving that the person interested had received or drawn the compensation amount for the acquired land, or had attested the mahazar/panchnama/proceedings delivering possession of the acquired land in pursuance of the acquisition, or had filed a case challenging the award or had acknowledged the making of the award in any document or in statement on oath or evidence. The person interested, not being in possession of the acquired land and the name of the State or its transferee being entered in the revenue municipal records coupled with delay, can also lead to an inference of constructive knowledge. In the absence of any such evidence by the Collector, the claim of the person interested that he did not have knowledge

earlier will be accepted, unless there are compelling circumstances not to do so."

15. In the light of the above, it is to be seen whether the conclusion recorded by the Reference Court, which has been approved by the High Court that the application filed by the appellant was barred by time is legally sustainable. A careful reading of the averments contained in paragraph 2 of the application filed by the appellant under Section 18(1) shows that the notice issued by the Collector under Section 12(2) was served upon him on 22.2.1985. Thereafter, his advocate obtained certified copy of the award and filed application dated 8.4.1985 for making a reference to the Court. This implies that copy of the award had not been sent to the appellant along with the notice and without that he could not have effectively made an application for seeking reference. On behalf of the State Government, no evidence was produced before the Reference Court to show that copy of the award was sent to the appellant along with the notice. Unfortunately, while deciding issue No.3, this aspect has been totally ignored by the Reference Court which mechanically concluded that the application filed on 8.4.1985 was beyond the time specified in Section 18(2)(b). The learned Single Judge of the High Court also committed serious error by approving the view taken by the Reference Court, albeit without considering the fact that the notice issued by the Collector under Section 12(2) was not accompanied by a copy of the award which was essential for effective exercise of right vested in the appellant to seek reference under Section 18(1).

16. In the result, the appeal is allowed. The impugned judgment and the award passed by the Reference Court are set aside and the respondents are directed to pay enhanced compensation to the appellant at the rate of Rs.450 per Are for the irrigated land and Rs.280 per Are for non-irrigated land with an additional amount of Rs.2 per square meter. The appellant shall also be entitled to other statutory benefits like

solatium and interest. The respondent shall calculate the amount payable to the appellant and make payment within three months from today.

17. Although, the other landowners are not shown to have prosecuted the matter further except that three of them filed appeals under Section 54 of the Act, we are convinced that this is a fit case in which the Court should exercise power under Article 142 of the Constitution and direct the respondents to pay enhanced compensation, solatium etc. even to those who did not file appeals before the High Court and/or have not approached this Court by filing petitions under Article 136 of the Constitution. This approach is consistent with the judgments of this Court in - *B. N. Nagarajan v. State of Mysore* (1966) 3 SCR 682, *Bhupinderpal Singh and others v. State of Punjab and others* (2000) 5 SCC 262, *Nilabati Behera (Smt) Alias Lalita v. State of Orissa and others* (1993) 2 SCC 746 and *B. Prabhakar Rao and others v. State of Andhra Pradesh* 1985 (Supp) SCC 432. Therefore, we direct that the other landowners shall also be paid enhanced compensation and other statutory benefits within three months from today.

D.G. Appeal allowed.

RAM DHAN

v.

STATE OF U.P. AND ANR.

(Special Leave Petition (Crl.) No. 335 of 2012)

APRIL 10, 2012

[DR. B.S. CHAUHAN & JAGDISH SINGH KHEHAR, JJ.]

Code of Criminal Procedure, 1973 – ss. 239, 195, 340, 482 – Petitioner had filed complaint against respondent No.2 and other accused alleging that they had kidnapped the petitioner's son – Respondent No.2 stood convicted u/s. 364 r/w s.149 of IPC – Petitioner's son came back home and disclosed that he had not been kidnapped rather he had gone out voluntarily – Respondent No.2 alleging that he was wrongly enroped and convicted, lodged FIR against the petitioner, whereupon chargesheet was filed against the petitioner u/ss. 177, 181, 182, 195 of IPC – Petitioner filed application u/s.239 Cr.P.C. contending that FIR at the behest of respondent No.2 was not maintainable in view of the provisions of s.195 r/w s.340 Cr.P.C – Application rejected by Magistrate – Order upheld by High Court in revision – Held: The petitioner did not disclose anywhere in the instant SLP that he had approached the High Court u/s.482 Cr.P.C. for quashing of the charge-sheet, which stood rejected and the said order attained finality having not been challenged any further – Thus, he was guilty of suppressing the material fact which makes the petition liable to be dismissed only on this sole ground – Filing of successive petition before the court amounts to abuse of the process of the court – Considering the composite nature of the offences, no cogent reason for interference by Supreme Court – Penal Code, 1860 – ss. 364, 149, 177, 181, 182, 195.

The petitioner filed complaint against respondent No.2 and other accused alleging that they had kidnapped

the petitioner's son. Charge-sheet was filed and respondent No.2 and other accused were convicted u/s. 364 r/w s.149 of IPC and sentenced accordingly. The petitioner's son came back home and disclosed to the public as well as to the police that he had not been kidnapped rather he had gone out voluntarily.

Respondent No.2 alleging that he had wrongly been enroped, convicted, and sentenced lodged FIR against the petitioner, whereupon chargesheet was filed against the petitioner u/ss. 177, 181, 182, 195 of IPC. The petitioner filed application under Section 239 Cr.P.C. contending that the FIR at the behest of the respondent No.2 was not maintainable in view of the provisions of Section 195 read with Section 340 Cr.P.C. The Magistrate rejected the application. The petitioner filed revision before the High Court which was dismissed.

In the present petition, it was contended on behalf of the petitioner that the prosecution of the petitioner was illegal and liable to be quashed in view of the provisions of Sections 195 and 340 Cr.P.C, for the reason that as the offence has been committed in the court, such a drastic action can be taken against the petitioner only on a complaint lodged by the court and not by the convict/ respondent No.2.

Dismissing the petition, the Court

HELD:1.1. The petitioner had suppressed the material fact and has not disclosed anywhere in this petition that he had approached the High Court under Section 482 Cr.P.C. for quashing of the chargesheet, which stood rejected vide order dated 3.2.2010 and the said order attained finality having not been challenged any further. Thus, he is guilty of suppressing the material fact which makes the petition liable to be dismissed only on this sole ground. It was necessary for the petitioner to disclose

such a relevant fact. The Magistrate while deciding the application under Section 239 Cr.P.C. has made reference to the said order of the High Court dated 3.2.2010. [Para 6] [1064-C-D]

1.2. The courts below may be right to the extent that question of discharge under Section 239 Cr.P.C. was totally unwarranted in view of the order passed by the High Court on 3.2.2010. For the reasons best known to the petitioner, neither the copy of the chargesheet nor of the order dated 3.2.2010 passed by the High Court have been placed on record. [Para 7] [1064-G]

1.3. The charge-sheet has been filed under Sections 177, 181, 182, 195 and 420 IPC. Section 177 IPC deals with an offence furnishing false information. Section 181 IPC deals with false statement on oath. Section 182 IPC deals with false information with intent to cause public servant to use his lawful power to the injury of another person. Section 195 IPC deals with giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment for a term of seven years or upwards. At least the provisions of Sections 177 and 182 deal with the cases totally outside the court. Therefore, the question of attracting the provisions of Sections 195 and 340 Cr.P.C. does not arise. Section 195 IPC makes fabrication of false evidence punishable. It is not necessary that fabrication of false evidence takes place only inside the court as it can also be fabricated outside the court though has been used in the court. Therefore, it may also not attract the provisions of Section 195 Cr.P.C. [Paras 8, 9] [1064-H; 1065-A-D]

1.4. The petitioner is guilty of suppressing the material fact. Admittedly, filing of successive petition before the court amounts to abuse of the process of the court. Thus, this Court is not inclined to examine the issue any further. Considering the composite nature of

the offences, there is no cogent reason to interfere with the impugned order. [Para 10] [1065-F-G]

Sachida Nand Singh and Anr. v. State of Bihar and Anr. **(1998) 2 SCC 493: 1998 (1) SCR 492 – relied on.**

Abdul Rehman and Ors. v, K.M.Anees-ul-Haq **JT (2011) 13 SC 271 and** *Balasubramaniam v. State of Anr.* **(2002) 7 SCC 649 – referred to.**

Case Law Reference:

1998 (1) SCR 492	**relied on**	**Para 9**
JT (2011) 13 SC 271	**referred to**	**Para 10**
(2002) 7 SCC 649	**referred to**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 335 of 2012.

From the Judgment & Order dated 14.11.2011 of the High Court of Judicature at Allahabad in Criminal Revision No. 4259 of 2011.

Ashok Kumar Sharma, Avnish Kumar Jain for the Petitioner.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This petition has been filed against the judgment and order dated 14.11.2011 passed by the High Court of Judicature at Allahabad in Criminal Revision No.4259 of 2011 by which the High Court has rejected the said revision petition against the impugned order dated 3.9.2011 passed by the Chief Judicial Magistrate, Bagpat, rejecting the application under Section 239 of the Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.').

2. Facts and circumstances giving rise to this petition are that present petitioner Ram Dhan lodged an FIR dated 4.6.1995 alleging that his son Dinesh had disappeared and,

subsequently, filed a complaint against Balraj alias Billu and others (respondents) under Section 364 of the Indian Penal Code, 1860 (hereinafter called IPC). The investigating agency concluded the investigation and filed a chargesheet on the basis of which trial commenced against the respondents Balraj etc. and the trial Court vide judgment and order dated 11.5.2005 convicted the respondent No.2 Balraj and others for the offences punishable under Section 364 read with Section 149 IPC and awarded sentence of 9 years rigorous imprisonment and imposed a fine of Rs.5,000/-.

3. Being aggrieved, Balraj, respondent No.2 and others preferred an appeal before the High Court of Allahabad which was admitted and the respondent No.2 and other convicts were granted bail by the High Court. The petitioner's son for whose kidnapping Balraj, respondent No.2 and others had been convicted, came back home and disclosed to the public as well as to the police that he had not been kidnapped rather had voluntarily gone to Punjab, where he worked for several years. Balraj, respondent No.2 realised that he had been wrongly enroped and convicted in the offence by the petitioner. Thus, he filed an FIR on 29.8.2009 under Sections 177, 181, 182, 195 and 420 IPC. After investigating the case, chargesheet was filed against the petitioner and others under Sections 177, 181, 182 and 195 IPC on 23.11.2009.

4. The petitioner filed an application under Section 239 Cr.P.C. before the Chief Judicial Magistrate contending that the FIR at the behest of the respondent No.2, Balraj was not maintainable in view of the provisions of Section 195 read with Section 340 Cr.P.C. The Chief Judicial Magistrate rejected the said application vide order dated 3.9.2011. The petitioner challenged the said order dated 3.9.2011 by filing a criminal revision before the High Court which has been dismissed vide impugned order dated 14.11.2011. Hence, this petition.

5. Shri Ashok Kumar Sharma, learned counsel appearing for the petitioner, has vehemently contended that the prosecution of the petitioner is illegal and liable to be quashed

in view of the provisions of Sections 195 and 340 Cr.P.C, for the reason that as the offence has been committed in the court, such a drastic action can be taken against the petitioner only on a complaint lodged by the court and not by the convict/ respondent No.2.

6. We find no merit in the petition. After investigation, chargesheet has been filed against the petitioner and others under Sections 177, 181, 182 and 195 IPC. The petitioner has suppressed the material fact and has not disclosed anywhere in this petition that he had approached the High Court under Section 482 Cr.P.C. for quashing of the chargesheet, which stood rejected vide order dated 3.2.2010 and the said order attained finality as has not been challenged any further. Thus, he is guilty of suppressing the material fact which makes the petition liable to be dismissed only on this sole ground. We are of the view that it was necessary for the petitioner to disclose such a relevant fact. The learned Chief Judicial Magistrate while deciding the application under Section 239 Cr.P.C. has made reference to the said order of the High Court dated 3.2.2010. We had been deprived of the opportunity to scrutinise the chargesheet as well as the order of the High Court dated 3.2.2010 and to ascertain as to whether the grievance of the petitioner in respect of the application of the provisions of Section 195 read with Section 340 Cr.P.C. had been raised in that petition and as to whether even if such plea has not been taken whether the petitioner can be permitted to raise such plea subsequently.

7. In such a fact-situation, the courts below may be right to the extent that question of discharge under Section 239 Cr.P.C. was totally unwarranted in view of the order passed by the High Court on 3.2.2010. For the reasons best known to the petitioner, neither the copy of the chargesheet nor of the order dated 3.2.2010 passed by the High Court have been placed on record.

8. Be that as it may, the chargesheet has been filed under

Sections 177, 181, 182, 195 and 420 IPC. Section 177 IPC deals with an offence furnishing false information. Section 181 IPC deals with false statement on oath. Section 182 IPC deals with false information with intent to cause public servant to use his lawful power to the injury of another person. Section 195 IPC deals with giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment.

9. At least the provisions of Sections 177 and 182 deal with the cases totally outside the court. Therefore, the question of attracting the provisions of Sections 195 and 340 Cr.P.C. does not arise. Section 195 IPC makes fabrication of false evidence punishable. It is not necessary that fabrication of false evidence takes place only inside the court as it can also be fabricated outside the court though has been used in the court. Therefore, it may also not attract the provisions of Section 195 Cr.P.C. (See: *Sachida Nand Singh & Anr. v. State of Bihar & Anr.,* (1998) 2 SCC 493).

10. Mr. Ashok Kumar Sharma, learned counsel appearing for the petitioner, has placed a very heavy reliance on the judgment of this Court in *Abdul Rehman & Ors. v. K.M. Anees-ul-Haq,* JT (2011) 13 SC 271. However, it is evident from the judgment relied upon that the judgment in *Sachida Nand Singh* (Supra), which is of a larger Bench, has not been brought to the notice of the court. (See also: *Balasubramaniam v. State & Anr.,* (2002) 7 SCC 649).

The petitioner is guilty of suppressing the material fact. Admittedly, filing of successive petition before the court amounts to abuse of the process of the court. Thus, we are not inclined to examine the issue any further.

Considering the composite nature of the offences, we do not see any cogent reason to interfere with the impugned order.

The petition lacks merit and is, accordingly, dismissed.

B.B.B. Special Leave Petition dismissed.

HIRALAL PANDEY AND ORS.
v.
STATE OF U.P.
(Criminal Appeal No. 65 of 2008)

17 APRIL, 2012.

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Penal Code, 1860:

s.302/34 – Two persons shot dead by three accused – Conviction and life imprisonment – Upheld by High Court – Held: The evidence of the son of one of the deceased that the accused fired at them when he and the two victims were going on a motorcycle was corroborated by another witness who at the time of the incident reached there on a cycle along with others – The oral evidence was further supported by the medical evidence – Minor defects in investigation cannot be a ground to disbelieve the prosecution case, which has been proved beyond reasonable doubt through the evidence of two eye-witnesses as supported by the medical evidence – Evidence.

INVESTIGATION:

Lapses – Held: Unless the lapses on the part of the investigation are such as to cast reasonable doubt about the prosecution story or seriously prejudice the defence of the accused, the court will not set aside the conviction.

The three appellants were prosecuted for murders of one 'RR' the father of the complainant (PW-1) and his companion 'KBS'. The case of the prosecution was that when at about 6 p.m. on 22.9.1979, PW-1, his father and 'KBS' were going on a motorcycle being driven by 'KBS', the three appellants-accused fired at them as a result of which 'RR' and 'KBS' died at the spot. Meanwhile, PW-2

and some others reached the place of incident and all the three accused ran away. The trial court convicted all the three accused u/s 302/34 IPC and sentenced each of them to imprisonment for life. The High Court affirmed the conviction and the sentence.

In the instant appeal filed by the accused persons, it was, inter alia, contended for the appellants that the courts below should not have relied upon the evidence of PWs-1 and 2 who were interested witnesses and the prosecution should have examined the independent witnesses cited in the FIR; that the time of recording of FIR at the police chowki was doubtful as the FIR was first written by pencil which was erased and again overwritten as per the evidence of the constable (PW-4); that there was no recovery of empty cartridges from the place of occurrence and that the injuries on the dead bodies were not correlated with the weapons allegedly possessed by the appellants.

Dismissing the appeal, the Court

HELD: 1.1. PW-1 has stated that he and his father 'RR' were going on a motorcycle driven by 'KBS' when the incident took place at about 5-10 minutes before 6.00 p.m. From the narration of the incident by PW-1, it is very clear that he was present at the time of the occurrence and has seen the appellants with double barrel gun, single barrel gun and a rifle with cartridges. He has stated that when the appellants fired, 'KBS', who was driving the motorcycle, got scared by the firing and the motorcycle got dis-balanced and came on the western strip of the road and he and his father jumped from the motorcycle and ran but 'KBS' fell down along with motorcycle; that the appellants were firing continuously and his father ran towards paddy fields and he ran towards Harijan Basti; that after he returned to the spot he found that 'KBS' was lying dead by gun-shot on the road and his father was

lying dead by gun-shot in paddy fields. PW-1 has clearly disclosed that hearing the firing, 'SLS' and PW-2, who were coming on cycles reached there and 'LS' also reached there. The evidence of PW-1 could not have been doubted by either the trial court or the High Court. [para 14] [1077-A-B; 1078-C-F; 1079-A]

1.2. The testimony of PW-2 supports the evidence of PW-1 in all material respects. He has said that as soon as the motorcycle fell, appellant 'S' went near 'KBS' and fired. He has also said that 'RR' fell down in the water-filled paddy fields and when 'RR' tried to get up, appellants 'S' and 'H' reached there and fired while PW-1 ran away. He has also disclosed that 'SL' and 'L' also reached the place of occurrence and shouted along with him not to fire and hearing this, the appellants ran away from the spot. He has also said that after the incident, PW-1 came on the spot along with 7-8 persons. PW-2 is, therefore, a direct eyewitness to the firing by the appellants on the two deceased persons and in his lengthy cross-examination the defence has not been able to bring to the notice of the court any material to hold that his evidence is not reliable. He gave vivid description of the occurrence in the witness box during the cross-examination. The veracity of PW-2, has been tested in the cross-examination and his evidence is, thus, reliable. [para 16] [1080-C-F]

1.3. It cannot be said that the evidence of PW-2 could have been discarded on the ground that he was only a chance witness. The incident took place when the victims were traveling on a motorcycle on the road and PW-2 was also coming on the same road on his cycle when he saw the incident. Moreover, PW-2 has been named in the FIR as one of the persons who were coming on a cycle and as one of the persons who shouted at the appellants not to fire. [para 17] [1081-C-E]

Hem Raj and Others v. State of Haryana **2005 (2) SCR 1152 = (2005) 10 SCC 614; and** *Thangaiya v. State of T.N.* **2004 (6) Suppl. SCR 786 = (2005) 9 SCC 650 - relied on**

1.5. Once it is accepted that PW-1 and PW-2 were present at the place of occurrence and their evidence was reliable, the fact that other independent witnesses named in the FIR have not been examined before the court, cannot be a ground for not believing the prosecution case. [para 17] [1081-F]

State of U.P. v. Anil Singh **1988 Supp. (2) SCR 611 – relied on**

2. From the evidence of PW-4, it is evident that although a suggestion was made to him in cross-examination by the defence that the time of incident in the chik register was first written in pencil and thereafter erased and again written, PW-4 has said that the suggestion is incorrect. There is no definite evidence before the Court to come to the conclusion that the time of incident as recorded in the FIR was doubtful. [para 18] [1082-B-C]

3. The IO (PW-5) has admitted during cross-examination by the defence that no empty cartridge was found from the passage on which PW-1 ran away from the spot nor did he find any empty pellet, tikli or cartridge from the spot where the motorcycle was lying and where 'KBS" was shot. PW-5 has also not stated that any empty cartridge was recovered from the paddy field where 'RR' was shot, but the fact remains that both the deceased were killed by gun shots. PW-3, the doctor, who carried out the *post mortem*, has described the gun shot wounds of both the deceased as *ante mortem* injuries and has opined that the injuries were sufficient to normally cause death. Thus, the medical evidence supports the

eyewitness accounts of PW-1 and PW-2. [para 19] [1082-F; 1083-A]

4. The defects in the investigation like the injuries on the body of deceased were not correlated with the weapons allegedly possessed by the appellants, that serological report has not been produced although the blood-stained earth was collected and that the investigation was started not on 22.09.1979 but only the following day in the morning, cannot be a ground to disbelieve the prosecution story which has been proved beyond reasonable doubt through the evidence of the two eyewitnesses as supported by the medical evidence. Unless the lapses on the part of the investigation are such as to cast reasonable doubt about the prosecution story or seriously prejudice the defence of the accused, the court will not set aside the conviction. [para 20] [1083-B-D, G]

State of Uttar Pradesh v. Bhagwant Kishore Joshi **1964 SCR 71 = AIR 1964 SC 221 – relied on.**

Case Law Reference:

2005 (2) SCR 1152	**relied on**	**para 7 and 12**
2004 (6) Suppl. SCR 786	**relied on**	**para 9 and 17**
1988 Supp. (2) SCR 611	**relied on**	**para 10 and 17**
1964 SCR 71	**relied on**	**para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 65 of 2008.

From the Judgment & Order dated 06.02.2007 of the High Court of Judicature at Allahabd in Criminal Appeal No. 178 of 1981.

Vijay Hansaria, Gaurav Jain, Abha Jain Sneha Kalita for the Appellants.

R.K. Das, Pradeep Misra, Suraj Singh for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution of India against the judgment and order dated 06.02.2007 of the Allahabad High Court in Criminal Appeal No.178 of 1981.

2. The facts very briefly are that on 22.09.1979 at 8.05 p.m. Balbir Singh, the complainant, lodged an FIR with Police Chowki Dhata, P.S. Khakhreru in District Fatehpur. The prosecution story as stated in the FIR was that on 22.09.1979 the complainant was returning home after purchasing crude oil from Khaga and Raja Ram Singh (his father) and Kunj Behari Singh were waiting for him at Dhata and he left the oil at Dhata and the three sat on the Motorcycle No.UTY 3213. Kunj Behari Singh drove the motorcycle and when they reached near bamboo clumps ahead of Kanya Pathshala on Dhata-Hinauta Road at about 6.00 P.M., Hira Pandey, Subhash Pandey @ Bodhan and Surendra Nath Pandey, the three appellants herein, who were waiting with single barrel gun, double barrel gun and rifle respectively and cartridge belts, started firing at them. As soon as Kunj Behari was shot, the Motorcycle lost balance and he and his father jumped off from the bike and while his father ran towards the west into the paddy fields, he ran towards Harijan Basti. From Dhata end, Sunder Lal Singh, Hari Prasad Singh, Lakhpat Sonar and Shisuvir Narain were coming and many other persons were coming from Kabraha side and on their exhortation, the appellants ran away to hide in the fields. Raja Ram and Kunj Behari died at the spot as a result of the firing. He had lodged a case against two of the appellants, Subhash and Surendra under Sections 323, 325 and 147 of the Indian Penal Code (for short 'IPC') and they had asked him to compromise several times but he had not compromised and to take revenge they had fired upon them. The complainant has also stated in the FIR that his pant got torn while running to save his life.

3. The FIR was registered. The investigation was entrusted to Pyare Lal Sharma, S.I. (for short 'the IO'). The IO reached the place of occurrence at 7.30 A.M. on 23.09.1979 where the complainant was present. He recorded the statement of the complainant and wrote the *Panchnamas* of the deceased Raja L.;P-Ram and the deceased Kunj Behari in the presence of the witnesses and seized the bodies of the two deceased persons and sent them for *post mortem* to the District Hospital through Constable Jamil Ahmad. He also collected blood-stained earth and sealed them in containers. He recorded the statements of Raghupat Singh, Sunder Lal Singh, Hari Prasad Singh and a few other persons of the Harijan Basti. The remaining investigation was completed by S.O. Ram Mohan Ramand a charge-sheet was filed against the appellants under Section 302 read with 34, IPC.

4. At the trial, the complainant was examined as PW-1, who fully supported the prosecution case as alleged in the FIR. Hari Prasad Singh was examined as PW-2 and he also supported the prosecution case as alleged in the FIR. Dr. Anand Swarup of the District Hospital, who carried out the *post mortem,* was examined as PW-3. He described in details the *ante-mortem* gun shot injuries in the chest and abdominal cavity and the thighs of the deceased Raja Ram and opined that the cause of his death was due to shock and hemorrhage as a result of the injuries sustained by him. PW-3 also described the *ante-mortem* gun shot injuries on left side of the chin and below the left ear and the left side of the neck of the deceased Kunj Behari Singh and opined that the cause of his death was due to shock and hemorrhage. Ram Prakash, the constable who received the complaint at Dhata Chowki of P.S. Khakheru, was examined as PW-4. The IO was examined as PW-5 and Jamil Ahmad, the constable, who carried the dead body for the *post mortem*, was examined as PW-6. In defence, the appellants examined a resident of the Harijan Basti of village Dhata, Shiv Balak, as DW-1 who stated that he had heard some voice coming from the road in the south of his house asking for help

and when he walked ahead in the direction of the voice he saw 6-7 miscreants who fired twice, but he could not recognise the miscreants and the appellants were not amongst the miscreants. The trial court, however, relied upon the evidence of PW-1 and PW-2 and convicted the appellants under Section 302 read with Section 34, IPC and after hearing the parties on the question of sentence, sentenced them for life imprisonment. The appellants carried an appeal to the High Court, but the High Court has affirmed the conviction and the sentence and has dismissed the appeal.

5. Mr. Vijay Hansaria, learned Senior Counsel appearing for the appellants, submitted that the trial court and the High Court should not have relied on the evidence of PW-1 as admittedly he had previous enmity with the appellants. He submitted that if PW-1 was the prime target of the appellants, he would have received some injury as according to PW-1 all the appellants were armed with fire arms and cartridges, but as a matter of fact PW-1 has not received a single injury and this would go to show that PW-1 has falsely implicated the appellants. He further submitted that according to the evidence of PW-1, as soon as the motorcycle lost balance he jumped off from the motorcycle and ran away from the place of occurrence towards the Harijan Basti and therefore he could not have seen the appellant firing on the two deceased persons.

6. Mr. Hansaria submitted that the trial court and the High Court should not have relied on PW-2, who was a mere chance witness and was also a witness cited by PW-1 in support of his complaint against the appellants under Sections 323, 325 and 147 IPC pending in the Court. He argued that PW-2 therefore was an interested witness and his evidence should have been discarded. He submitted that PW-2 has made material improvements over his statement made to the police under Section 161 of the Cr.P.C. He has stated that Hira and Surendra fired at the deceased Raja Ram in which case Raja Ram would have had injuries from at least two gun shots, but according to PW-3, the Doctor, who carried out the *post*

mortem on the dead body of Raja Ram, all the injuries on his dead body were caused by a single gun shot.

7. Mr. Hansaria next submitted that in the FIR, PW-1 has stated that when the appellants were firing on the deceased persons from the Dhata end besides Hari Prasad Singh (PW-2) Sunder Lal Singh, Lakhpat Sonar and Shisuvir Narain were coming and many other persons were coming from Kabraha side, but the prosecution has examined only PW-1 and has not examined the other witnesses. He submitted that the I.O. (PW-5) has admitted that he had recorded the statement of Sunder Lal Singh and yet Sunder Lal Singh has been withheld from the witness box and there is no explanation whatsoever as to why Sunder Lal Singh was not examined. He submitted that independent witnesses have therefore not been examined in support of the prosecution case though these witnesses were named in the FIR. He cited *Hem Raj and Others v. State of Haryana* [(2005) 10 SCC 614] in which this Court has held that when the evidence of alleged eyewitnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the relevant witnesses would assume significance.

8. Mr. Hansaria also pointed out the following lapses in the prosecution case:

(i) The time of recording of FIR at Dhata Police Chowki is doubtful, since at the time of writing the report it was made by pencil which was erased and again overwritten as per the evidence of PW-4 (Constable Ram Prakash).

(ii) There is no recovery of empty cartridges from the place of occurrence, even though both the eyewitnesses have stated that several gun shots were fired.

(iii) Injuries on the bodies of the two deceased persons

were not correlated with weapons allegedly possessed by accused persons.

(iv) The fire arms allegedly used have not been recovered nor is there any mention of efforts made to recover the same.

(v) Though blood stained earth was collected and sealed near the dead body of Kunj Behari; no serological report has been produced to match the blood with that of the deceased Kunj Behari.

(vi) As per PW-4, though Darogaji from Police Station, Khakeru came to the outpost in the night after the report of the incident has been sent from Chowki, yet investigation was started only in the morning.

9. Mr. R.K. Das, learned Senior Counsel appearing for the State, submitted that the presence of PW-1 at the spot of occurrence is supported by three circumstances: (a) that his motorcycle was found lying at the spot; (b) that his pant was torn and (c) DW-1 admitted to have seen the motorcycle lying on the western side of the road. He submitted that PW-1 therefore was present at the place of occurrence and was an eyewitness to the firing. He submitted that PW-2 could not be treated as a chance witness as the incident took place on the road and only passers-by on the road would be witnesses to any such incident which took place on the road and their evidence could not be brushed aside on the ground that they are chance witnesses. He cited *Thangaiya v. State of T.N.* [(2005) 9 SCC 650] in which this Court has held that if a murder is committed in a street, only passers-by will be the witnesses and their evidence could not be brushed aside or viewed with suspicion on the ground that they were mere chance witnesses.

10. Mr. Das also cited the decision of this Court in *State of U.P. v. Anil Singh* (1988 Supp. (2) SCR 611) for the proposition that the prosecution version could not be rejected

only on the ground that all the witnesses to the occurrence have not been examined. He submitted that the prosecution story thus cannot be discarded merely because all the witnesses named in the FIR including Sunder Lal Singh were not examined before the court.

11. Mr. Das submitted that it is true that the fired cartridges have not been recovered from the place of occurrence and this may be because the paddy fields had water and paddy stand up to knee height and it was impossible to search and collect the fired cartridges, but the fact remains that the deceased have died of fire arm injuries. He contended that the trial court and the High Court have rightly believed the two eyewitnesses PW-1 and PW-2 considering the fact that the motive of the appellant was to take revenge against the complainant and his father for not agreeing to compromise the complaint case under Sections 323, 325 and 147 of the IPC pending before the court.

12. We may first examine the contention of Mr. Hansaria that the trial court and the High Court should not have relied on the evidence of PW-1 and PW-2 who were interested witnesses and that the prosecution should have examined the independent witnesses cited in the FIR, namely, Sunder Lal Singh, Lakhpat Sonar and Shisuvir Narain, who as per the FIR shouted at the appellants when they were firing at the deceased. We have perused the decision of this Court in *Hem Raj and Others v. State of Haryana* (supra) cited by Mr. Hansaria and we find that in the aforesaid decision this Court has held that non-examination of independent witnesses by itself may not give rise to adverse inference against the prosecution, but when the evidence of the alleged eyewitnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witnesses would assume significance. Hence, we will have to first consider whether the evidence of the two eyewitnesses PW-1 and PW-2 raises serious doubts on the point of their presence at the time of actual occurrence.

13. When we examine the evidence of PW-1 in this light, we find that he has stated that he had a motorcycle and a diesel pump set and on the day of the incident he purchased crude oil from Khaga, which is entered in his card and he came back to Dhata taking crude oil at 5.30 P.M. in the evening where he met his father and Kunj Behari and he kept the oil in a shop there and Kunj Behari drove the motorcycle from Dhata and his father and he sat behind him and when they started from Dhata for their village on the motorcycle the incident took place at about 5-10 minutes before 6.00 p.m. He has stated:

> "When we reached ahead of Kanya Pathshala Dhata near bamboo clumps, these three accused came out bamboo clumps. At that time accused Subhash was holding a double barrel gun with cartridge belt on shoulder. Hira Lal Pandey was having single barrel gun with cartridge belt on shoulder. Surendra had rifle and also cartridge belt. When these people came on the road and saw us going, then the three accused exhorted that today let them not escape. It was combined voice of the three. On exhortation all the three fired almost same time. First Subhash fired, I do not know whether it hit any body or not. But Kunj Behari Singh was scared by firing and Motor Cycle got dis-balanced and came on western strip of the road. Me and my father jumped from Motorcycle and ran. But Kunj Behari fell down along with Motorcycle. Accused persons were firing continuously. My father went ran towards paddy field towards west and I ran towards Harijan Basti in north. Hearing the fire, Sunder Lal Singh and Hari Prasad Singh of village Sonari coming on cycles from Dhata reached there. Lakpat Sonar also reached there. These people stopped there and shouted at the accused. I was running and hearing the fire. I was clearly hearing the sound of fire. Accused persons ran away on exhortation-lalkara of witnesses. When I jumped from the motorcycle and ran, I could not see whether my father or Kunj Behari was hurt or not because I was running to save myself. I ran towards

> village through Harijan Basti and Canal Side. I shouted reaching near the village. I returned back at the spot along with several persons collected there, and found that Kunj Behari was lying dead by gun shot on the road and my father was lying dead by gun shot in paddy field, while running my trouser got torned. We people remained for about an hour at the place of occurrence. From there I came to Dhata and wrote the report in my hand writing sitting near the shop of Uma Shankar and gave that in Data Chowki."

14. From the aforesaid narration of the incident by PW-1, it is very clear that he was present at the time of the occurrence and has seen the appellants with double barrel gun, single barrel gun and a rifle with cartridges. He has stated that when the appellants fired, Kunj Behari, who was driving the motorcycle, got scared by the firing and the motorcycle got dis-balanced and came on the western strip of the road and he and his father jumped from the motorcycle and ran but Kunj Behari fell down along with motorcycle. He has also stated that the appellants were firing continuously and his father ran towards paddy field towards west and he ran towards Harijan Basti towards north. He has also said that after he returned to the spot he found that Kunj Behari was lying dead by gun shot on the road and his father was lying dead by gun shot in paddy field. Moreover, PW-1 has clearly disclosed that hearing the firing, Sunder Lal Singh and Hari Prasad Singh (PW-2), who were coming on cycles from Dhata, reached there and Lakhpat Sonar also reached there. He has not said that only Hari Prasad Singh (PW-2) from Dhata reached there. If PW-1 was really interested in falsely implicating the appellants in the case with the help of PW-2, he could have also said that he also saw the appellants firing at his father and at Kunj Behari and that only Hari Prasad Singh (PW-2) was coming on cycle from Dhata and shouted at the appellants and that Sunder Lal Singh and Lakhpat Sonar, whom he had named in the FIR, did not reach the spot in time to be able to witness the incidence. We are,

thus, of the view that the evidence of PW-1 could not have been doubted by either the trial court or the High Court.

15. When we examine the evidence of PW-2 Hari Prasad Singh, we find that he has stated:

> "Incident occurred about an year ago. Sun was about to set at about 6 P.M. in the evening I along with fellow Sunder Singh were going from Dhata to Sonari on our separate cycles. Sunder Singh is also resident of Sonari. When I reached near girls school on Dhata-Sonari road, then from our back, deceased Raja Ram, Kunj Behari and Balbir P.W.1 crossed us on motorcycle. Kunj Behari was driving the motorcycle, Raja Ram and then Balbir were sitting behind him.
>
> After crossing the girls school and when we were 30-40 paces away from Bamboo Kothi, all the three accused, Surendra, Heera and Subhash, present in court, came on the road from Bamboo Kothi. Seeing these persons, all the three accused gave a Lalkara that they should not go, and after saying this, three accused fired. At that time, accused Subhash had a double barrel gun, Surendra had a rifle and Hira Pandey had a single barrel gun. Due to fire, motor cycle got disbalanced. I did not see that the fire hit any body riding the motorcycle or its driver but I saw motorcycle getting disbalanced and going towards left strip of the road. Balbir P.W.1 jumped from that disbalanced motorcycle and ran towards north in the side we were going. Raja Ram also got down from motorcycle and ran towards paddy fields in west. But Kunj Behari fell there with motorcycle. As soon as the motorcycle fell, accused Subhash went near Kunj Behari and fired. Raja Ram fell down in water filled paddy fields. As Raja Ram tried to get up, accused Surendra and Hira reached near him and fired. Kunj Behari and Raja Ram died due to fire injuries then and there and Balbir ran away.
>
> I asked accused persons not to fire which could hit us. Apart from me and Sunder Lal, Lakhpat Sonar also reached on the place of occurrence from south side and he also shouted that do not fire, do not kill (Maaro). Hearing this, accused persons ran away from the spot.
>
> After the incident, I stayed for about 30-45 minutes at the spot. During this, Balbir came on the spot along with 7-8 persons."

16. The aforesaid testimony of PW-2 supports the evidence of PW-1 in all material respects. He has said that due to the firing by the appellants, the motorcycle got disbalanced and went towards left strip of the road and PW-1 jumped from the motorcycle and ran towards north side while Raja Ram ran towards paddy fields in the west, but Kunj Behari fell there with the motorcycle. PW-2 has further said that that as soon as the motorcycle fell, the appellant Subhash went near Kunj Behari and fired. He has also said that Raja Ram fell down in the water-filled paddy fields and when Raja Ram tried to get up, the appellants Subhash and Hira reached there and fired while PW-1 ran away. He has also disclosed that Sunder Lal and Lakhpat also reached the place of occurrence and shouted along with him not to fire and hearing this, the appellants ran away from the spot. He has also said that after the incident, PW-1 came on the spot along with 7-8 persons. PW-2 is, therefore, a direct eyewitness to the firing by the appellants on the two deceased persons and in the lengthy cross-examination of PW-2 the defence has not been able to bring to the notice of the court any material to hold that his evidence is not reliable. On the other hand, we find, on a reading of the cross-examination of PW-2, that he has stated that Kunj Behari had fallen flat and his face was towards the sky when he was shot and his head was in the north, one leg in the south and one leg was on the motorcycle. He has stated that the appellant Subhash fired at Kunj Behari from the east from a standing position and at that time the barrel of the gun of the appellant Subhash was downwards on Kunj Behari. PW-2 has also

stated that there were four paces distance between the place where Raja Ram fell in the paddy field and the place from where the two appellants entered the field and the two appellants fired on Raja Ram when he tried to get up. Had PW-2 not seen the occurrence, he could not have given such details of the occurrence in the witness box during the cross-examination. The veracity of PW-2, in our considered opinion, has been tested in the cross-examination and his evidence is, thus, reliable.

17. We do not also think that the evidence of PW-2 could have been discarded on the ground that he was only a chance witness. The incident took place when the deceased were traveling on a motorcycle on the road and PW-2 was also coming on the same road on his cycle when he saw the incident. This Court has held in *Thangaiya v. State of T.N.* (supra) that if a murder is committed in a street, only passers-by will be witnesses and their evidence cannot be brushed aside or viewed with suspicion on the ground that they were mere chance witnesses. Moreover, PW-2 has been named in the FIR as one of the persons who were coming on a cycle from Dhata side and as one of the persons who shouted at the appellants not to fire. In *State of U.P. v. Anil Singh* (supra), this Court has held that when a witness figures as an eyewitness in the FIR, he cannot be categorized as a chance witness. Once we accept that PW-1 and PW-2 were present at the place of occurrence and their evidence was reliable, the fact that other independent witnesses named in the FIR, such as Sunder Lal Singh, have not been examined before the Court, cannot be a ground for not believing the prosecution case. In *State of U.P. v. Anil Singh* (supra), this Court has held that the prosecution case cannot be doubted for not examining the witnesses after taking note of the fact that the public are generally reluctant to come forward to depose before the Court. We, therefore, do not find any merit in the submission made by the learned counsel for the appellants that the prosecution story should not be believed because the independent witnesses have not been examined.

18. We have also considered the contention of Mr. Hansaria that the time of recording of FIR at Dhata Police Chowki is doubtful as the FIR was first written by pencil which was erased and again overwritten as per the evidence of PW-4. We find from the evidence of PW-4 that although a suggestion was made to him in cross-examination by the defence that the time of incident in the chik register as the time of incident was first written in pencil and thereafter erased and again written, PW-4 has said that the suggestion is incorrect. There is no definite evidence before the Court to come to the conclusion that the time of incident in the FIR was first written in pencil and was thereafter erased and again written and that the time of incident as recorded in the FIR was doubtful.

19. Regarding the contention of Mr. Hansaria that there was no recovery of empty cartridges, we find that the IO (PW-5) has admitted during cross-examination by the defence that no empty cartridge was found from the passage on which PW-1 ran away from the spot and he did not find any empty pellet, tikli or cartridge from the spot where the motorcycle was lying and where the deceased Kunj Behari was shot. PW-5 has also not stated that any empty cartridge was recovered from the paddy field where Raja Ram was shot, but the fact remains that the deceased Kunj Behari and Raja Ram were killed by gun shots. Dr. Anand Swarup (PW-3), who carried out the *post mortem*, has described the gun shot wounds of the deceased Raja Ram as *ante mortem* injuries in the chest and abdominal cavity and has opined that the cause of his death is shock and hemorrhage as a result of the injuries sustained by him. Mr. Hansaria is right that according to PW-3 all the injuries on the deceased Raja Ram were caused by one gun shot, whereas PW-2 has deposed that both Surendra and Hira fired at Raja Ram, but it appears only one of them was able to hit Raja Ram with a bullet because of which Raja Ram died. PW-3 has similarly described the injuries on the body of the deceased Kunj Behari as gun shot injuries in his oval cavity on the left side

of the chin and neck and left shoulder and has opined that the injuries were sufficient to normally cause death. Thus, the medical evidence supports the eyewitness accounts of PW-1 and PW-2.

20. The submission of Mr. Hansaria that injuries on the body of deceased were not correlated with the weapons allegedly possessed by the appellants would have been relevant if the fire arms were recovered from the appellants and the bullets were also recovered from the body of the deceased or from the place of occurrence. Regarding his contention that serological report has not been produced although the blood-stained earth was collected and that the investigation was started not on 22.09.1979 but only next day in the morning, these are defects in investigation but such defects cannot be a ground to disbelieve the prosecution story which has been proved beyond reasonable doubt through the evidence of the two eyewitnesses as supported by the medical evidence. In *State of Uttar Pradesh v. Bhagwant Kishore Joshi* (AIR 1964 SC 221), Subba Rao, J., as he then was, has held that it was necessary for the accused to throw a reasonable doubt that the prosecution evidence is such that it must have been manipulated or shaped by reason of the irregularity in the matter of investigation, or that he was prevented by reason of such irregularity from putting forward his defence or adducing evidence in support thereof, but where the prosecution evidence has been held to be true and where the accused had full say in the matter, the conviction cannot obviously be set aside on the ground of every irregularity or illegality in the matter of investigation. In other words, unless the lapses on the part of the investigation are such as to cast reasonable doubt about the prosecution story or seriously prejudice the defence of the accused, the Court will not set aside the conviction.

21. We, therefore, do not find any merit in this appeal and we accordingly dismiss the appeal.

R.P. Appeal dismissed.

DESIYA MURPOKKU DRAVIDA KAZHAGAM & ANR.
v.
THE ELECTION COMMISSION OF INDIA
(Writ Petition (C) No. 532 of 2008)

APRIL 18, 2012

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

Election Symbols (Reservation and Allotment) Order, 1968:

Clauses 6A and 6B as inserted by Notification No. 56 dated 1.12.2000 – Political parties – Reservation/allocation of symbols – Criterion for recognition of political parties at State level and National level – Constitutional validity of – Held: ***Per majority (****Chelameswar, J - dissenting): In addition to rr. 5 and 10 of Conduct of Election Rules, the powers vested in the Election Commission can be traced to Art. 324 of the Constitution – The Election Commission has set down a bench-mark which is not unreasonable – In order to gain recognition as a political party, a party has to prove itself and to establish its credibility as a serious player in the political arena of the State – Once it succeeds in doing so, it will become entitled to all the benefits of recognition, including the allotment of a common symbol – A voter has the right to know the antecedents of the candidates, but such right has to be balanced with the ground realities of conducting a State-wide poll – The Election Commission has kept the said balance in mind while setting the bench-marks to be achieved by a political party in order to be recognized as a State Party and become eligible to be given a common election symbol – There is no variance between the views expressed by the Constitution Bench in the PUCL* case and the amendments effected by the Election Commission to the Election Symbols Order, 1968, by its Notification dated 1.12.2000 – Nothing new*

has been brought out on behalf of the petitioners which could make the Court take a different view from what has been decided earlier – Representation of the People Act, 1951 – Conduct of Election Rules, 1961 – rr. 5 and 10 – Constitution of India, 1950 – Art. 324.

The instant writ petitions and special leave petitions were filed challenging the constitutional validity of the amendment of the Election Symbols (Reservation and Allotment) Order, 1968, by Notification No.O.N.56/2000/ Jud-III dated 1.12.2000, substituting Clause 6 with 6A(i) and (ii) and Clause 6B therein. The common grievance in all the petitions was with regard to the amendment which required that in order to be recognized as a State party in the State, a political party should have secured not less than 6% of the total valid votes polled in the State and also returned at least 2 members to the Legislative Assembly of the State in the last general election.

It was contended that the classification of parties into recognized and unrecognized parties on the basis of the seats won during an election and the percentage of votes polled, was unreasonable and arbitrary, having no nexus with the purpose sought to be achieved.

Dismissing the petitions, the Court

HELD:

Per Altamas Kabir, J (for himself and for Surinder Singh Nijjar, J).

1.1. The Election Commission constituted under Art. 324 of the Constitution of India evolved the procedure for grant of recognition to political parties. After the First General Election, it fixed 3% of the valid votes polled in the elections as the minimum standard for grant of recognition. After the Third General election the minimum standard was raised by the Commission from 3 to 4%.

After the Fourth General Election were held in 1967, the Election Commission decided to streamline the provisions and procedure. Accordingly, by virtue of powers conferred on it by Art. 324 of the Constitution, read with s.29A of the Representation of the People Act, 1951 and rr. 5 and 10 of the Conduct of Election Rules, 1961 and other powers vested in it, the Election Commission of India made and promulgated the Election Symbols (Reservation and Allotment) Order, 1968. [para 5-6] [1099-G; 1100-D-H; 1101-B-C]

1.2. The grounds made on behalf of the writ petitioners regarding the constitutional validity of the Election Symbols Order, 1968, and the power of the Election Commission to settle issues relating to claims of splinter groups to be the original party, had fallen for the decision of this Court in *Sadiq Ali's** **case, when this Court had occasion to observe that the Election Commission had been clothed with plenary power by rr. 5 and 10 of the Conduct of Election Rules, 1961, in the matter of conducting of elections, which included the power to allot symbols to candidates during elections. The challenge to the vires of the Symbols Order, 1968, was, accordingly, repelled. The view in** *Sadiq Ali's* **case has since been followed in the** *All Party Hill Leaders' Conference* **case,** *Roop Lal Sathi's* **case,** *Kanhiya Lal Omar's* **case and as recently as in** *Subramanian Swamy's* **case, where the provisions of Article 324 of the Constitution vesting the superintendence, direction and control of elections, were considered in detail and it was, inter alia, held that in addition to rr. 5 and 10 of the Conduct of Election Rules, 1961, the powers vested in the Election Commission could be traced to Article 324 of the Constitution. [para 31-32] [1116-B-F]**

Shri Sadiq Ali & Anr. Vs. Election Commission of India, New Delhi & Ors. **1972 (2) SCR 318 =(1972) 4 SCC 664;** *All Party Hill Leaders' Conference, Shillong Vs. Captain W.A.*

Sangma & Ors. **1978 (1) SCR 393 = (1977) 4 SCC 161;** *Roop Lal Sathi Vs. Nachhattar Singh Gill* **1983 (1) SCR 702 = (1982) 3 SCC 487;** *Kanhiya Lal Omar Vs. R.K. Trivedi & Ors.* **1985 (3) Suppl. SCR 1 = (1985) 4 SCC 628; and** *Subramanian Swamy Vs. Election Commission of India* **2008 (13) SCR 846 = (2008) 14 SCC 318 – relied on.**

1.3. The evolution of the law relating to the criteria for a political party to be recognized as a State Party clearly indicates that the Election Commission, in its wisdom, was of the view that in order to be recognized as a political party, such party should have achieved a certain bench-mark in State politics. Nothing new has been brought out in the submissions made on behalf of the writ petitioners which could make the Court take a different view from what has been decided earlier. [para 33] [1116-G]

1.4. The Election Commission has set down a bench-mark which is not unreasonable. In order to gain recognition as a political party, a party has to prove itself and to establish its credibility as a serious player in the political arena of the State. Once it succeeds in doing so, it will become entitled to all the benefits of recognition, including the allotment of a common symbol. [para 33] [1117-B-C]

2. A voter has the right to know the antecedents of the candidates, but such right has to be balanced with the ground realities of conducting a State-wide poll. The Election Commission has kept the said balance in mind while setting the bench-marks to be achieved by a political party in order to be recognized as a State Party and become eligible to be given a common election symbol. There is no variance between the views expressed by the Constitution Bench in the PUCL case and the amendments effected by the Election Commission to the Election Symbols Order, 1968, by its**

Notification dated 1.12.2000. [Para 34] [1117-D-E]

*** People's Union for Civil Liberties (PUCL) & Anr. Vs. Union of India & Anr.* **2003 (2) SCR 1136 = (2003) 4 SCC 399; and** *Union of India Vs. Association for Democratic Reforms & Anr.* **2002 (3) SCR 696 = (2002) 5 SCC 294 - referred to.**

Kuldip Nayar & Ors. Vs. Union of India & Ors. **2006 (5) Suppl. SCR 1 = (2006) 7 SCC 1;** *Kharak Singh Vs. State of U.P. & Ors.* **1964 SCR 332 = AIR 1963 SC 1295;** *Kanhiya Lal Omar Vs. R.K. Trivedi & Ors.* **1985 (3) Suppl. SCR 1 = (1985) 4 SCC 628;** *Sakal Paper (P) Ltd. & Ors. Vs. Union of India* **(1962) 3 SCR 842;** *Subramanian Swamy Vs. Election Commission of India* **2008 (13) SCR 846 = (2008) 14 SCC 318;** *Rama Kant Pandey Vs. Union of India* **1993 (1) SCR 786 = (1993) 2 SCC 438 – cited.**

James L. Buckley Vs. Francis R. Valeo **424 US 1 (1976); and** *Texas Vs. Gregory Lee Johnson* **491 US 397 (1989) – cited.**

<u>Per Chelameswar, J (Dissenting)</u>

1.1. If a principle laid down by this Court is demonstrably inconsistent with the scheme of the Constitution, it becomes the duty of this Court to correct the wrong principle laid down. It is also the duty of this Court to correct itself as early as possible in the matters of the interpretation of the Constitution, "as perpetuation of a mistake will be harmful to public interest". [para 28] [1132-B]

1.2. The right to elect members of Lok Sabha or the Legislatie Assemblies flows from the language of Arts. 81 and 170 r/w Arts. 325 and 326 of the Constitution of India. Such a right can be restricted by the appropriate Legislature only on four grounds specified under Art. 326. As regards the right to get elected / being CHOSEN either

to the Lok Sabha or to the Legislative Assembly of a State, Arts. 84 and 173 stipulate the requisite qualifications for a person to be either a member of the Lok Sabha or the Legislature of a State. Arts. 102 and 191 prescribe the various contingencies in which a person would become disqualified to be a member of any one of the Legislative Bodies, such as, holding of a public office or owing allegiance or adherence to a foreign State, etc. Therefore, subject to the fulfilment of the various conditions stipulated in the Constitution or by an appropriate law made in that behalf, every citizen of this country has a Constitutional right both to elect and also be elected to any one of the Legislative Bodies created by the Constitution – the "straight conclusion" of the Mohinder Singh Gill's case, "that every Indian has a right to elect and be elected – subject to statutory regulations", which rights can be curtailed only by a law made by the appropriate legislation that too on grounds specified under Art. 326 only. [para 33,34 and 36] [1135-D; 1137-B, C; 1138-A; 1139-A-C-D]

Mohinder Singh Gill and anr. v The Chief Election Commissioner, New Delhi and ors. **1978 (2) SCR 272 = (1978) 1 SCC 405 – relied on.**

N.P.Ponnuswamy v Returning Officer, Namakkal Constituency, **1952 SCR 218;** *Jyothi Basu v. Debi Gosal* **1982 (3) SCR 318 = (1982) 1 SCC 691 – distinguished.**

People's Union for Civil Liberties (PUCL) and anr. v. Union of India and anr. **2003 (2) SCR 1136 = (2003) 4 SCC 399 – referred to.**

Justice M.N. Venkatachaliah National Commission to review the working of the Constitution Report **– referred to.**

2.1. On 30.7.1957, the Election Commission held a Conference, where 7 well established political parties, then organized on All India basis, participated. A

consensus was arrived at in the abovementioned Conference to adopt the symbol system. It was with the creation of the Symbols Order, 1968, that for the first time, the Election Commission conferred on itself the authority to recognise or refuse to recognise or derecognise political parties, which did not demonstrate that they have some minimum political following and legislative presence. Till 1996, gaining recognition from the Election Commission did not confer any advantage on a political party other than securing the reservation of a symbol commonly for all the candidates set up by such a party at any election. Political parties could still set up, then and now also, candidates at any election irrespective of the fact whether they are recognised by the Election Commission or not. It is only much later (1996), certain legal rights and obligations came to emanate from the factum of recognition or lack of it. [para 7, 50 and 51] [1121-C-D; 1149-A-B; 1148-G-H]

2.4. The substance of the provisions of the Symbols Order is that, no political party is entitled for allotment or use of an election symbol permanently. The allotment of an exclusive election symbol is available to a political party only so long as it is recognised by the Election Commission. Securing the recognition and its continuance depends upon the performance of the political party at every succeeding general election. Therefore, newly formed political parties are not entitled, as a matter of right, for the exclusive allotment of a common election symbol for the benefit of all the candidates set up by them at any election. Such candidates are required to choose one of the free symbols notified by the Election Commission. Therefore, all the candidates set up by a political party need not get the same symbol at a general election. Even in the case of an existing political party, which was recognised at some anterior point of time, but lost the recognition in view of its inadequate performance at any general

election or in the case of a political party, which contested a general election, but failed to satisfy the requisite standards of performance stipulated in the Symbols Order, a common symbol would not be available for the exclusive use of such party's candidates at any subsequent election beyond a period specified in para 10A. [para 19-20] [1128-E-H; 1129-A-B]

Subramanian Swamy v. Election Commission of India, **2008 (13) SCR 846 = (2008) 14 SCC 318;** *Golaknath v. State of Punjab* **(1967) 2 SCR 762;** *Superintendent & Legal Remembrancer State of West Bengal v. Corporation of Calcutta* **(1967) 2 SCR 170 and** *Bengal Immunity Company Limited v. State of Bihar* **(1955) 2 SCR 603 – referred to.**

3.1 Until 1985, the Constitution of India made no reference to political parties. It was by the Fifty Second Amendment that the Tenth Schedule was added to the Constitution, where the expression "political party" occurs. The Tenth Schedule recognises the existence of political parties and the practice of political parties setting up candidates for election to either of the Houses of Parliament or State Legislature. However, the Election Commission recognised, from the inception, the existence of political parties and the practice of political parties setting up candidates at elections to any one of the Houses created by the Constitution. [para 39] [1142-D-F]

William vs. Rhodes **393 US 23 (1968) – referred to.**

3.2 Art. 19(1)(c) confers a fundamental right on all citizens to form associations or associate with organisations of their choice. Therefore, all the citizens have a fundamental right to associate for the advancement of political beliefs and opinions held by them and can either form or join a political party of their choice. A political party is nothing but an association of individuals pursuing certain shared beliefs. Political

parties are, no doubt, not citizens, but their members are generally citizens. Therefore, any restriction imposed on political parties would directly affect the fundamental rights of its members. [para 40] [1142-F; 1143-A-C-D]

Romesh Thapper v. State of Madras, **1950 SCR 594 = AIR 1950 SC 124 – referred to.**

3.3 The Symbols Order, insofar as it provides for the allotment of a symbol for the exclusive use only of a recognised political party's candidates, certainly creates a disadvantage to the political parties, which have not been able to secure recognition from the Election Commission apart from creating two classes of political parties. The citizens' right to form or join a political party for the advancement of political goals means little if such a party is subjected to a disadvantage, in the matter of contesting elections. [para 42] [1144-C-D]

Shri Sadiq Ali and anr. v The Election Commission Of India, New Delhi and Ors. **1972 (2) SCR 318 = (1972) 4 SCC 664; and** *Kanhiya Lal Omar v. R.K.Trivedi and Ors.* **1985 (3) Suppl. SCR 1 = (1985) 4 SCC 628 – referred to.**

3.4 Except for the Tenth Schedule, which is a relatively recent addition to the Constitution, no other provision of the Constitution, expressly refers to the political parties either recognised or unrecognised. The R.P. Act, as it was originally enacted, also did not make any reference to a political party. The expression "political party" was first introduced in the R.P. Act in the year 1989 by the amending Act No.1 of 1989. Section 2 (f) was inserted, which provides for the definition of the expression "political party". Simultaneously, by the same amending Act, Part – IV A was introduced into the Act, which dealt with the registration of political parties with the Election Commission and the advantages flowing from such registration. The expression "recognised political party" was first introduced in the Act by Act

No.21 of 1996, in the proviso to s. 33 and sub-s. (2) of s.38. Later, such an expression was employed in s.39A and in the second explanation to sub-s. (1) of s.77, s. 78A and s. 78B, which occur under Part–VA of the Act by the amending Act No.46 of 2003. The Explanation to s. 78B(2), defines the expression "unrecognised political party" for the limited purposes mentioned therein. None of the provisions referred to in the explanation deal with the allotment of a reserved symbol. Thus, there is a statutory compulsion (post 1996) on the part of the Election Commission to recognise or not to recognise a political party as it is only on the basis of the recognition by the Election Commission, the rights or obligations created under the abovementioned provisions come into play. There is still no constitutional compulsion in that regard. [para 45] [1145-D-H; 1146-B-C]

3.5 Though, post-1996, the R.P. Act, 1951, obligates the Election Commission to confer recognition on some political parties for certain purposes, the Act does not stipulate the criteria on the basis of which such recognition is to be accorded. It simply borrowed the definition of the expression 'recognised political party' from the Symbols Order, thereby leaving it to the discretion of the Election Commission to recognise or not to recognise a political party on such terms and conditions, which the Election Commission deems fit. But, there is nothing either in R.P. Act, or any other law, which obligates the Election Commission to accord recognition to a political party on the basis of its performance at an election. [para 46] [1146-D-E]

3.6 Thus, it is not legally obligatory for the Election Commission to choose the criteria of performance at an election for the purpose of according or refusing to accord recognition to a political party. It so happened that such a criterion was chosen by the Election Commission well before the R.P. Act obliged the Election Commission

to undertake the exercise and the Parliament while amending the R.P. Act simply took note of the existing practice of the Election Commission. Even on date, there is nothing in the law, which prevents the Election Commission from changing the criteria for conferring recognition on a political party. [para 46] [1146-G-H]

3.7 Once a qualified voter decides to contest an election under the provisions of the R.P. Act, 1951, whether such a voter is sponsored by a political party or not, whether such a political party is recognised by the Election Commission or not, there is no way under the law, to prevent him from contesting. Also the Election Commission is bound to allot pictorial symbols to each such candidate. [para 53] [1149-H; 1150-A]

4.1 All political parties form one class. All of them have the same goal of propagating their respective political ideas though the ideas themselves may differ. The endeavour of all the political parties is to capture the State power in order to implement their respective policies, professedly, for the benefit of the society in general. Transient success or failure cannot be the basis to determine the constitutional rights of the candidates or members of such political parties. The enjoyment of the fundamental rights guaranteed by the Constitution cannot be made dependent upon the popularity of a person or an idea held by the person. Otherwise, it would be the very antithesis of liberty and freedom. The constitutional guarantees are meant to protect the unpopular, the minorities and their rights. Denying the benefit of a symbol to the candidates of a political party, whose performance does not meet the standards set up by the Election Commission, would disable such political party from effectively contesting the election, thereby, negating the right of an association to effectively pursue its political beliefs. [para 54] [1150-C-H; 1151-A-B]

4.2 The classification created in the Symbols Order does not satisfy the doctrine of reasonable classification as envisaged by Art.14. The Symbols Order certainly violates the prohibition contained under Arti. 14. [para 43, 55-56] [1152-A; 1145-A]

4.3 It is not sufficient for a law to survive the challenge under Art. 14 to demonstrate that the law makes a classification based on intelligible differentia between two groups of persons or things. It must also be established that such differentia have a rational relation to the object sought to be achieved by such classification. Therefore, the Symbols Order has to satisfy (i) the test of being a reasonable restriction designed to achieve any of the purposes specified under Art. 19(2) and (4); and (ii) the twin tests of being a reasonable classification, and having a nexus to the object sought to be achieved by such classification. [para 42, 56] [1144-E-F; 1152-E]

Budhan Choudhry v. State of Bihar, **(1955) 1 SCR 1045 - relied on**

4.4 The object sought to be achieved by the Election Commission by the Symbols Order is to avoid the confusion in the minds of the voters at the time of voting. Such a result is said to be achieved by the Election Commission by denying recognition to the political party with insignificant following, thereby, denying them the benefit of the reservation of an exclusive symbol to its candidates. [para 57] [1152-G]

4.5 There is nothing either in the Constitution or in the R.P. Act, 1951 or any other law, which prohibits an unrecognised political party from setting up candidates at an election. The legal position is the same with regard to even independent candidates. Therefore, notwithstanding the refusal of recognition by the Election Commission, unrecognised or derecognised political

parties or independent candidates without any party support can still contest the election. Candidates set up by an unregistered political party can also contest an election as registration u/s 29A of the R.P. Act is not mandatory for a political party, except that registration begets certain advantages specified in the R.P. Act, 1951 to a political party. The Election Commission is bound to allot a symbol to any of the candidates belonging to any one of the abovementioned categories. [para 58] [1153-B-D]

4.6 Therefore, there is no rational nexus between the classification of recognised and unrecognised political parties and the professed purpose sought to be achieved by such classification. On the other hand, it is likely to preserve the political status quo. [para 58] [1153-E]

4.7 In a "democratic set up", while the majorities rule, minorities are entitled to protection. Otherwise, the mandate of Art. 14 would be meaningless. The status of majority or minority, even an insignificant minority, could only be transient. Further, the question as to what is the legitimate purpose sought to be achieved by the classification under the Symbols Order, was not considered. [para 59] [1154-E]

4.8 It is, therefore, held the Symbols Order, insofar as it denies the reservation of a symbol for the exclusive allotment of the candidates set up by a political party with "insignificant poll performance", is violative of Art. 14 of the Constitution of India. [para 60] [1154-G]

Case Law Reference:

As per Altamas Kabir, J.

1972 (2) SCR 318	**relied on**	**para 7**
1978 (1) SCR 393	**cited**	**para 8**
1983 (1) SCR 702	**relied on**	**para 8**

1985 (3) Suppl. SCR 1	**relied on**	**para 9**
2002 (3) SCR 696	**referred to**	**para 19**
2003 (2) SCR 1136	**referred to**	**para 19**
2006 (5) Suppl. SCR 1	**cited**	**para 20**
1964 SCR 332	**cited**	**para 21**
1985 (3) Suppl. SCR 1	**cited**	**para 23**
(1962) 3 SCR 842	**cited**	**para 23**
1972 (2) SCR 318	**cited**	**para 23**
424 US 1 (1976);	**cited**	**para 24**
491 US 397 (1989)	**cited**	**para 24**
2008 (13) SCR 846	**relied on**	**para 28**
1993 (1) SCR 786	**cited**	**para 29**

As per chelameswar, J.

1972 (2) SCR 318	**referred to**	**para 9**
1985 (3) Suppl. SCR 1	**referred to**	**para 9**
1952 SCR 218	**distinguished**	**para 24 and 37**
1982 (3) SCR 318	**distinguished**	**para 24 and 37**
2008 (13) SCR 846	**relied on**	**para 25**
(1967) 2 SCR 762	**referred to**	**para 28**
(1967) 2 SCR 170	**referred to**	**para 28**
(1955) 2 SCR 603	**referred to**	**para 28**
1978 (2) SCR 272	**relied on**	**para 28**
2003 (2) SCR 1136	**relied on**	**para 37**
393 US 23 (1968)	**referred to**	**para 37**

1950 SCR 594	**referred to**	**para 40**
(1955) 1 SCR 1045	**relied on**	**para 56**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 532 of 2008.

Under Article 32 of Constitution of India.

WITH

W.P. (C) Nos. 315, 422 of 2009, S.L. P. (C) No. 23494 of 2009, W.P. (C) No. 426, 444, 454, 463, 447, 132 of 2009, S.L. P. (C) No. 7379-7380 of 2009, W.P. (C) Nos. 111, 117, 125, 124 and 128 of 2011.

K.K. Venugopal, Rukshana Choudhary, Col. Edwin Jesudas, Ankur Talwar, S. Ravi Shankar, Pravin Satale, Rajiv Shankar Dvivedi, Manoj Goel, Wajeeh Shafiq, Gopal Verma, Ashutosh Kumar Singh, Shuvodeep Roy, Vishwajit SIngh, Harinder Mohan Singh, Naushad Ahmad Khan, Mehbubul Hassan L., Aftab Ali Khan, Dushyant Singh, R. Nedumaran, Meenakshi Arora, S. Ravi Shankar, Ankur Mittal, Pranav Kumar Jha, Sanjay R. Hegde, Tenzin Tsering, S. Nithin, Anil Kumar Mishra-I, Hari Shankar K., Vikash Singh Jangra, Ramesh Babu M.R., N. Rajaraman, Meenakshi Arora, S.K. Mendiratta, Poli Kaiki, Vasav V., Rakesh K. Sharma, Venkateswara Rao Anumolu, Jogy Scaria, Sharmila Upadhyay, Lawyer's Knit & Co., Ramesh N. Keswani, Ram Lal Roy, Keswai & Co. for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Writ Petition (Civil) No.532 of 2008 was filed by Desiya Murpokku Dravida Kazhagam and Colonel Edwin Jesudoss (Retd.), challenging the constitutional validity of the amendment of the Election Symbols (Reservation and Allotment) Order, 1968, hereinafter referred to as the "Election Symbols Order, 1968", vide Notification No.O.N.56/ 2000/Jud-III dated 1st December, 2000, substituting Clause 6 with 6A(i) and (ii) and Clause 6B therein. The same was taken

up for final hearing along with several other Writ Petitions on account of the common issue involved therein. The common grievance in all these writ petitions is with regard to the amendment which mandates that in order to be recognized as a State party in the State, it would have to secure not less than 6% of the total valid votes polled in the State and should also have returned at least 2 members to the Legislative Assembly of the State.

2. The grievance of the Desiya Murpokku Dravida Kazhagam is that it had been refused recognition as a State party by the Election Commission of India, although, it secured 8.33% of the valid votes in the Assembly elections. It is the further grievance of the Petitioners that in view of the amendment made to Clause 6 of the Election Symbols Order, 1968, it had been denied recognition on account of the cumulative effect of the requirement that a political party would not only have to secure not less than 6% of the total valid votes polled, but it had also to return at least 2 members to the Legislative Assembly of the State. It is the Petitioners' case that despite having secured a larger percentage of the votes than was required, it was denied recognition, since it had failed to return 2 members to the Legislative Assembly.

3. In order to appreciate the case made out by the writ petitioners, it would be apposite at this stage to look into the background in which the Election Symbols Order, 1968, came to be pronounced.

4. After the commencement of the Constitution on 26th January, 1950, the Election Commission was constituted under Article 324 of the Constitution. On 30th July, 1951, the Commission held a conference in New Delhi with 7 established political parties organised on an all-India basis and discussed the possibilities of allotting a distinctive symbol to each one of them all over India. During the deliberations, the participants generally agreed that the same symbols would be used throughout India for all candidates of a party, both for

parliamentary and assembly elections. What also fell for discussion was whether where among several constituencies one of the seats was reserved for Scheduled Castes or Scheduled Tribes, the candidates belonging to a party would be allotted the party's symbol. The said discussions led to ad hoc recognition being given by the Election Commission to several parties as national or multi-state parties and allotted to them the symbols as were shown against their names.

5. Drawing inspiration from the first General Elections conducted by the Election Commission in 1951-52, the Election Commission decided to withdraw recognition from such parties whose poll performance was far below the standards to merit further recognition. However, giving due recognition to the fact that some of the parties were new and were not fully organised before the elections, the Commission fixed 3% of the valid votes polled in the elections as the minimum standard for grant of recognition. In the case of national parties, such percentage was calculated with reference to the votes polled in regard to elections to the House of the People, while in the case of State parties, the votes polled in the elections to the State Legislative Assemblies were the factors to be considered. On account of the standards laid down, only 4 political parties remained eligible for recognition as national parties, namely, (1) Indian National Congress; (2) All India Bharatiya Jan Sangh; (3) Communist Party of India; and (4) Praja Socialist Party, and all other parties lost their recognition. Standards for maintaining such recognition continued to be applied by the Election Commission in the Second and Third General Elections held in 1957 and 1962 respectively, but after the Third General Elections the minimum standard was raised by the Commission from 3 to 4%. The same formula was also used by the Election Commission after the Fourth General Elections in 1967.

6. After the Fourth General Elections were held in 1967, the Election Commission decided to streamline the provisions and procedure so long followed relating to recognition of political parties in the conduct of elections. The Commission

was of the view that the provisions relating to recognition of political parties and their functioning, was required to be codified and provision was also required to be made for registration of political parties as a pre-condition for recognition. Accordingly, by virtue of powers conferred on it by Article 324 of the Constitution, read with Section 29A of the Representation of the People Act, 1951 and Rules 5 and 10 of the Conduct of Election Rules, 1961 and other powers vested in it, the Election Commission of India made and promulgated the Elections Symbols (Reservation and Allotment) Order, 1968, which is at the core of the issues being heard in these matters.

7. As the Preamble of the aforesaid Order states, the same was promulgated to provide for specification, reservation, choice and allotment of symbols at elections in Parliamentary and Assembly Constituencies; for the recommendation of the political parties in relation thereto and for matters connected therewith. It was also promulgated in the interest of purity of elections to the House of the People and the Legislative Assembly of every State and in the interest of the conduct of such elections in a fair and effective manner. After the Election Symbols Order was promulgated, some of its provisions were challenged on the ground of their constitutional validity. One of the questions raised was whether under the aforesaid Order, the Election Commission could have vested itself with the powers contained in Clause 15 thereof, reserving to itself powers to settle issues in relation to splinter groups or rival sections of recognized political party, each of whom claimed to be the original party. The decision of the Commission was made binding on all the rival sections and groups. The said question fell for the decision of this Court in the case of *Shri Sadiq Ali & Anr. Vs. Election Commission of India, New Delhi & Ors.* [(1972) 4 SCC 664] and it was held by a Three-Judge Bench of this Court that Clause 15 was intended to effectuate and subserve the main purposes and objects of the Symbols Order. It was observed that the Clause was designed to ensure that because of a dispute having arisen in a political party

between two or more groups, the entire scheme of the Election Symbols Order relating to the allotment of a symbol reserved for the political party, was not frustrated. This Court took note of the fact that the Election Commission had been clothed with plenary powers by Rules 5 and 10 of the Conduct of Election Rules, 1961, in the matter of allotment of Symbols, the validity whereof had not been challenged. This Court, therefore, came to the conclusion that the fact that the power to settle such disputes had been vested in the Commission could not constitute a valid ground for assailing the vires of the said clause. Since the said decision has also been referred to by the learned counsel for the parties in extenso, we will revert back to the same at a later stage in this judgment.

8. The same view was also expressed by this Court in *All Party Hill Leaders' Conference, Shillong Vs. Captain W.A. Sangma & Ors.*[(1977) 4 SCC 161] and in *Roop Lal Sathi Vs. Nachhattar Singh Gill* [(1982) 3 SCC 487], wherein while dealing with the provisions of Clause 13 of the Symbols Order, this Court held that the dispute relating to the procedure for setting up of candidates could be the subject matter of an Election Petition under Section 100(1)(d)(iv) of the Representation of the People Act, 1951.

9. The authority of the Election Commission under the Election Symbols Order, 1968, as a whole was also challenged before this Court in *Kanhiya Lal Omar Vs. R.K. Trivedi & Ors.* [(1985) 4 SCC 628], wherein it was urged on behalf of the Petitioner that the said Order, being legislative in character, could not have been issued by the Election Commission, which was not entrusted by law with power to issue such an Order regarding the specification, reservation, choice and allotment of symbols that might be chosen by the candidates during elections in the Parliamentary and Assembly Constituencies. It was also urged that Article 324 of the Constitution which vests the power of superintendence, direction and control of all elections to Parliament and to the Legislative Assemblies, in the Commission, could not be construed as conferring power

on the Commission to issue the Symbols Order. Rejecting the said contention, this Court held that the expression "election" in Article 324 of the Constitution is used in a wide sense so as to include the entire process of election which consists of several stages, some of which had an important bearing on the result of the process and that every norm which laid down a Code of Conduct could not possibly be elevated to the status of legislation or even delegated legislation. It was emphasized that there are certain authorities or persons who may be the source of rules of conduct and who at the same time could not be equated with authorities or persons who are entitled to make law in the strict sense.

10. As has been indicated hereinbefore, the Petitioner political party, Desiya Murpokku Dravida Kazhagam, hereinafter referred to as "DMDK" was refused recognition as a State Party by the Election Commission of India, despite having secured 8.33% of the valid votes on account of the fact that by virtue of the amendment to the Election Symbols Order in 2000, in order to obtain recognition, DMDK was required to secure not less than 6% of the total valid votes polled in the State and must have returned at least two members to the Legislative Assembly of the State.

11. Appearing for the Writ Petitioners, Mr. K.K. Venugopal, learned Senior Advocate, submitted that the condition for a political party to be recognized as a State Party was originally prescribed in Clause 6 of the Election Symbols Order, 1968, which provides as follows:-

> "6(2). A political party shall be treated as a recognized political party in a State, if and only if either the conditions specified in clause (A) are, or the condition specified in clause (B) is, fulfilled by that party and not otherwise, that is to say –
>
> (A) that such party -
>
> (a) has been engaged in political activity for a continuous period of five years; and
>
> (b) has, at the general election in that State to the House of the People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning, returned – either (i) at least one member to the House of the People for every twenty-five members of that House or any fraction of that number elected from the State;
>
> Or (ii) at least one member to the Legislative Assembly of that State for every thirty members of that Assembly or any fraction of that number;
>
> (B) that the total number of valid votes polled by all the contesting candidates set up by such party at the general election in the State to the House of the People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning (excluding the valid votes of each such contesting candidate in a constituency as has not been elected and has not polled at least one-twelfth of the total number of valid votes polled by all the contesting candidates in that constituency), is not less than four per cent of the total number of valid votes polled by all the contesting candidates at such general election in the State (including the valid votes of those contesting candidates who have forfeited their deposits)."

12. Mr. Venugopal submitted that the said conditions remained in force from 1968 to 1997 when the conditions stipulated in Clause 6(2)(B) for recognition of a political party as a State Party were amended by the Election Commission of India vide its Notification No.56/97 Jud III dated 15.12.1997, which provided as follows :-

> "6(2). A political party shall be treated as a recognized political party in a State, if and only if either the conditions

specified in clause (A) are, or the condition specified in clause (B) is, fulfilled by that party and not otherwise, that is to say –

(A) that such party -

(a) has been engaged in political activity for a continuous period of five years; and

(b) has, at the general election in that State to the House of the People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning, returned – either (i) at least one member to the House of the People for every twenty-five members of that House or any fraction of that number elected from the State;

Or (ii) at least one member to the Legislative Assembly of that State for every thirty members of that Assembly or any fraction of that number;

(B) that the total number of valid votes polled by all the contesting candidates set up by such party at the general election in the State to the House of the People, or, as the case may be, to the Legislative Assembly, is not less than six per cent of the total number of valid votes polled by all the contesting candidates at such general election in the State.

2(A) Notwithstanding anything contained in clause (B) of the sub-paragraph (2), a political party shall be treated as a recognized political party in a State, if at the general election to the House of the People or as the case may be, to the Legislative Assembly of the State, in existence and functioning at the commencement of the Election Symbol (Reservation and Allotment) (Amendment) Order, 1997, the total number of valid votes polled by all the contesting candidates setup by such party (but excluding the valid votes of each such candidate in a constituency

as has not been elected and has not polled at least one-twelfth of the total valid votes polled by all the contesting candidates in that constituency), is not less than 4% of the total number of valid votes polled by all the contesting candidates at such general election in that State (including the valid votes of those contesting candidates who have forfeited their deposits)."

13. By virtue of the aforesaid Notification, the minimum percentage of votes to be obtained by a political party for recognition as a State Party was increased from 4% to 6%, but the other criteria regarding the number of seats or percentage of votes was maintained. The said conditions relating to the recognition of a political party as a State Party solely on the basis of the percentage of votes held by its candidates, was again amended in 2007 by the Election Commission of India vide its Notification No.56/2000/Jud-III dated 1.12.2000, where the criteria was altered in the manner following :-

"6B. Conditions for recognition as a State party – a political party, other than a National party, shall be treated as a recognized State party in a State or States, if, and only if, -

Either (A) (i) the candidates set up by it, at the last general election to the House of People, or to the Legislative Assembly of the State concerned, have secured not less than six per cent of the total valid votes polled in that State at that general election; AND

(ii) In addition, it has returned at least two members to the Legislative Assembly of the State at the last general election to that Assembly;

or (B) it wins at least three per cent of the total number of seats in the Legislative Assembly of the State, (any fraction exceeding one-half being counted as one), or at least three seats in the Assembly, whichever is more, at the aforesaid

general election."

14. It was submitted that the DMDK was constituted as a political party on 14.9.2005 and was registered with the Election Commission of India under Section 29A of the Representation of the People Act, 1951, hereinafter referred to as "the 1951 Act", and contested the General Elections in 2006 for the Tamil Nadu Legislative Assembly in 232 out of 234 constituencies, just after 8 months of its formation. Being an unrecognized party, the candidates were allotted the "Naqara" symbol in 224 constituencies, whereas in six constituencies its candidates were given the "Bell" symbol and the "Ring" symbol in 2 constituencies. Mr. Venugopal submitted that in the said elections all the candidates of the DMDK secured 8.33% of the total number of valid votes in comparison to the first and second political parties, which obtained 31.44% and 30.92% respectively of the votes. Apart from the above, the President of the Party, Mr. Vijayakanth, won the Assembly Election from the Virudhachalam Assembly Constituency, thereby returning one candidate to the Tamil Nadu Legislative Assembly, in addition to having polled 8.33% of the total valid votes.

15. Mr. Venugopal submitted that the criteria laid down by the Election Commission of India for recognition of a political party as a State Party, whereby a State Party had to secure not less than 6% of the total valid votes polled in the State in the General Elections and in addition it had to return at least two members in the said State election, was an erroneous methodology for granting recognition to a political party as a State Party, since in a given General Election, it was not always the political party which had secured the highest number of votes, that had won the General Elections in the State. That in the 13th Assembly General Elections in 2006, held in Tamil Nadu, the DMK having polled 8,728,716 votes won 96 seats, whereas the AIADMK, having polled 10,768,559 votes, won only 61 seats i.e. despite having polled more than one crore votes over the votes polled by DMK, the AIDMK got only 61 seats as against the DMK's 96 seats. Similarly, in the 9th Lok

Sabha General Elections held in 1989 in Tamil Nadu, the DMK having polled 70,38,849 votes did not win a single seat, whereas the AIADMK, having polled almost half of the number of votes, viz. 45,18,649, won all the Lok Sabha seats from Tamil Nadu. Similarly, in the 10th Lok Sabha General Elections held in 1991 and the 14th Lok Sabha General Elections held in 2004, the AIADMK in 1991 and the DMK in 2004 won all the seats for the Lok Sabha, despite having polled lesser number of votes than the rival group. In view of the aforesaid facts and figures, Mr. Venugopal submitted that the criteria adopted by the Election Commission of India for grant of recognition to political parties in a State as a State party was not a correct index for determining grant of such recognition.

16. Mr. Venugopal submitted that the recognition of a political party entitles it to the right of exclusive reservation and use of an electoral symbol, as otherwise there was bound to be confusion in the minds of the voters if different symbols were allotted to different candidates belonging to the same political party. Learned counsel submitted that the classification of parties into recognized and unrecognized parties on the basis of the seats won during an election and the percentage of votes polled, is unreasonable and arbitrary, having no nexus with the purpose sought to be achieved. Mr. Venugopal submitted that yet another disadvantage suffered by unrecognized parties under the Election Symbols Order, 1968, is that in subsequent elections, it does not enjoy any priority with regard to symbols and more often than not, symbols which it had used in the earlier election when given to other candidates, resulted in benefit to such candidate to the disadvantage of the party concerned.

17. Mr. Venugopal also contended that paragraph 6(B) of the Election Symbols Order, 1968, was causing hardship to political parties as it imposes two conditions clubbed with other conditions which were highly anomalous and was, therefore, liable to be struck down.

18. Mr. Manoj Goel, learned Advocate, who appeared for the Petitioners in SLP(C)No. 23494 of 2009 and Writ Petition

(C) No.426 of 2009, reiterated the submissions made by Mr. Venugopal and submitted that by denying the unrecognized political parties a common election symbol to its candidates, an attempt was being made by the Election Commission of India, to suppress the growth of such parties. It was submitted that parties that did not have a common electoral symbol have a disadvantage in relation to other unrecognized political parties, since party candidates and even the political parties were known by common citizens by their symbols. It was urged that a political party like the Bhartiya Janata Party was known by its "Lotus" symbol, while the Bahujan Samaj Party was known by its "Elephant" symbol. Similarly, other parties were also entitled to be recognized by their electoral symbols, which otherwise resulted in hostile discrimination. It was urged that in order to provide a level playing field for all candidates, it was necessary to associate each party with a common electoral symbol, which would eliminate any confusion in the mind of the voter as to who or which party he or she was voting for.

19. Mr. Goel submitted that in *Union of India Vs. Association for Democratic Reforms & Anr.* [(2002) 5 SCC 294], it was laid down without any ambiguity that the voter has a right to know the antecedents of the candidates based on interpretation of Article 19(1)(a) of the Constitution, which provides that freedom of speech and expression includes the fundamental right to know the relevant antecedents of the candidates contesting the elections. It was also submitted that the said decision was reiterated in the decision rendered by this Court in *People's Union for Civil Liberties (PUCL) & Anr. Vs. Union of India & Anr.* [(2003) 4 SCC 399].

20. Mr. Goel then urged that questions similar to those, which have arisen in this case, also arose for consideration before a Constitution Bench in *Kuldip Nayar & Ors. Vs. Union of India & Ors.* [(2006) 7 SCC 1], wherein, while considering various aspects of election laws, the Constitution Bench reiterated the submissions made in *People's Union for Civil Liberties* (supra), wherein it was stated that it was required to

be understood that democracy based on adult franchise, is part of the basic structure of the Constitution. There could, therefore, be no doubt that democracy is a basic feature of the Constitution of India and democratic form of Government depends on a free and fair election system. The Constitution Bench also recorded the contention of the writ petitioners that free and fair election is a constitutional right of the voter, which includes the right that a voter shall be able to cast his vote according to his choice, free will and without fear.

21. Reference was also made to a decision of a Bench of six Judges of this Court in *Kharak Singh Vs. State of U.P. & Ors.* [AIR 1963 SC 1295], in which the freedom of movement and life and personal liberty, as provided under Article 19(1)(d) and Article 21, ensuring a citizen's free right to move and travel while protecting his life and liberty, fell for consideration. It was held that any restriction on such activity would result in denying a citizen the fundamental rights guaranteed to him under Part III of the Constitution.

22. Learned counsel submitted that the Election Symbols Order, 1968, did not have any statutory force and was in the nature of general directions issued by the Election Commission to regulate the mode of allotment of symbols to contesting candidates. He urged that the said Order was only a compilation of general directions, and not being law, is violative of Articles 19(1)(a) and 19(2) of the Constitution and was, therefore, unconstitutional and void.

23. Mr. Goel also referred to the decisions of this Court in *Kanhiya Lal Omar Vs. R.K. Trivedi & Ors.* [(1985) 4 SCC 628] and *Sakal Paper (P) Ltd. & Ors. Vs. Union of India* [(1962) 3 SCR 842, wherein the provisions of the Election Symbols Order, 1968, were under consideration. In the first case, this Court held that the power of superintendence, direction and control vested in the Election Commission under Article 324(1) of the Constitution, include all powers necessary for the smooth conduct of elections. Reliance was placed on the earlier decision of this Court in *Shri Sadiq Ali & Anr. Vs. Election*

Commission of India, New Delhi & Ors. [(1972) 4 SCC 664] in holding that recommendation of political parties by virtue of Election Symbols Order, 1968, was not unconstitutional and the powers under the said Order were derived not only from the Conduct of Election Rules, 1961, but also from Article 324 of the Constitution. In the latter case, this Court was considering the right to freedom of speech as guaranteed under Article 19(1)(g) of the Constitution and the question which fell for consideration was whether an order which violated Article 19(1)(a) included the freedom of the Press and for propagating his ideas a citizen has the right to publish them, to manage them and to circulate them, either by word of mouth or by writing. It was also held that the State could not make a law which directly restricted one guaranteed freedom for securing the better enjoyment of another freedom. Mr. Goel urged that by denying to a political party a common symbol, the right to propagate its ideas would amount to interference with the fundamental right of freedom of speech as guaranteed under the aforesaid Article. Mr. Goel urged that since a large chunk of the eligible voters of the country were illiterate, they needed some form of communication which would help them to connect with the political party and the ideas which it propagated.

24. Mr. Goel also referred to two judgments of the U.S. Courts, namely,

(a) *James L. Buckley Vs. Francis R. Valeo* [424 US 1 (1976); and

(b) *Texas Vs. Gregory Lee Johnson* [491 US 397 (1989)];

which were decisions relating to the protection of a citizen under the First Amendment. Mr. Goel submitted that democracy is not just about political expression of the majority, but also the right of political minorities, however small, to express themselves. It was urged that the voices of the political minorities could not be stifled under the weight of hugely imbalanced provisions relating to freedom of speech and

expression. Mr. Goel submitted that the quantity, width and spread, effectiveness and efficacy and mobilization of people and resources could not be made dependent on the percentage of votes polled and the number of seats won during an election, but the right to freedom of political speech and expression and its communication and propagation must be held to be available to all, irrespective of whether they could get even a single vote or a single seat.

25. Mr. Sanjay Hedge, appearing for the Writ Petitioner in Writ Petition No.125 of 2011, India Jana Nayaka Katchi, formed in April, 2010, urged that the criterion sought to be introduced by the amendment of paragraphs 6(A) and 6(B) of the Election Symbols Order, 1968, was wholly arbitrary, as it sought to discriminate between parties which had a long existence as against those which have been formed only in recent times. Mr. Hegde submitted that it was highly arbitrary and unreasonable to pit candidates from a newly formed party without a common symbol against parties which were recognized by their Symbols by the common electorate. Mr. Hegde submitted that the rationale behind the decision not to allot any common symbol to the candidates of the parties which had recently come into existence gave an unfair advantage to parties which were already established and would prevent a newly-formed party from making any impact on the voters. Mr. Hegde submitted that the Writ Petitioner Party had been formed by an educationist and had in its very first election, secured 1% of the valid votes polled, which only went to show that given the proper opportunities, parties, such as the Writ Petitioner party, would be able to make a larger impact on the electorate if it could set up candidates who could be identified with the party by means of a common symbol. Mr. Hegde submitted that the symbol in the context of an illiterate electorate is absolutely necessary for a free and fair election and equating established parties with newly-formed parties is a disadvantage to the newly formed party, was contrary to Article 14 and was, therefore, liable to be struck down.

26. Col. Edwin Jesudass, appearing for the Writ Petitioner, All India NR Congress in Writ Petition No.124 of 2011, urged that having fulfilled the criteria, the party has been duly recognized and was, therefore, entitled to the allotment of a permanent election symbol. Echoing the submissions made by Mr. Venugopal, Mr. Goel and Mr. Hegde, Col. Jesudass, who appeared in person, urged that the conditions under the notification issued by the Election Commission on 16.9.2011 were unreasonable and there was no justification for increasing the percentage of votes for qualifying as a State Party from 4% to 6%.

27. In reply to the submissions made on behalf of the Writ Petitioners, Ms. Meenakshi Arora, learned Advocate, appearing for the Election Commission of India, submitted that Section 29-A contained in Part 4A of the Representation of the People Act, 1951, provided a complete procedure as to the manner in which political parties were to be registered. Part V of the Act deals with conduct of elections, which includes nomination of candidates, their Election Agents and the general procedure to be followed during the elections. The remaining Chapters of Part V deal with the conduct of elections while Part VA deals with free supply of certain material to candidates of recognized political parties. Ms. Arora urged that similar provisions regarding recognized political parties and registered political parties are also to be found under the Conduct of Election Rules framed under Section 169 of the 1951 Act. Referring to the Conduct of Election Rules, 1961, Ms. Arora referred to Rule 5 which makes provision for allotment of symbols for elections in Parliamentary and Assembly Constituencies. Learned counsel urged that the said Rules empowered the Election Commission to specify the symbols that may be chosen by candidates at elections in Parliamentary or Assembly Constituencies. Learned counsel referred to Rule 10 which relates to the preparation of list of contesting candidates. It was submitted that under the aforesaid Rules, the Election Commission was fully competent in law not only to allot symbols, but also to determine the right of a recognized political

party to an election symbol, as was initially held in *Sadiq Ali's* case (supra) and also in the case of *Kanhiya Lal Omar* (supra). Ms. Arora submitted that, in fact, in the case of *Kanhiya Lal Omar* (supra), this Court observed that the Commission has been clothed with plenary powers by the Conduct of Election Rules and the Commission could not be disabled from exercising effectively the plenary powers vested in it in the matter of allotment of symbols and for issuing directions in connection therewith. It was also held that it was plainly essential that the Commission should have the power to settle a dispute, in case claim for the allotment of the symbol of a political party was made by two rival claimants. In such a case, the machinery for resolving such disputes was contained in paragraphs 13 and 15 of the Elections Symbols Order, 1968. It was re-emphasised that the Commission is an authority created by the Constitution and according to Article 324, the superintendence, direction and control of the electoral rolls for and the conduct of elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President was vested in the Commission. Ms. Arora submitted that it was no longer available to the Petitioners to contend that the Election Commission was not competent to decide questions relating to the allotment of symbols to political parties and candidates at the time of elections, since its powers had been vested in it under Article 324 of the Constitution itself.

28. In this regard, Ms. Arora also referred to the recent decision of this Court in *Subramanian Swamy Vs. Election Commission of India* [(2008) 14 SCC 318], in which the validity of the Election Symbols Order, 1968, was upheld and it was also held that though the matter of symbol is extremely sensitive for a political party, it should be or remain to be firstly a political party since Section 29-A of the Representation of People Act, 1951, clearly shows that a political party must have a certain amount of following as one could not imagine a political party without substantial following.

29. Ms. Arora urged that in *Rama Kant Pandey Vs. Union*

of India [(1993) 2 SCC 438], while holding that creation of distinction between candidates of recognized parties and other candidates, though alleged to be artificial, inconsistent with the spirit of election law, discriminatory, giving important and special treatment to party system in democracy, was quite proper and that political parties constitute a class from other candidates and hence Articles 14, 19 and 21 were not violated in the facts of the case. It was also observed that the right to vote or to stand as a candidate and contest an election is not a fundamental right or even civil right, but a purely statutory right, as is the right to be elected. It was also urged that even the right to dispute an application was a statutory right emerging from the Representation of the People Act, 1951. According to Ms. Arora, outside the Statute, there is no right to elect, no right to be elected and no right to dispute an election. It was submitted that these rights were the creation of a Statute and were, therefore, subject to statutory limitations, as no fundamental right was involved.

30. Ms. Arora submitted that the Election Symbols Order, 1968, concerns registered parties, recognised and non-recognised parties and independent candidates. Learned counsel urged that paragraph 2(h) of the Election Symbols Order, 1968, defines "political party" to be an association of a body of individual citizens of India, registered with the Commission as a political party under Section 29-A of the Representation of the People Act, 1951, which as mentioned herein earlier, deals with registration of association of bodies as political parties with the Election Commission. Ms. Arora submitted that since the provisions of paragraph 6A, 6B and 6C of the Election Symbols Order, 1968, have been held to be valid, they could not be departed from and the political party would, therefore, be bound by whatever amendments that may have been brought to the Election Symbols Order, 1968. Ms. Arora urged that although freedom of expression was a fundamental right within the meaning of Article 19(1)(a) of the Constitution, the right to vote was a statutory right which could

not be questioned by way of a Writ Petition so long as said right remained in the statute book.

31. The submissions made on behalf of the writ petitioners regarding the constitutional validity of the Election Symbols Order, 1968, and the power of the Election Commission to settle issues relating to claims of splinter groups to be the original party, had fallen for the decision of this Court about forty years ago in *Sadiq Ali's* case, when this Court had occasion to observe that the Election Commission had been clothed with plenary power by Rules 5 and 10 of the Conduct of Election Rules, 1961, in the matter of conducting of elections, which included the power to allot symbols to candidates during elections. The challenge to the vires of the Symbols Order, 1968, was, accordingly, repelled.

32. The view in *Sadiq Ali's* case has since been followed in the *All Party Hill Leaders' Conference* case (supra), *Roop Lal Sathi's* case (supra), *Kanhiya Lal Omar's* case (supra) and as recently as in *Subramanian Swamy's* case (supra), to which reference has been made in the earlier part of this judgment, where the provisions of Article 324 of the Constitution vesting the superintendence, direction and control of elections, were considered in detail and it was, inter alia, held that in addition to Rules 5 and 10 of the Conduct of Election Rules, 1961, the powers vested in the Election Commission could be traced to Article 324 of the Constitution.

33. The evolution of the law relating to the criteria for a political party to be recognized as a State Party clearly indicates that the Election Commission, in its wisdom, was of the view that in order to be recognized as a political party, such party should have achieved a certain bench-mark in State politics. Nothing new has been brought out in the submissions made on behalf of the writ petitioners which could make us take a different view from what has been decided earlier. Mr. Venugopal's submissions regarding political parties winning a larger number of seats while polling a lesser percentage of the votes, sounds attractive, but has to be discarded. Mr.

Venugopal's submissions are in relation to the poll performance of the larger parties within a State where even a vote swing of 2 to 5 per cent could cause a huge difference in the seats won by a political party. A three or four-cornered contest could lead to a splitting of the majority of the votes so that a candidate with a minority share of the votes polled could emerge victorious. The Election Commission has set down a bench-mark which is not unreasonable. In order to gain recognition as a political party, a party has to prove itself and to establish its credibility as a serious player in the political arena of the State. Once it succeeds in doing so, it will become entitled to all the benefits of recognition, including the allotment of a common symbol.

34. There cannot be any difference of opinion that, as was laid down in *Union of India Vs. Association for Democratic Reforms* (supra), a voter has the right to know the antecedents of the candidates, a view which was later reiterated by this Court in *People's Union for Civil Liberties* (supra), but such right has to be balanced with the ground realities of conducting a State-wide poll. The Election Commission has kept the said balance in mind while setting the bench-marks to be achieved by a political party in order to be recognized as a State Party and become eligible to be given a common election symbol. We do not see any variance between the views expressed by the Constitution Bench in the PUCL case and the amendments effected by the Election Commission to the Election Symbols Order, 1968, by its Notification dated 1st December, 2000.

35. The writ petitions and the Special Leave Petitions must, therefore, fail and are dismissed.

36. There will be no order as to costs.

CHELAMESWAR, J. 1. I have had the advantage of the opinion of my learned brother Altamas Kabir, J. I regret my inability to agree with the same.

2. All these petitions filed either under Article 32 or under Article 136 raise certain common and substantial questions of law as to the interpretation of the Constitution. The lis, essentially, is between the Election Commission of India, a creature of the Constitution under Article 324, on the one hand and various bodies claiming to be political parties and some of their functionaries, on the other hand. The essence of the dispute is whether a political party is entitled for the allotment of an election symbol on a permanent basis irrespective of its participation and performance judged by the vote share it commanded at any election. Some of the petitioner parties had contested some election, either General or By-Election, by the time they filed these petitions and had been in existence for some time, while the others came into existence just before the commencement of this litigation. All of them are political parties registered under Section 29A[1] of the Representation of the People Act, 1951(for short 'the R.P.Act'), but none of them is a "recognised political party", under the provisions of the Election Symbols (Reservation and Allotment) Order, 1968, (henceforth referred to as 'the Symbols Order').

3. To examine the issues arising out of this batch of petitions, the facts pertaining to W.P.No.532 of 2008 and S.L.P.No.7379 – 7380 of 2009 arising out of an interim order passed by the Andhra Pradesh High Court in W.P.No.3212 of 2009, shall be taken as representative facts. The first of the abovementioned two cases represents the case of a political party, which was registered with the Election Commission on 24-01-2006 and contested 232 assembly constituencies out of

1. Section: 29A (1) Any association or body of individual citizens of India calling itself a political party and intending to avail itself of the provisions of the Part shall make an application to the Election Commission for its registration as a political party for the purposes of this Act.

(2) Every such application shall be made:-

(a) if the association or body is in existence at the commencement of the Representation of the People (Amendment) Act, 1988 (1 of 1989) within sixty days next following such commencement;

(b) if the the association or body is formed after such commencement, within thirty days next following the dated of its formation.

a total of 234 in the general elections to the Legislative Assembly of Tamil Nadu held in the year 2006. It secured 8.337 total number of valid votes and returned one Member to the Legislative Assembly, whereas the political party in the second of the abovementioned cases, was registered with the Election Commission on 22-12-2006 and contested a couple of by-elections to the Legislative Assembly of Andhra Pradesh. Both the abovementioned political parties restricted, for the time being, their political activity to one State each, i.e., Tamil Nadu and Andhra Pradesh, respectively.

4. Section 29A of the R.P. Act, 1951, provides for the registration of the political parties with the Election Commission. It was inserted in the R.P. Act, 1951 in the year 1989. From the language of Section 29A it appears that registration with the Election Commission is not mandatory for a political party, but optional for those political parties, which intend to avail the benefits of Part IV of the said Act of which Section 29A is also a part. The expression "political party" is defined under Section 2(f) of the R.P. Act, to mean "an association or a body of individual citizens of India registered under Section 29A". The definition, was inserted by an amendment to the R.P.Act, in the year 1989.

5. Until 1985, the Constitution of India made no reference to political parties. It was by the Fifty Second Amendment to the Constitution, Tenth Schedule was added to the Constitution, where the expression "political party" occurs. Judicial note can be taken of the fact that as a matter of practice, most of the political parties are registered under some law dealing with the registration of Societies. They are not bodies corporate, they are only associations consisting of shifting masses of people.

6. Even as on the date of the coming into force of the Constitution, there were numerous political parties claiming to be either National Parties or State Parties. Neither the Constitution nor the R.P. Act, or any other Statute obligates a political party to seek recognition either by the Election

Commission or any other body. However, the Election Commission, from its very inception, duly took note of the existence of the political parties in this country for the purpose of discharging its constitutional obligation of the conduct of elections to Parliament and the Legislatures of various States apart from the elections to the Office of the President and the Vice President.

7. On 30-07-1957, the Election Commission held a Conference, where 7 well established political parties, then organised on All India basis, participated. Whether a system of pictorial symbols is to be adopted to make the task of the voters easy for identifying the party / candidate they choose to vote and a distinctive symbol should be allotted to each of the political parties, was one of the items discussed in the said Conference, having regard to the large scale illiteracy of the voters. A consensus was arrived at in the abovementioned Conference to adopt such a system. "Symbolism is a primitive but effective way of communicating ideas. The use of emblem or flag to symbolise some system, idea, institution or personalisation is a short cut from mind to mind".

8. The first general elections ever held in the Republic of India were in the year 1952. It may not be out of place to mention that in the said election the symbol allotted to a contesting political party's candidate was marked on a separate box in each of the polling station. Goes without saying that there were as many ballot boxes in each of the polling stations as there were contesting candidates with reference to each of the constituencies. The system of maintaining separate ballot boxes for each of the names of contesting candidates disappeared in due course of time. A system of a 'ballot paper' with multiple names of the contesting candidates with the candidate's election symbol indicated against each of the contesting candidates came to be adopted. With the advancement of technology, even the abovementioned system was discarded in favour of Electronic Voting Machine (EVM), but the practice of using the pictorial symbol still continues.

9. The purpose behind the adoption of the system of pictorial symbol was considered by this Court in *Shri Sadiq Ali and anr. v The Election Commission Of India, New Delhi and Ors.* (1972) 4 SCC 664, as under:

> "……. It may be pertinent to find out the reasons which led to the introduction of symbols. It is well known that overwhelming majority of the electorate are illiterate. It was realised that in view of the handicap of illiteracy, it might not be possible for the illiterate voters to cast their votes in favour of the candidate of their choice unless there was some pictorial representation on the ballot paper itself whereby such voters might identify the candidate of their choice. Symbols were accordingly brought into use. Symbols or emblems are not a peculiar feature of the election law of India. In some countries, details in the form of letters of alphabet or numbers are added against the name of each candidate while in others, resort is made to symbols or emblems. The object is to ensure that the process of election is a genuine and fair as possible and that no elector should suffer from any handicap in casting his vote in favour of a candidate of his choice."

And also, at para 9 in *Kanhiya Lal Omar v R.K.Trivedi and Ors* (1985) 4 SCC 628, it is held as under:

> "……. India is a country which consists of millions of voters. Although they are quite conscious of their duties politically, unfortunately, a larger percentage of them are still illiterate. Hence there is need for using symbols to denote the candidates who contest elections so that the illiterate voter may cast his vote in secrecy in favour of the candidate of his choice by identifying him with the help of the symbol printed on the ballot paper against his name."

10. In the Conference dated 30-07-1957, referred to earlier, there was a general agreement among all the participants on various items; relevant in the context is that; "the

same symbol would be used throughout India for all candidates of a party, both for parliamentary and assembly elections"[2]. As a consequence of the consensus arrived at the said Conference, the Election Commission gave "recognition" to fourteen political parties as National / Multi State parties and allotted to each of them a specific symbol. Such a recognition was accorded in exercise of the general power of superintendence conferred on the Election Commission under Article 324[3] r/w 5(1)[4] of the Conduct of Election Rules, 1961.

---

2. see How India votes Elections Laws, Practice and Procedure, by V.S. Ramadevi and S.K. Mendiratta page 551.

3. Article 324. Superintendence, direction and control of elections to be vested in an Election Commission:-

(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)

(2).....

(3).....

(4).....

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine; Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

4. Rule5(1): The Election Commission shall, by notification in the Gazette of India, and in the Official Gazette of each State, specify the symbols that may be chosen by candidates at elections in parliamentary or assembly constituencies and the restrictions to which their choice shall be subject.

11. After the first General Elections, the Election Commission decided to withdraw recognition of those political parties whose poll performance was poor. Parties, which polled a minimum of 3 per cent of the votes at the first General Elections, were allowed to retain their recognition and the recognition accorded earlier to the other parties was withdrawn. The said percentage was raised to 4 after the third General Elections in 1962. The situation continued the same till 1967. What happened thereafter can be conveniently explained by extracting a passage from the 'How India Votes Election Laws, Practice and Procedure', by V.S. Ramadevi and S.K. Mendiratta:

> " After the fourth general elections in 1967, the Election Commission considered it more desirable to codify the provisions relating to recognition of political parties and all matters connected therewith at one place, so that all concerned and interested may be fully aware of the prescribed requirements and may regulate their functioning accordingly. Further, the Commission considered it appropriate and desirable that there should also be provision for registration of political parties and that such registration should be made a condition precedent for recognition of any party for the purposes of the election law.
>
> Accordingly, the Commission promulgated on 31 August 1968, an Order called the Election Symbols (Reservation and Allotment) Order 1968, which is still in force. The Order made detailed provisions for registration of parties, their recognition and all matters connected therewith, together with the provisions for specification, reservation, choice and allotment of symbols at elections. Paragraph 18 of that Order vests in the Election Commission all residuary powers to remove any difficulty arising in the implementation of that Order or to deal with a situation for which no provision or insufficient provision is made in that Order."

12. The Symbols Order, 1968, was made by the Election Commission, purportedly, in exercise of the power conferred on it by Article 324 of the Constitution r/w Rules 5 and 10 of the Conduct of Elections Rules, 1961, initially. Pursuant to the introduction of Section 29A in the R.P. Act, 1951, the Election Commission purports to draw authority from the said Section also. Para 4 of the said Order postulates the allotment of a symbol to each contesting candidate at every contested election of a given constituency. Under para 5, symbols are classified into two groups; reserved and free. Para 5 reads as follows:

> "5. Classification of symbols – (1) For the purpose of this Order symbols are either **reserved** or **free**.
>
> (2) Save as otherwise provided in this Order, a reserved symbol is a symbol which is reserved for a recognised political party for exclusive allotment to contesting candidates set up by that party.
>
> (3) A free symbol is a symbol other than a reserved symbol."
>
> Emphasis supplied

It can be seen from the above that certain symbols are reserved exclusively for the allotment to the candidates set up by a recognised political party. Para 6[5] of the said Order empowers the Election Commission to classify the political parties as either recognised political parties or unrecognised political parties. It further stipulates that a recognised political party can either be a National Party or a State Party.

13. Paras 6A and 6B of the said Order stipulate the conditions, which are required to be fulfilled by any political party, if it is to be classified as a recognised political party. In

5. **Rule 6:** For the purposes of this Order and for such other purposes as the Commission may specify an and when necessity therefor arises, political parties are either recognised political parties or unrecognised political parties.

the case of a State Party, para 6A stipulates the conditions, which are required to be fulfilled / satisfied, while para 6B stipulates the conditions for a National Party. Broadly speaking, in either case (National Party and State Party), the requirement is, participation in one general election either to the Parliament or to the corresponding State Legislature, before seeking recognition, and procuring there at a certain minimum percentage of validly polled votes and also securing a minimum number of seats, specified therein. Such conditions stipulated under paras 6A and 6B varied from time to time.

14. All the petitioners are aggrieved by the Symbols Order, 1968 as it stood amended up to May 2005. Since, these parties are, admittedly, unrecognised political parties, they did not have a reserved symbol for exclusive allotment to the candidates setup by those parties at elections. It is also not out of place to mention that during the pendency of these petitions, the said Order came to be amended again by Notification date 16-09-2011.

15. The conditions, which are required to be satisfied for a political party to be classified as a recognised political party (State), thereby entitling it for the exclusive allotment of a common symbol to all its candidates at any election (under the Symbol Order, 1968, as it stood amended up to 2005), are contained in para 6A of the said Order, which came to be substituted for the original para6A by a Notification dated 14-05-2005.

> "6A. Conditions for recognition as a State Party – A political party shall be eligible for recognition as a State party in a State, if and only if any of the following conditions is fulfilled:
>
> (i) At the last general election to the Legislative Assembly of the State, the candidates set up by the party have secured not less than six percent of the total valid votes polled in the State; and, in addition, the party has returned at least two members to the Legislative Assembly of that State at such general election; or
>
> (ii) At the last general election to the House of the People from that State, the candidates set up by the party have secured not less than six percent of the total valid votes polled in the State; and, in addition, the party has returned at least one member to the House of the People from that State at such general election; or
>
> (iii) At the last general election to the Legislative Assembly of the State, the party has won at least three percent of the total number of seats in the Legislative Assembly, (any fraction exceeding half being counted as one), or at least three seats in the Assembly, whichever is more; or
>
> (iv) At the last general election to the House of the People from the State, the party has returned at least one member to the House of the People for every 25 members or any fraction thereof allotted to that State."

From the above it can be seen that to secure recognition, a political party must satisfy the following conditions:

(1) that it must have contested one general election to the Legislative Assembly of the concerned State and the candidates setup by the party must have secured cumulatively not less than 6 % of the total valid votes polled in the State and also must have returned, at least, two Members to the Legislative Assembly at such an election;

(2) *in the alternative*, the party must have contested the election to the Lok Sabha from that State and the candidates setup by the party must have cumulatively secured not less than 6% of the total valid votes polled in the State, apart from returning, at least, one Member to the Lok Sabha;

(3) *a third alternative condition*, which if fulfilled would entitle the party for recognition, is that the party must have contested the general election to the Legislative Assembly and won, at least, 3% of the total number of seats or 3 seats, whichever is higher;

(4) *in the alternative*, the party must have contested the election to the Lok Sabha and returned, at least, one Member to the House of the People for every 25 Members allotted to that State.

16. Since, none of the political parties before us satisfied any one of the abovementioned conditions, they were not classified as recognised political parties, thereby, they were unable to secure a common symbol for all their candidates at any election. Hence, the present batch of petitions.

17. The advantages that accrue to any political party by virtue of it being classified as a recognised political party are:

1. reservation of a symbol for the exclusive allotment to all the candidates setup by such party at any election;

2. the candidates set up by such party are entitled to the supply of such number of copies of the "electoral roll" and "such other material" as may be prescribed, free of cost (*see* Sections 78A and 78B of the R.P. Act); and

3. allocation of equitable sharing of time on the cable television network and other electronic media, by the Election Commission (Section 39A of the R.P.Act.)

18. Para 6C[6] of the Symbols Order, stipulates that a

6. **6C. Conditions for continued recognition as a National or State party.**— If a political party is recognized as a State party under paragraph 6A, or a National party under paragraph 6B, the question whether it shall continue to be so recognized after any subsequent general election to the House of the People or, as the case may be, to the Legislative Assembly of the State concerned, shall be dependent upon the fulfilment by it of the conditions specified in the said paragraphs on the results of that general election.

recognised political party shall continue to enjoy that status for every succeeding general election and in the interregnum between two general elections only if it fulfils the conditions specified under para 6A or 6B, (depending upon whether it is a National party or a State Party) in every successive general election. After each succeeding general election, obviously, an assessment is made by the Election Commission whether such status of each of the political parties should continue or not. On such assessment, if it is found that a recognised political party failed to satisfy the conditions requisite for the continued recognition, such party would be derecognised. Though by virtue of para 10A, the effect of de-recognition, insofar it pertains to the exclusive use and allotment of the election symbol, which had been originally allotted to such party, stands postponed by certain period, but the other advantages, which are incidental to the status of a recognised political party, would be denied immediately on de-recognition.

19. The substance of the abovementioned provisions of the allotment of Symbols Order is that, no political party is entitled for allotment or use of an election symbol permanently. The allotment of an exclusive election symbol is available to a political party only so long as it is recognised by the Election Commission. Securing the recognition and its continuance depends upon the performance of the political party at every succeeding general election. Therefore, newly formed political parties are not entitled, as a matter of right, for the exclusive allotment of a common election symbol for the benefit of all the candidates set up by them at any election. Such candidates are required to choose one of the free symbols notified by the Election Commission. Allotment of a free symbol to the candidate depends upon the various factors, such as, the existence of a prior claim, etc., the details of which are not necessary for the purpose of this case. Therefore, all the candidates set up by a political party need not get the same symbol at a general election.

20. Even in the case of an existing political party, which was recognised at some anterior point of time, but lost the recognition in view of its inadequate performance at any general election or in the case of a political party, which contested a general election, but failed to satisfy the requisite standards of performance stipulated in the Symbols Order, a common symbol would not be available for the exclusive use of such party's candidates at any subsequent election beyond a period specified in para 10A.

21. It is the abovementioned non-availability of a common symbol for the exclusive use of the candidates of political parties, which have not gained or continue to enjoy the status of a recognised political party, is the bone of contention in these petitions.

22. It is submitted that the Symbols Order, insofar as it provides for the recognition and de-recognition of a registered political party, is; (i) arbitrary and violative of the Article 14 of the Constitution of India; it creates an artificial classification between recognised and unrecognised political parties without any rational nexus to the object sought to be achieved; and (ii) violative of the fundamental rights guaranteed under Article 19(1)(a) & (c); to the members of the political party; and (iii) violative of the constitutional right of the members of the political party to participate in the electoral process by virtue of their being voters.

23. Elaborating the abovementioned grounds of attack, various submissions are made by the learned counsel appearing for the petitioners and the same are extensively incorporated in the Judgment of my learned brother Altamas Kabir, J. I, therefore, see no reason to repeat the same except to briefly note the submissions made by the learned counsel for the Election Commission.

24. It is the stand of the Election Commission that the rules of de-recognition or non-recognition of the political parties by

the Election Commission are designed to prevent "insignificant political parties from gaining recognition". A political party, which failed to secure a minimum stipulated percentage of validly polled votes at a general election and return a minimum stipulated number of members to the Legislature, has no right to claim either recognition or a permanent symbol. It is also submitted by Ms. Meenakshi Arora, that recognition of a political party by the Election Commission under the provisions of the Symbols Order not only enables the political party for the reservation and exclusive use of an electoral symbol in favour of its candidates at any election, but also confers certain other advantages contemplated under Section 78A and 78B of the R.P. Act (which has been taken note of, earlier). Therefore, unrestricted and unregulated recognition of political parties would be an additional burden on the exchequer. The learned counsel, relying on *N.P.Ponnuswamy v Returning Officer, Namakkal Constituency*, 1952 SCR 218 and *Jyothi Basu v. Debi Gosal* (1982) 1 SCC 691, argued that all the electoral rights are creation of statutes and there is no common law right or a fundamental right vested in a political party or a candidate set up by a political party to contest an election. Equally, there is no fundamental right either in favour of the political party or its members to seek the allotment of a permanent electoral symbol in favour of a political party irrespective of its following, which is to be judged, according to the learned counsel, solely based on its performance in a general election. The Election Commission being charged with the responsibility, by the Constitution, of conducting the elections in this country, is constitutionally authorised[7] to take all measures for appropriately regulating each step of the electoral process in ensuring a free and fair electoral process, which is essential for preserving the democratic structure established under the Constitution of the Republic of India.

25. The learned counsel for the Election Commission further submitted that the question whether a political party once

7. (1985) 4 SCC 628 = Kanhiya Lal Omar v. R.K. Trivedi.

recognised should retain its reserved symbol permanently fell for the consideration of this Court earlier in *Subramanian Swamy v. Election Commission of India,* (2008) 14 SCC 318, and the submission was refuted by this Court and, therefore, the same is no more res integra and cannot be reopened again.

26. I am of the opinion that this batch of petitions raise basic issues of far-reaching consequences in the functioning of the democracy – which we the people of India have "solemnly resolved to constitute":

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." – *376 US 1 Wesberry v. Sandors.*

'Electoral rights' subsume such distinct concerns as the citizen's right, the territorial constituencies' ability to choose a representative in the legislature - a political party's opportunity to gain access to power and a candidate's chance of securing a place in the legislature to voice the desires and aspirations of the community. They spring from a common root – the electoral process, which is source and product of the constitutional scheme of establishing a democratic republic.

27. Before I examine the various submissions and the larger question involved in the petitions, one preliminary issue is required to be settled, i.e., in view of the earlier decision of this Court in *Subramanian Swamy* (supra), whether is it permissible for the petitioners to raise these various questions, which they are seeking to raise in this batch of petitions and right for this Court to examine the same ?

28. It is held by this Court in *Golaknath v. State of Punjab* (1967) 2 SCR 762, relying upon *Superintendent & Legal Remembrancer State of West Bengal v. Corporation of Calcutta* (1967) 2 SCR 170 and *Bengal Immunity Company*

Limited v. State of Bihar (1955) 2 SCR 603, that there is "nothing in the constitution that prevented the Supreme Court from departing from the previous decisions of its own if it was satisfied of its error and of its harmful effect on the general interest of the public". If a principle laid down by this Court is demonstrably inconsistent with the scheme of the Constitution, it becomes the duty of this Court to correct the wrong principle laid down. It is also the duty of this Court to correct itself as early as possible in the matters of the interpretation of the Constitution, "as perpetuation of a mistake will be harmful to public interest". Therefore, in my opinion, the various legal issues raised by the petitioners are required to be examined.

29. In *Mohinder Singh Gill and anr. v. The Chief Election Commissioner, New Delhi and ors.* (1978) 1 SCC 405, speaking for the Court, Justice Iyer opined:

> **"23.** Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular Government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. "The right of election is the very essence of the constitution" (Junius). It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more."

30. Though this Court held that adult franchise and general elections are constitutional compulsions, it did not elaborate and explain the basis of such statement. The statement is less rhetoric and more legal than what it might sound for the following

reasons. Article 326[8], declares that the elections to the House of the People and the Legislative Assembly of every State shall be on the basis of adult suffrage. Articles 81(1)(a)[9] and 83, cumulatively command that, 530 members of the House of the People (Lok Sabha) are required to be "chosen by direct election from the territorial constituencies in the State". Article 81(2)(b)[10] mandates that each State shall be divided into territorial constituencies in the manner specified therein, whereas Article 83(2)[11] mandates that the duration of the House of the People shall be no longer than 5 years. The expiry of the period of 5 years reckoned from the date of the first meeting shall operate for dissolution of the House. These provisions cumulatively command a periodical election to the House of the People based on adult suffrage. Similarly, Articles 168, 170

8. **Article 326. Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage:** The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature on the ground of non residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

9. **Article 81(1)(a):** not more than five hundred and thirty members chosen by direct election from territorial constituencies in the States, and

10. **Article 81(2)(b)** each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and number of seats allotted to it is, so far as practicable, the same throughout the State: Provided that the provisions of sub clause (a) of this clause shall not be applicable for the purpose of allotment of seats in the House of the People to any State so long as the population of that State does not exceed is millions.

11. Article 83(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House: Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

and 172 cumulatively command a periodical election based on adult suffrage to the Legislative Assembly of a State.

31. To ensure the conduct of periodic elections to these various legislative bodies, the Election Commission is established by the Constitution. It is endowed with such powers necessary to enable the same to function as an independent constitutional entity to discharge the constitutional obligations entrusted to it untrammelled by the authority of the Executive[12]. This entire scheme of a representative democracy enshrined in the Constitution is for the purpose of achieving the constitutional goal of establishing a "Democratic Republic" adumbrated in the preamble to the Constitution. It is in this background, this Court held in *Mohinder Singh Gill and anr.* (supra), "that the heart of the Parliamentary system is free and fair elections periodically held based on adult franchise".

32. It was held in *Mohinder Singh Gill and anr.* (supra):

> "The most valuable right in a democratic polity is the 'little man's' little pencil-marking, accenting and dissenting, called his vote. ……. Likewise, *the little man's right, in a representative system of Government to rise to Prime Ministership or Presidentship by use of the right to be candidate* cannot be wished away by calling it of no civil moment. If civics mean anything to self-governing citizenry, if participatory democracy is not to be scuttled by law. ……. The straightaway *conclusion is that every Indian has a right to elect and be elected and this is constitutional* as distinguished from a common law right and is entitled to cognizance by Courts, subject to statutory regulations."

The little man's right in this country to become a member of any one of the Houses created by the Constitution metaphorically described by Justice Iyer as a right to 'rise to Prime

12. Article 324 : see foot note 1.

Ministership or Presidentship', emanates out of a necessary implication from the express language and scheme of the Constitution. It is already noticed that predominant majority of the seats in the House of the People and in Legislative Assembly of a State are required to be filled up by 'direct election' from the 'territorial constituencies'. Such members are required to be "chosen" in such manner as Parliament may by law provide[13]. Such Process of choosing, by direct election - the members of the House of the People or the Legislative Assembly - is described by this Court in *Mohinder Singh Gill and anr.* (supra), as the citizens right to elect or get elected.

33. The *right to elect* flows from the language of Articles 81 and 170 r/w Articles 325 and 326. Article 326 mandates that the election to the Lok Sabha and legislative Assemblies shall be on the basis of ADULT SUFFRAGE, i.e., every citizen, who is of 18 years of age and is not otherwise disqualified either under the Constitution or Law on the ground specified in the Article SHALL BE entitled to be registered as a voter. Article 325[14] mandates that there shall be one general electoral roll for every territorial constituency. It further declares that no person shall be ineligible for inclusion in such electoral roll on

13. **Article 81(1)** Subject to the provisions of Article 331 the House of the People shall consist of-

(a) not more than five hundred and thirty members chosen by direct election from territorial constituencies in the State, and

(b) not more than twenty members to represent the Union territories, chosen in such manner as parliament may by law provide.

14. Article 325:.....There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constitutency on grounds only of religion, race, caste, sex or any of them.

the grounds only of religion, race, caste, sex, etc. Articles 81[15] and 170[16] mandate that the members of the Lok Sabha and Legislative Assembly are required to be CHOSEN BY DIRECT ELECTION from the territorial constituencies in the States. The Sates are mandated to be divided into territorial constituencies under Articles 81(2)(b) and 170(2).[17] The cumulative effect of all the abovementioned provisions is that the Lok Sabha and the Legislative Assemblies are to consist of members, who are to be elected by all the citizens, who are of 18 years of age

15. Article 81: Composition of the House of the People—

(1) Subject to the provisions of Article 331 the House of the People shall consist of

(a) not more than fiver hundred and thirty members chosen by direct election from territorial constituencies in the States, and

(b).....

(2) For the purposes of sub clause (a) of clause (1):-

(a) there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and

(b) **each State shall be divided into territorial constituencies** in such manner that the ratio between the population of each contituency and number of seats allotted to it is, so far as practicable, the same throughout the State: Provided that the provisions of sub clause (a) of this clause shall not be applicable for the purpose of allotment of seats in the House of the People to any State so long as the population of that State does not exceed six millions.

16. Article 170(1): Subject to the provisions of Article 333, the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State.

17. Article 170(2): For the purpose of clause (1), each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State.

Explanation: In this clause, the expression 'population' means the population as ascertained at the last preceding cenus of which the relevant figures have been published: Provided that the reference in this Explanation to the last preceding cenus of which the relevant figure have been published shall, until the relevant figures for the first cenus taken after the year 2026 have been published, be construed as a reference to the 2001 census.

and are not otherwise disqualified, by a valid law, to be voters. Thus, a Constitutional right is created in all citizens, who are 18 years of age to choose (participate in the electoral process) the members of the Lok Sabha or the Legislative Assemblies. Such a right can be restricted by the appropriate Legislature only on four grounds specified under Article 326.

34. Coming to the question of the *right to get elected / being CHOSEN* either to the Lok Sabha or to the Legislative Assembly of a State, Articles 84[18] and 173[19] stipulate the requisite qualifications for a person to be either a member of the Lok Sabha or the Legislature of a State. These two Articles are couched in negative language stipulating, essentially, that, to be chosen as a member of any of the Legislative Bodies envisaged under the Constitution, a person must be a citizen of India and must be of the qualifying age i.e., 25 years in the case of Lok Sabha or the Legislative Assembly and 30 years in the case of Rajya Sabha or the Legislative Council, as the case may be. Apart from that, these Articles also prescribe that

18. **Article 84:** A person shall not be qualified to be chosen to fill a seat in Parliament unless he;

(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;

(b) is, in the case of a seat in the Council of States, not less than thrity years of age and, in the case of a seat in the House of the People, not less than twenty five years of age; and

(c) possession such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

19. **Article 173.** A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless, he;

[(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Thrid Schedule;]

(b) is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age; and

(c) possesses such other qualification as may be prescribed in that behalf by or under any law made by Parliament.

any person aspiring to be a member of any one of the Legislative Bodies, created by the Constitution, is required to make and subscribe an Oath set out in the Third Schedule in the Constitution. Articles 102[20] and 191[21] prescribe the various contingencies in which a person would become disqualified to

20. Article 102 : Disqualifications for membership-

(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament;

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

(e) if he is so disqualifed by or under any law made by Parliament.

Explanation : For the purposes of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reasons only that he is a Minister either for the Union or for such State

(2) A person shall be disqualifed for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

21. **Article 191.** (1) A person shall be disqualified, for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) if he is unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

1[Explanation.—For the purposes of this clause], a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

2[(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule.]

be a member of any one of the Legislative Bodies, such as, holding of a public office or owing allegiance or adherence to a foreign State, etc.

35. It may be noted that the Constitution confers a right on every citizen, who is of the age of 18 years, to be a voter. But, every voter is not entitled to be a member of the Legislature. A higher age requirement is prescribed to be a member of the Legislature, as explained above.

36. In my opinion, therefore, subject to the fulfilment of the various conditions stipulated in the Constitution or by an appropriate law made in that behalf, every citizen of this country has a Constitutional right both to elect and also be elected to any one of the Legislative Bodies created by the Constitution – the "straight conclusion" of the *Mohinder Singh Gill's case* (supra), "that every Indian has a right to elect and be elected – subject to statutory regulations", which rights can be curtailed only by a law made by the appropriate legislation that too on grounds specified under Article 326 only.

37. At this stage, it is necessary to deal with the submission made by Ms. Meenakshi Arora, that in view of the decisions of this Court in *N.P.Ponnuswamy* and *Jyothi Basu* (supra), both the right to vote and the right to contest an election for the Constitutionally crated Legislative Bodies, is purely statutory. Relevant paras of the said two Judgments, insofar as they are relied upon by the learned counsel, read as follows:

N.P.Ponnuswamy (supra)

"**28**. The points which emerge from this decision may be stated as follows :—

(1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. ……."

Jyothi Basu (supra)

> "The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the Constitutional and statutory provisions in relation to these rights have been explained by the Court in *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency & Ors.,*(1) and *Jagan Nath v. Jaswant Singh*.(2) We proceed to state what we have gleaned from what has been said, so much as necessary for this case.
>
> A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation."

The limited question before this Court in those two cases revolved around the nature of the legal right to raise an election dispute. In the first of the abovementioned cases, the question was whether a challenge, under Article 226 of the Constitution, to the rejection of the nomination of Ponnuswami at an election to the Legislative Assembly is permissible in view of the specific prohibition contained under Article 329(b)[22] of the Constitution. In the second of the abovementioned cases, the question was, who are the persons, who could be arrayed as parties to an election petition. In both the cases, this Court was dealing with the nature of the election disputes, the forum before which such dispute could be raised and the procedure that is required to be followed in such disputes. The question as to

22. **Article 329 (b):** No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

the nature and scope of the right to vote or contest at any election to the Legislative Bodies created by the Constitution did not arise in these cases. With due respect to their Lordships, I am of the opinion that both the statements (extracted above) are overbroad statements made without a complete analysis of the scheme of the Constitution regarding the process of election to the Legislative Bodies adopted in subsequent decisions as a complete statement of law. A classical example of the half truth of one generation becoming the whole truth of the next generation. My conclusion is fully supported by *People's Union for Civil Liberties (PUCL) and anr. v. Union of India and anr.* (2003) 4 SCC 399:

> " However, case after case starting from Ponnuswami case characterized it as a statutory. ..... With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely the RP Act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple."
>
> (Para 96 of P.V.Reddi, J)

38. The next question is what is the role of a political party in the electoral process of a representative democracy. Whether the formation, existence and continuance of a political party are - activities, which are not prohibited by law and permitted as a matter of legislative grace or is there any constitutional or fundamental right in these activities.

39. "Political parties are indispensable to any democratic system and play the most crucial role in the electoral process

in setting up candidates and conducting election campaigns"[23]. The legal and constitutional position of political parties varies from country to country. In most countries, the political parties do not have any express constitutional or statutory recognition, except Germany, whose Constitution guarantees the legitimacy of the political parties and their right to exist, subject to the condition that they accept the principles of the democratic governance. Coming to the United Kingdom, the existence of political parties is a long established constitutional fact and their contribution to the growth of a healthy parliamentary democracy is a matter of the British constitutional history though political parties are not part of the Constitution of England[24]. In the United States, the "right of individuals to associate for the advancement of political beliefs and the right of the qualified voters .... to cast their votes effectively"[25] are considered as the most precious freedoms and protected by the First and the Fourteenth Amendments. The Indian Constitution made no reference to political parties prior to the 52nd Amendment made in 1985 by which the Tenth Schedule was inserted in the Constitution. The Tenth Schedule recognises the existence of political parties in this country and the practice of political parties setting up candidates for election to either of the Houses of Parliament or State Legislature. However, the Election Commission recognised, from the inception, the existence of political parties and the practice of political parties setting up candidates at elections to any one of the Houses created by the Constitution.

40. A political party is nothing but an association of individuals pursuing certain shared beliefs. Article 19(1)(c) confers a fundamental right on all citizens to form associations

---

23. See Justice M.N. Venkatachaliah National Commission to review the working of the Constitution Report.

24. Political parties are not part of our Constitution, but no part of our Constitution can ignore ther existence Governments, Parliaments and Local Authorities could hardly work without them—Lord Hailsham—The Dilemma of Democracy (page 37).

25. William vs. Rhodes — 393 US 23 (1968)

or associate with organisations of their choice. Article 19(1)(a) confers a fundamental right on the citizens of the freedom of speech and expression. The amplitude of the right takes within its sweep, the right to believe and propagate ideas whether they are cultural, political or personal. Discussion and debate of ideas is a part of free speech. This Court in *Romesh Thapper v. State of Madras*, AIR 1950 SC 124 as under:

> "……..without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible."

Therefore, all the citizens have a fundamental right to associate for the advancement of political beliefs and opinions held by them and can either form or join a political party of their choice. Political parties are, no doubt, not citizens, but their members are generally citizens. Therefore, any restriction imposed on political parties would directly affect the fundamental rights of its members.

41. It is argued that political parties, which do not qualify for recognition by the Election Commission by virtue of the stipulations in the Symbols Order suffer a disadvantage in the electoral process. The Symbols order cripples the ability of the unrecognised political parties and the candidates set up by such parties from effectively communicating with the electorate in order to garner their votes. Therefore, the Symbols Order imposes restriction on the citizens fundamental rights under Article 19(1)(c) and (a) to associate with a political party and propagate the political ideas subscribed to by the party on par with the recognised political parties, which are able to secure the allotment of a reserved symbol. The disadvantage imposed by the Symbols Order on political parties with limited following, at a given point of time, certainly is a law falling within the description of 'class legislation' and violative of Article 14 of the Constitution of India.

42. If the purpose of adopting the system of pictorial

symbols is to enable the voter to identify "the candidate of his choice"[26], and "the symbol of each political party, with passage of time, acquired a great value because of the bulk of the electorate associated the political party at the time of elections with its symbols"[27]. It does not require any further logic or authority to say that denying the reservation of a common symbol for the use of a political party on the ground that the Election Commission is not willing to 'recognise' such a political party, for whatever reasons, certainly renders the party disadvantaged. The Symbols Order, insofar as it provides for the allotment of a symbol for the exclusive use only of a recognised political party's candidates, in my opinion, certainly creates a disadvantage to the political parties, which have not been able to secure recognition from the Election Commission apart from creating two classes of political parties. The citizens right to form or join a political party for the advancement of political goals mean little if such a party is subjected to a disadvantage, in the matter of contesting elections. Therefore, the two questions raised;

(i) whether the Symbols Order satisfies the test of being a reasonable restriction designed to achieve any of the purposes specified under Article 19(2) and (4); and

(ii) the question whether such a classification satisfies the twin tests of being a reasonable classification, which has a nexus to the object sought to be achieved by such classification,

are required to be examined to decide the constitutionality of the Symbols Order.

43. I do not propose to examine the 1st question though I am of the opinion that the said question requires an exhaustive examination in an appropriate case, as, in my opinion, the

26. Shri Sadiq Ali (Supra) para 21.

27. Shri Sadiq Ali (Supra) para 21.

Symbols Order certainly violates the prohibition contained under Article 14, in view of the settled principle of law that this Court would not normally embark upon the examination of issues in the field of Constitutional Law unless it is absolutely necessary.

44. To establish the disadvantages imposed by the Symbols Order on the unrecognised political parties, it is necessary to analyse the nature of authority of the Election Commission either to recognise or not to recognise a political party. It is also necessary to examine whether, either the Constitution or any Law compels the Election Commission to recognise or not to recognise or derecognise a political party and what are the benefits or burdens, which flow from the recognition or non-recognition of a political party.

45. As already noticed, except for the Tenth Schedule, which is a relatively recent addition to the Constitution, no other provision of the Constitution, expressly refers to the political parties either recognised or unrecognised. The R.P. Act, as it was originally enacted, also did not make any reference to a political party. The expression "political party" was first introduced in the R.P. Act in the year 1989 by the amending Act No.1 of 1989. Section 2 (f) was inserted, which provides for the definition of the expression "political party". Simultaneously, by the same amending Act, Part – IV A was introduced into the Act, which dealt with the registration of political parties with the Election Commission and the advantages flowing from such registration. The expression "recognised political party" was first introduced in the Act by Act No.21 of 1996, in the proviso to Section 33 and Sub-Section (2) of Section 38. Later, such an expression was employed in Section 39A and in the second explanation to Sub-Section (1) of Section 77, Section 78A and Section 78B, which occur under Part–VA of the Act by the amending Act No.46 of 2003. The explanation to Section 78B(2), defines the expression "unrecognised political party" for the limited purposes mentioned therein and it reads as follows:

> "Explanation—For the purposes of section 39A, this Chapter and clause (hh) of sub-section (2) of section 169, the expression "recognised political party", has the meaning assigned to it in the Election Symbols (Reservation and Allotment) Order, 1968]."

None of the provisions referred to in the explanation deal with the allotment of a reserved symbol. Thus, there is a statutory compulsion (post 1996) on the part of the Election Commission to recognise or not to recognise a political party as it is only on the basis of the recognition by the Election Commission, the rights or obligations created under the abovementioned provisions come into play. There is still no constitutional compulsion in that regard.

46. Though, post-1996, the R.P. Act, 1951, obligates the Election Commission to confer recognition on some political parties for certain purposes, the Act does not stipulate the criteria on the basis of which such recognition is to be accorded. It simply borrowed the definition of the expression 'recognised political party' from the Symbols Order, thereby leaving it to the discretion of the Election Commission to recognise or not to recognise a political party on such terms and conditions, which the Election Commission deems fit. But, there is nothing either in R.P. Act, or any other law, which obligates the Election Commission to accord recognition to a political party on the basis of its performance at an election. In other words, it is not legally obligatory for the Election Commission to choose the criteria of performance at an election for the purpose of according or refusing to accord recognition to a political party. It so happened that such a criterion was chosen by the Election Commission well before the R.P. Act obliged the Election Commission to undertake the exercise and the Parliament while amending the R.P. Act simply took note of the existing practice of the Election Commission. Even today, there is nothing in the law, which prevents the Election Commission from changing the criteria

for conferring recognition on a political party.

47. It would be profitable to understand the genesis and evolution of the criterion of – poll performance – for evaluating its constitutionality in the context of the allotment of symbols. Pursuant to the 30th July 1957 Conference (referred to earlier) held by the Election Commission, "the Election Commission gave adhoc recognition on various dates between 2nd August 1951 to 7th September 1951", to fourteen parties as National or Multi-State parties and allotted symbols to them. "In addition to the above parties……, 59 other parties were recognised as State parties and allotted various symbols, as far as possible, inconformity with their choice. The recognition of these State parties was left …… to the Chief Electoral Officer of the States concerned". In this context, it is stated in "How India Votes Election Laws, Practice and Procedure, by *V.S. Ramadevi* (supra), as follows:

> "It may be significant to note here that there was no provision either in any Act or the rules for the recognition of political parties. All the orders granting recognition to the aforementioned parties either as national or state parties were issued by the Election Commission in exercise of its powers under art 324 and r 5 of the Representation of the People (Conduct of Elections and Election Petitions) Rules 1951. The said r 5 merely provided that the Election Commission shall publish a list of symbols and may add to or vary that list as it may like, but there was no mention about the political parties in this rule."

48. Essentially, the entire exercise was undertaken by the Election Commission to collect the data regarding the number of organisations claiming to be the political parties, who were likely to contest the elections either to the State Legislature or to the Parliament, in order to enable the Election Commission to discharge its constitutional obligations, under Article 324, of conducting elections to the various Legislative Bodies created

under the Constitution. As it is recorded by the former Chief Election Commissioner in 'How India Votes Election Laws, Practice and Procedure' (supra); "all those parties were allotted various symbols as far as possible inconformity with their choice." To start with, the exercise was never meant to regulate the right of various political parties to set up candidates at elections or choose a common electoral symbol for the benefit of the candidates set up by such parties. The purpose was only to eliminate the possibility of more than one political party claiming or using the same symbol resulting in friction between the parties and confusion in the minds of the voters. Such an arrangement became necessary because of the consensus of the Conference to have pictorial symbols for the meaningful exercise of the voting rights of the electors.

49. It was in the year 1968, eventually, the Election Commission thought of formalising the existing practice by creating a formal legal instrument of the entire exercise of the recognition of a political party. It is at that juncture, the exercise, which initially commenced as a facilitator of the constitutional obligation of the Election Commission to conduct the election, metamorphosised into an authority / power of the Election Commission to accord recognition or to refuse recognition with the attendant consequence of allotment and reservation of symbols in favour of the political parties, which are electorally more fortunate and denial of the same to the less fortunate political parties at a given point of time.

50. The result is the creation of the Symbols Order, 1968, where, for the first time, the Election Commission conferred on itself the authority to recognise or refuse to recognise or derecognise political parties, which did not demonstrate that they have some minimum political following and legislative presence.

51. Till 1996, gaining recognition from the Election Commission did not confer any advantage on a political party

other than securing the reservation of a symbol commonly for all the candidates set up by such a party at any election. Political parties could still set up, **then and now also**, candidates at any election irrespective of the fact whether they are recognised by the Election Commission or not. It is only much later (1996), certain legal rights and obligations came to emanate from the factum of recognition or lack of it, such as, the requirement of subscription of a larger number of proposers for a candidate set up by an unrecognised political party (*See* Section 33 of the R.P. Act.) and the requirement of postponing the poll only on the death of a candidate set up by a recognised political party (Section 52). It may be mentioned herein that Section 52, prior to its amendment in 1996, did not draw any distinction between a candidate set up by a recognised political party or otherwise. Death of a candidate, duly nominated at an election even as an independent, entailed countermanding of the poll.

52. Notwithstanding all these changes, the constitutional right of a qualified citizen to contest an election to any one of the Legislative Bodies created by the Constitution, whether supported by a political party or not, be it a recognised or unrecognised political party, has never been curtailed by the Legislature so far. All that a qualified voter requires to contest an election under the scheme of the R.P. Act, 1951, is to secure the support of, at least, one more elector to propose his name as a candidate if a recognised political party is willing to sponsor such a candidate, failing which, the requirement (post 1996 amendment) is, to secure the support of ten qualified voters to sign the nomination paper. The only other requirement is to make a deposit of certain amount specified under Section 34 of the Act, which amount varies depending upon whether the candidate is contesting the election of Lok Sabha or the Legislative Assembly.

53. Once a qualified voter decides to contest an election under the provisions of the R.P. Act, 1951, whether such a voter is sponsored by a political party or not, whether such a political

party is recognised by the Election Commission or not, there is no way under the law, as it exists today, to prevent him from contesting. Also the Election Commission is bound to allot a pictorial symbols to each such candidate. It is admitted unanimously by the learned counsel appearing that there have been elections, where hundreds of candidates contested an election from certain constituencies and the Election Commission did allot some symbol or the other to each of those candidates.

54. All political parties form one class. All of them have the same goal of propagating their respective political ideas though the ideas themselves may differ. The endeavour of all the political parties is to capture the State power in order to implement their respective policies, professedly, for the benefit of the society in general. In the process of such a political activity, some party, at a given point of time, successfully convinces a majority of the voters that the entrustment of the State power to that political party would be more beneficial to the society at large. It becomes victorious, while the other parties, which fail to successfully convince the majority of the voters about the wholesomeness of their ideas, loose the elections, sometimes even miserably. But, that does not mean that such parties, which fail to convince the voters about the wholesomeness of their political ideology, would be condemned forever by the electorate. Examples in our country and elsewhere are not lacking that political parties, which failed miserably both in terms of percentage of the votes secured by them, as well as the number of seats secured in the Legislature, at a given election, dramatically improving their performance in some subsequent election and capture power with thundering majority. It is said that “democracy envisages rule by successive temporary majorities”. Such transient success or failure cannot be the basis to determine the constitutional rights of the candidates or members of such political parties. The enjoyment of the fundamental rights guaranteed by the Constitution cannot be made dependent upon the popularity of

a person or an idea held by the person. If it were to be otherwise, it would be the very antithesis of liberty and freedom. The constitutional guarantees are meant to protect the unpopular, the minorities and their rights. Denying the benefit of a symbol to the candidates of a political party, whose performance does not meet the standards set up by the Election Commission, would disable such political party from effectively contesting the election, thereby, negating the right of an association to effectively pursue its political briefs.

55. Coming to the question, whether the classification created in the Symbols Order can satisfy the requirements of the mandate of Article 14, the argument of the learned counsel for the Election Commission is that, political parties, which do not command even a minimum vote-share and fail to secure a minimum prescribed legislative presence prescribed by the Election Commission, at a given election, form a distinct class in contradistinction to political parties, which satisfy the prescriptions of the Election Commission, regarding the eligibility for being classified as recognised political parties. The learned counsel further submitted that such classification is made for the purpose of avoiding insignificant political parties from permanently securing a symbol for the use of its candidates at elections. An interesting submission is made that a large number of political parties without the minimal voter support are in the electoral field and granting recognition to such parties and reserving a symbol in favour of such parties would create unnecessary confusion in the minds of the voters. Therefore, avoidance of such a confusion in the minds of the voters, is the purpose sought to be achieved by the classification in question.

56. Before I examine the tenability of the submission made by the Election Commission, I think it necessary to recapitulate the foundation of the doctrine of reasonable classification. In *Budhan Choudhry v. State of Bihar,* (1955) 1 SCR 1045, a Constitution Bench of 7 Judges of this Court, after a thorough

analysis of 7 earlier judgments of this Court, explained the doctrine of reasonable classification under Article 14 and held as under:

> "……. It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, *(i)* that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration……..".

Therefore, it can be seen from the above that it is not sufficient for a law to survive the challenge under Article 14 to demonstrate that the law makes a classification based on intelligible differentia between two groups of persons or things. It must also be established that such differentia have a rational relation to the object sought to be achieved by such classification.

57. Examined in the light of the above test, the object sought to be achieved by the Election Commission by the Symbols Order is to avoid the confusion in the minds of the voters at the time of voting. Such a result is said to be achieved by the Election Commission by denying recognition to the political party with insignificant following, thereby, denying them the benefit of the reservation of an exclusive symbol to its candidates.

58. I have no option, but to reject the submission made by

the Election Commission for the reason that by simply denying the recognition to a political party with insignificant voter-support, I do not understand, how the perceived voter confusion could be avoided. There is nothing either in the Constitution or in the R.P. Act, 1951 or any other law, which prohibits an unrecognised political party from setting up candidates at an election. The legal position is the same with regard to even independent candidates. Therefore, notwithstanding the refusal of recognition by the Election Commission, unrecognised or derecognised political parties or independent candidates without any party support can still contest the election. Candidates set up by an unregistered political party can also contest an election as registration under Section 29A of the R.P. Act is not mandatory for a political party, except that registration begets certain advantages specified in the R.P. Act, 1951 to a political party. The Election Commission is bound to allot a symbol to any of the candidates belonging to any one of the abovementioned categories. I am, therefore, of the opinion that there is no rational nexus between the classification of recognised and unrecognised political parties and the professed purpose sought to be achieved by such classification. On the other hand, it is likely to preserve the political status quo.

59. Coming to the decision of this Court in *Subramanian Swamy* (supra), the challenge in the case was only to para 10A of the Symbols Order, which was introduced by an amendment of 2000 in the Symbols Order on the ground that it was violative of Article 14 of the Constitution. It was argued on behalf of the Election Commission "that the symbol was integrally and inextricably connected with the concept of recognition of the party and since the appellant had never challenged and indeed could not so challenge the de-recognition of Janata Party, there was no question of it being allowed to insist on a reserved symbol which was the prerogative only of the recognised political party". Though this Court took note of the fact that, "for good long 17 years there was no concept of recognised political

party as till then there was no Symbols Order", came to the conclusion that the submission of the Election Commission is acceptable. It was held at para 15:

> "…….. the respondent is undoubtedly correct in arguing that concept of recognition is inextricably connected with the concept of symbol of that party. It is but natural that a party must have a following and it is only a political party having substantial following in terms of Clauses 6A, 6B and 6C would have a right for a reserved symbol. Thus, in our opinion, it is perfectly in consonance with the democratic principles. A party which remains only in the records can never be equated and given the status of a recognised political party in the **democratic set up**. We have, therefore, no hesitation in rejecting the argument of Dr. Swamy that in providing the symbols and reserving them for the recognised political parties alone amounted to an undemocratic act."

In my opinion, this Court, failed to appreciate that in a "democratic set up", while the majorities rule, minorities are entitled to protection. Otherwise, the mandate of Article 14 would be meaningless. If democracies are all about only numbers, Hitler was a great democrat. The status of majority or minority, even an insignificant minority, could only be transient. Further, the question as to what is the legitimate purpose sought to be achieved by the classification under the Symbols Order, was not considered.

60. For all the abovementioned reasons, I would hold that the Symbols Order, insofar as it denies the reservation of a symbol for the exclusive allotment of the candidates set up by a political party with "insignificant poll performance", is violative of Article 14 of the Constitution of India.

R.P. Writ Petitions dismissed.

SANGEETABEN MAHENDRABHAI PATEL

v.

STATE OF GUJARAT AND ANR.

(Criminal Appeal No. 645 of 2012)

APRIL 23, 2012

[DR. B.S. CHAUHAN & JAGDISH SINGH KHEHAR, JJ.]

Code of Criminal Procedure, 1973: s.300 – Applicability of – Rule of double jeopardy – Respondent no.2 filed complaint against appellant u/s.138 NI Act – Appellant tried for the said offence and the case sub judice before High Court – Subsequent case filed by respondent no.2 against appellant u/ss.406/420 r/w s.114 IPC – Plea of appellant that subsequent criminal case involving provisions of IPC was barred by s.300 Cr.P.C. and s.26 of General Clauses Act, 1897 as appellant was already dealt with/tried u/s.138 NI Act – Held: In the prosecution u/s.138 N.I. Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved – However, in the case under IPC, the issue of mens rea may be relevant – In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability – There is no such requirement in the offences under IPC – The case under N.I. Act can only be initiated by filing a complaint – However, in a case under the IPC such a condition is not necessary – There may be some overlapping of facts in both the cases but ingredients of offences are entirely different – Thus, the subsequent case is not barred by any of the said statutory provisions – Negotiable Instruments Act, 1881 – s.138 – Penal Code, 1860 – General Clauses Act, 1897 – s.26 – ss.406/420 r/w s.114.

Doctrine/Principle: Double jeopardy – Held: The rule against double jeopardy provides foundation for the pleas of autrefois acquit and autrefois convict – The manifestation of this rule is to be found contained in s.300 Cr.P.C; s.26 of the General Clauses Act; and s.71 IPC – In order to attract the provisions of Article 20(2) of the Constitution i.e. doctrine of autrefois acquit or s.300 Cr.P.C. or s.71 IPC or s.26 of General Clauses Act, ingredients of the offences in the earlier case as well as in the latter case must be the same and not different – The test to ascertain whether the two offences are the same is not the identity of the allegations but the identity of the ingredients of the offence – Motive for committing offence cannot be termed as ingredients of offences to determine the issue – The plea of autrefois acquit is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge.

Respondent No. 2 filed a complaint under Section 138 of N.I. Act against the appellant on the ground that the appellant had taken loan of Rs. 20 lakhs from respondent no.2 and in order to meet the said liability, the appellant issued cheque which on presentation got dishonoured. Subsequently respondent no. 2 filed an FIR under Sections 406/420 read with Section 114, IPC for committing the offence of criminal breach of trust, cheating and abetment etc. The trial court convicted the appellant under Section 138 of N.I. Act. However, the District Court ordered his acquittal. Respondent no. 2 filed appeal before the High Court which was pending. The appellant filed an application under Section 482 Cr.P.C., seeking quashing of the criminal case pending before the Magistrate for committing the offence of criminal breach of trust, cheating and abetment etc. on the grounds, *inter-alia* that it amounted to abuse of process of law. The High Court dismissed the said application. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. The rule against double jeopardy provides foundation for the pleas of *autrefois acquit* and *autrefois convict*. The manifestation of this rule is to be found contained in Section 300 Cr.P.C; Section 26 of the General Clauses Act; and Section 71 I.P.C. The law is well settled that in order to attract the provisions of Article 20(2) of the Constitution i.e. doctrine of *autrefois acquit* or Section 300 Cr.P.C. or Section 71 IPC or Section 26 of General Clauses Act, ingredients of the offences in the earlier case as well as in the latter case must be the same and not different. The test to ascertain whether the two offences are the same is not the identity of the allegations but the identity of the ingredients of the offence. Motive for committing offence cannot be termed as ingredients of offences to determine the issue. The plea of *autrefois acquit* is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge. [Paras 5, 24] [1163-G; 1174-F-H; 1175-A]

Maqbool Hussain v. State of Bombay **AIR 1953 SC 325; *S.A.** Venkataraman v. Union of India & Anr.* **AIR 1954 SC 375;** *Om Prakash Gupta v. State of U.P.* **AIR 1957 SC 458;** *State of Madhya Pradesh v. Veereshwar Rao Agnihotri* **AIR 1957 SC 592;** *Leo Roy Frey v. Superintendent, District Jail, Amritsar & Anr.* **AIR 1958 SC 119;** *The State of Bombay v. S.L. Apte and Anr.* **AIR 1961 SC 578;** *Roshan Lal & Ors. v. State of Punjab* **AIR 1965 SC 1413;** *Kharkan & Ors. v. State of U.P.* **AIR 1965 SC 83;** *Bhagwan Swarup Lal Bishan Lal v. The State of Maharashtra* **AIR 1965 SC 682;** *Sardul Singh Caveeshar v. State of Bombay* **AIR 1957 SC 747;** *The State of A.P. v. Kokkiligada Meeraiah & Anr.* **AIR 1970 SC 771;** *The Assistant Collector of the Customs, Bombay & Anr. v. L. R. Melwani & Anr.* **AIR 1970 SC 962;** *V.K. Agarwal v. Vasantraj Bhagwanji Bhatia & Ors.* **AIR 1988 SC 1106** *M/s. P.V.*

Mohammad Barmay Sons v. Director of Enforcement **AIR 1993 SC 1188;** *State of Bihar v. Murad Ali Khan & Ors.* **AIR 1989 SC 1;** *Union of India etc. etc. v. K.V. Jankiraman etc. etc.* **AIR 1991 SC 2010;** *State of Tamil Nadu v. Thiru K.S. Murugesan & Ors.* **(1995) 3 SCC 273;** *State of Punjab & Anr. v. Dalbir Singh & Ors.* **(2001) 9 SCC 212;** *A.A. Mulla & Ors. v. State of Maharashtra & Anr.* **AIR 1997 SC 1441;** *Union of India & Ors. v. Sunil Kumar Sarkar* **AIR 2001 SC 1092;** *R. Viswan & Ors. v. Union of India & Ors.* **AIR 1983 SC 658;** *Union of India & Anr. v. P.D. Yadav* **(2002) 1 SCC 405:2001 (4) Suppl. SCR 209;** *State of Rajasthan v. Hat Singh & Ors.* **AIR 2003 SC 791;** *State of Haryana v. Balwant Singh* **AIR 2003 SC 1253;** *Hira Lal Hari Lal Bhagwati v. C.B.I. New Delhi* **AIR 2003 SC 2545;** *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao & Anr.* **(2011) 2 SCC 703: 2011 (2) SCR 364 – relied on.**

2. Where an issue of fact has been tried by a competent court on an earlier occasion and a finding has been recorded in favour of the accused, such a finding would constitute an estoppel or *res judicata* against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the acceptance/reception of evidence to disturb the finding of fact when the accused is tried subsequently for a different offence. This rule is distinct from the doctrine of double jeopardy as it does not prevent the trial of any offence but only precludes the evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial. Thus, the rule relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court in a previous trial on a factual issue. [Para 15] [1171-D-F]

Pritam Singh & Anr. v. The State of Punjab **AIR 1956 SC 415;** *Manipur Administration, Manipur v. Thokchom Bira*

Singh **AIR 1965 SC 87;** *Workmen of the Gujarat Electricity Board, Baroda v. Gujarat Electricity Board, Baroda* **AIR 1970 SC 87;** *Bhanu Kumar Jain v. Archana Kumar & Anr.* **AIR 2005 SC 626 – relied on.**

3. Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Section 138 N.I. Act and the case is *sub judice* before the High Court. In the instant case, he is involved under Sections 406/420 read with Section 114 IPC. In the prosecution under Section 138 N.I. Act, the *mens r*ea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved, the issue of *mens rea* may be relevant. The offence punishable under Section 420 IPC is a serious one as the sentence of 7 years can be imposed. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under N.I. Act can only be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary. There may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the said statutory provisions. [Paras 27-28] [1176-G-H; 1177-A-D]

Radheshyam Kejriwal v. State of West Bengal & Anr. **(2011) 3 SCC 581: 2011 (4) SCR 889;** *G. Sagar Suri & Anr. v. State of U.P. & Ors.* **(2000) 2 SCC 636: 2000 (1) SCR 417 – held inapplicable.**

Case Law Reference:

AIR 1953 SC 325	**relied on**	**Para 6**
AIR 1954 SC 375	**relied on**	**Para 7**
AIR 1957 SC 458	**relied on**	**Para 8**
AIR 1957 SC 592	**relied on**	**Para 8**
AIR 1958 SC 119	**relied on**	**Para 9**
AIR 1961 SC 578	**relied on**	**Para 10**
AIR 1965 SC 1413	**relied on**	**Para 11**
AIR 1965 SC 83	**relied on**	**Para 12**
AIR 1965 SC 682	**relied on**	**Para 13**
AIR 1957 SC 747	**relied on**	**Para 14**
AIR 1970 SC 771	**relied on**	**Para 15**
AIR 1970 SC 962	**relied on**	**Para 15**
AIR 1956 SC 415	**relied on**	**Para 15**
AIR 1965 SC 87	**relied on**	**Para 15**
AIR 1970 SC 87	**relied on**	**Para 15**
AIR 2005 SC 626	**relied on**	**Para 15**
AIR 1988 SC 1106	**relied on**	**Para 16**
AIR 1993 SC 1188	**relied on**	**Para 17**
AIR 1989 SC 1	**relied on**	**Para 17**
AIR 1991 SC 2010	**relied on**	**Para 17**
(1995) 3SCC 273	**relied on**	**Para 17**
(2001) 9 SCC 212	**relied on**	**Para 17**
AIR 1997 SC 1441	**relied on**	**Para 18**

AIR 2001 SC 1092	**relied on**	**Para 19**
AIR 1983 SC 658	**relied on**	**Para 19**
2001 (4) Suppl. SCR 209	**relied on**	**Para 20**
AIR 2003 SC 791	**relied on**	**Para 21**
AIR 2003 SC 1253	**relied on**	**Para 22**
AIR 2003 SC 2545	**relied on**	**Para 23**
2011 (4) SCR 889	**held inapplicable**	**Para 25**
2000 (1) SCR 417	**held inapplicable**	**Para 26**
2011 (2) SCR 364	**relied on**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 645 of 2012.

From the Judgment & Order dated 18.08.2011 of the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 7807 of 2006.

Abhishek Singh, Samir Ali Khan for the Appellant.

Rakesh Uttamchandra Upadhyay, Aarti Upadhyay, R. Baliya, Hemantika Wahi, S. Panda for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 18.8.2011 passed by the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 7807 of 2006, by which the High Court has dismissed the application filed by the present appellant under Section 482 of Criminal Procedure Code, 1973 (hereinafter referred as 'Cr.P.C.') for quashing the I.CR No. 18 of 2004 and Criminal Case No. 5 of 2004 pending before the Chief Judicial Magistrate, Patan, on the plea of double jeopardy for the reason that the appellant has already been tried and dealt with under the provisions of Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred as 'N.I. Act') for the same offence.

2. Facts and circumstances giving rise to this appeal are that:

A. Respondent No. 2 filed a complaint dated 22.10.2003 i.e. Criminal Case No. 1334 of 2003 under Section 138 of N.I. Act on the ground that the appellant had taken hypothecation loan of Rs. 20 lakhs and had not repaid the same. In order to meet the said liability, the appellant issued cheque bearing no. 59447 and on being presented, the cheque has been dishonoured.

B. Subsequent thereto on 6.2.2004, the respondent no. 2 filed an FIR being I.C.R. No. 18 of 2004 under Sections 406/ 420 read with Section 114 of Indian Penal Code, 1860 (hereinafter referred as `IPC') with the Sidhpur Police Station for committing the offence of criminal breach of trust, cheating and abetment etc.

C. In the criminal case No.1334 of 2003 filed under Section 138 of N.I. Act, the trial court convicted the appellant. Aggrieved, appellant preferred Appeal No. 12 of 2006, before the District Judge wherein, he has been acquitted. Against the order of acquittal, respondent no. 2 has preferred Criminal Appeal No. 1997 of 2008 before the High Court of Gujarat which is still pending consideration.

D. Appellant filed an application under Section 482 Cr.P.C., seeking quashing of ICR No. 18 of 2004 and Criminal Case No. 5 of 2004, pending before the Chief Judicial Magistrate, Patan, on the grounds, inter-alia, that it amounts to abuse of process of law. The appellant stood acquitted in criminal case under Section 138 of N.I. Act. Thus, he cannot be tried again for the same offence. In the facts of the case, doctrine of double jeopardy is attracted. The High Court dismissed the said application.

Hence, this appeal.

3. Shri Abhishek Singh, learned counsel appearing for the appellant, has submitted that the ICR as well as the criminal case pending before the Chief Judicial Magistrate, Patan, is barred by the provisions of Section 300 Cr.P.C. and Section 26 of the General Clauses Act, 1897 (hereinafter called 'General Clauses Act') as the appellant has already been dealt with/tried under Section 138 of N.I. Act for the same offence. Thus, the High Court committed an error in not quashing the said ICR and the criminal case. It amounts to double jeopardy and, therefore, the appeal deserves to be allowed.

4. On the contrary, Shri Rakesh Upadhyay, learned counsel appearing for the respondent no. 2 and Mr. S. Panda, learned counsel appearing for the State of Gujarat, have vehemently opposed the appeal contending that the provisions of Section 300 Cr.P.C. i.e. `Doctrine of Double Jeopardy' are not attracted in the facts and circumstances of the case, for the reason, that the ingredients of the offences under Sections 406/420 read with Section 114 IPC are entirely distinct from the case under Section 138 of N.I. Act, and therefore, do not constitute the same offence. The appeal is devoid of any merit and liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

The sole issue raised in this appeal is regarding the scope and application of doctrine of double jeopardy. The rule against double jeopardy provides foundation for the pleas of autrefois acquit and autrefois convict. The manifestation of this rule is to be found contained in Section 300 Cr.P.C; Section 26 of the General Clauses Act; and Section 71 I.P.C.

Section 300(1) Cr.P.C. reads:

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof."

Section 26 of the General Clauses Act, 1897 reads:

"Provision as to offences punishable under two or more enactments. - Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

Section 71 of I.P.C. reads:

"Limit of punishment of offence made up of several offences. - Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

……."

6. In *Maqbool Hussain v. State of Bombay,* AIR 1953 SC 325, the Constitution Bench of this Court dealt with the issue wherein the central issue arose in the context of the fact that a person who had arrived at an Indian airport from abroad on being searched was found in possession of gold in contravention of the relevant notification, prohibiting the import of gold. Action was taken against him by the customs authorities and the gold seized from his possession was

confiscated. Later on, a prosecution was launched against him in the criminal court at Bombay charging him with having committed the offence under Section 8 of the Foreign Exchange Regulation Act, 1947 (hereinafter called `FERA') read with the relevant notification. In the background of these facts, the plea of "autrefois acquit" was raised seeking protection under Article 20(2) of the Constitution of India, 1950 (hereinafter called the 'Constitution'). This court held that the fundamental right which is guaranteed under Article 20 (2) enunciates the principle of "autrefois convict" or "double jeopardy" i.e. a person must not be put in peril twice for the same offence. The doctrine is based on the ancient maxim "nemo debet bis punire pro uno delicto", that is to say that no one ought to be twice punished for one offence. The plea of "autrefois convict" or "autrefois acquit" avers that the person has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other and not that the facts relied on by the prosecution are the same in the two trials. A plea of "autrefois acquit" is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter.

7. The Constitution Bench of this Court in S.A.Venkataraman v. Union of India & Anr., AIR 1954 SC 375, explained the scope of doctrine of double jeopardy, observing that in order to attract the provisions of Article 20 (2) of the Constitution, there must have been both prosecution and punishment in respect of the same offence. The words 'prosecuted' and 'punished' are to be taken not distributively so as to mean prosecuted or punished. Both the factors must co-exist in order that the operation of the clause may be attractive.

8. In *Om Prakash Gupta v. State of U.P.,* AIR 1957 SC 458; and *State of Madhya Pradesh v. Veereshwar Rao*

Agnihotri, AIR 1957 SC 592, this Court has held that prosecution and conviction or acquittal under Section 409 IPC do not debar trial of the accused on a charge under Section 5(2) of the Prevention of Corruption Act, 1947 because the two offences are not identical in sense, import and content.

9. In Leo Roy Frey v. Superintendent, District Jail, Amritsar & Anr., AIR 1958 SC 119, proceedings were taken against certain persons in the first instance before the Customs Authorities under Section 167(8) of the Sea Customs Act and heavy personal penalties were imposed on them. Thereafter, they were charged for an offence under Section 120-B IPC. This Court held that an offence under Section 120-B is not the same offence as that under the Sea Customs Act:

> "The offence of a conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences."
>
> (Emphasis added)

10. In *The State of Bombay v. S.L. Apte and Anr.* AIR 1961 SC 578, the Constitution Bench of this Court while dealing with the issue of double jeopardy under Article 20(2), held:

> "To operate as a bar the second prosecution and the consequential punishment thereunder, must be for "the same offence". The crucial requirement therefore for attracting the Article is that the offences are the same i.e. they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the

benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out.

xx xx xx xx xx xx xx

The next point to be considered is as regards the scope of Section 26 of the General Clauses Act. Though Section 26 in its opening words refers to "the act or omission constituting an offence under two or more enactments", the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to "shall not be liable to be punished twice for the same offence". If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked." (Emphasis added)

11. In *Roshan Lal & Ors. v. State of Punjab,* AIR 1965 SC 1413, the accused had caused disappearance of the evidence of two offences under sections 330 and 348 IPC and, therefore, he was alleged to have committed two separate offences under section 201 IPC. It was held that neither section 71 IPC nor section 26 of the General Clauses Act came to the rescue of the accused and the accused was liable to be convicted for two sets of offences under section 201 IPC, though it would be appropriate not to pass two separate sentences.

A similar view has been reiterated by this Court in *Kharkan & Ors. v. State of U.P.,* AIR 1965 SC 83.

12. In *Bhagwan Swarup Lal Bishan Lal v. The State of Maharashtra,* AIR 1965 SC 682, while dealing with the issue, held:

"The previous case in which this accused was convicted

was in regard to a conspiracy to commit criminal breach of trust in respect of the funds of the Jupiter and that case was finally disposed of by this Court in *Sardul Singh Caveeshar v. State of Bombay,* AIR 1957 SC 747. Therein it was found that Caveeshar was a party to the conspiracy and also a party to the fraudulent transactions entered into by the Jupiter in his favour. The present case relates to a different conspiracy altogether. The conspiracy in question was to lift the funds of the Empire, though its object was to cover up the fraud committed in respect of the Jupiter. Therefore, it may be that the defalcations made in Jupiter may afford a motive for the new conspiracy, *but the two offences are distinct ones.* Some accused may be common to both of them, some of the facts proved to establish the Jupiter conspiracy may also have to be proved to support the motive for the second conspiracy. The question is whether that in itself would be sufficient to make the two conspiracies the one and the same offence….

The two conspiracies are distinct offences. It cannot even be said that some of the ingredients of both the conspiracies are the same. The facts constituting the Jupiter conspiracy are not the ingredients of the offence of the Empire conspiracy, but only afford a motive for the latter offence. Motive is not an ingredient of an offence. The proof of motive helps a court in coming to a correct conclusion when there is no direct evidence. Where there is direct evidence for implicating an accused in an offence, the absence of proof of motive is not material. *The ingredients of both the offences are totally different and they do not form the same offence within the meaning of Article 20(2) of the Constitution* and, therefore, that Article has no relevance to the present case." (Emphasis added)

13. In *The State of A.P. v. Kokkiligada Meeraiah & Anr.,*

AIR 1970 SC 771, this Court while having regard to Section 403 Cr.P.C., 1898, held:

"The following important rules emerge from the terms of Section 403 of the Code of Criminal Procedure:

(1) An order of conviction or acquittal in respect of any offence constituted by any act against or in favour of a person does not prohibit a trial for any other offence constituted by the same act which he may have committed, if the court trying the first offence was incompetent to try that other offence.

(2) If in the course of a transaction several offences are committed for which separate charges could have been made, but if a person is tried in respect of some of those charges, and not all, and is acquitted or convicted, he may be tried for any distinct offence for which at the former trial a separate charge may have been, but was not, made.

(3) If a person is convicted of any offence constituted by any act, and that act together with the consequences which resulted therefrom constituted a different offence, he may again be tried for that different offence arising out of the consequences, if the consequences had not happened or were not known to the court to have happened, at the time when he was convicted.

(4) A person who has once been tried by a Court of competent jurisdiction for an offence and has been either convicted or acquitted shall not be tried for the same offence or for any other offence arising out of the same facts, for which a different charge from the one made against him might have been made or for which he might have been convicted under the Code of Criminal Procedure." (Emphasis added)

14. The Constitution Bench of this Court in *The Assistant Collector of the Customs, Bombay & Anr. v. L. R. Melwani & Anr.* AIR 1970 SC 962, repelled the contention of the respondents therein that their criminal prosecution for alleged smuggling was barred because proceedings were earlier instituted against them before Collector of Customs. It was observed that neither the adjudication before the Collector of Customs was a prosecution, nor the Collector of Customs was a Court. Therefore, neither the rule of autrefois acquit can be invoked, nor the issue estoppel rule was attracted. The issue estoppel rule is a facet of doctrine of autrefois acquit.

15. This Court has time and again explained the principle of issue estoppel in a criminal trial observing that where an issue of fact has been tried by a competent court on an earlier occasion and a finding has been recorded in favour of the accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the acceptance/reception of evidence to disturb the finding of fact when the accused is tried subsequently for a different offence. This rule is distinct from the doctrine of double jeopardy as it does not prevent the trial of any offence but only precludes the evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial. Thus, the rule relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court in a previous trial on a factual issue. (Vide: *Pritam Singh & Anr. v. The State of Punjab,* AIR 1956 SC 415; *Manipur Administration, Manipur v. Thokchom Bira Singh,* AIR 1965 SC 87; *Workmen of the Gujarat Electricity Board, Baroda v. Gujarat Electricity Board, Baroda,* AIR 1970 SC 87; and *Bhanu Kumar Jain v. Archana Kumar & Anr.,* AIR 2005 SC 626).

16. In *V.K. Agarwal v. Vasantraj Bhagwanji Bhatia & Ors.,* AIR 1988 SC 1106, wherein the accused were prosecuted

under Customs Act, 1962 (hereinafter referred to as 'Customs Act') and subsequently under Gold (Control) Act, 1968, (hereinafter called as 'Gold (Control) Act') it was held that the ingredients of the two offences are different in scope and content. The facts constituting the offence under the Customs Act are different and are not sufficient to justify the conviction under the Gold (Control) Act. It was held that what was necessary is to analyse the ingredients of the two offences and not the allegations made in the two complaints.

17. In *M/s. P.V. Mohammad Barmay Sons v. Director of Enforcement* AIR 1993 SC 1188, it was held:

> "The further contention that under the Sea Custom Act for the self same contravention, the penalty proceedings terminated in favour of the appellant, is of little avail to the appellant for the reasons that two Acts operate in different fields, one for contravention of FERA and the second for evasion of excise duty. The mere fact that the penalty proceedings for evasion of the excise duty had ended in favour of the appellant, does not take away the jurisdiction of the enforcement authorities under the Act to impose the penalty in question. The doctrine of double jeopardy has no application."

(See also: *State of Bihar v. Murad Ali Khan & Ors.,* AIR 1989 SC 1; *Union of India etc. etc. v. K.V. Jankiraman etc. etc.,* AIR 1991 SC 2010; *State of Tamil Nadu v. Thiru K.S. Murugesan & Ors.,* (1995) 3 SCC 273; and *State of Punjab & Anr. v. Dalbir Singh & Ors.,* (2001) 9 SCC 212).

18. In *A.A. Mulla & Ors. v. State of Maharashtra & Anr.,* AIR 1997 SC 1441, the appellants were charged under Section 409 IPC and Section 5 of the Prevention of Corruption Act, 1947 for making false panchnama disclosing recovery of 90 gold biscuits on 21-9-1969 although according to the prosecution case the appellants had recovered 99 gold biscuits. The appellants were tried for the same and acquitted. The

appellants were also tried for offence under Section 120-B IPC, Sections 135 and 136 of the Customs Act, Section 85 of the Gold (Control) Act and Section 23(1-A) of FERA and Section 5 of Import and Export (Control) Act, 1947. The appellants filed an application before the Judicial Magistrate contending that on the selfsame facts they could not be tried for the second time in view of Section 403 of the Code of Criminal Procedure, 1898 (corresponding to Section 300 Cr.P.C.). This Court held:

> "After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the respective parties, it appears to us that the ingredients of the offences for which the appellants were charged in the first trial are entirely different. The second trial with which we are concerned in this appeal, envisages a different fact-situation and the enquiry for finding out facts constituting offences under the Customs Act and the Gold (Control) Act in the second trial is of a different nature……. Not only the ingredients of offences in the previous and the second trial are different, the factual foundation of the first trial and such foundation for the second trial is also not indented (sic). Accordingly, the second trial was not barred under Section 403 CrPC of 1898 as alleged by the appellants." (Emphasis added)

19. In *Union of India & Ors. v. Sunil Kumar Sarkar,* AIR 2001 SC 1092, this Court considered the argument that if the punishment had already been imposed for Court Martial proceedings, the proceedings under the Central Rules dealing with disciplinary aspect and misconduct cannot be held as it would amount to double jeopardy violating the provisions of Article 20 (2) of the Constitution. The Court explained that the Court Martial proceedings deal with penal aspect of the misconduct while the proceedings under the Central Rules deal with the disciplinary aspect of the misconduct. The two proceedings do not over-lap at all and, therefore, there was no question of attracting the doctrine of double jeopardy. While

deciding the said case, the court placed reliance upon its earlier judgment in *R. Viswan & Ors. v. Union of India & Ors.,* AIR 1983 SC 658.

20. In *Union of India & Anr. v. P.D. Yadav,* (2002) 1 SCC 405, this Court dealt with the issue of double jeopardy in a case where the pension of the official, who stood convicted by a Court-Martial, had been forfeited. The Court held:

> "This principle is embodied in the well-known maxim nemo debet bis vexari si constat curiae quod sit pro una et eadem causa, meaning no one ought to be vexed twice if it appears to the court that it is for one and the same cause. Doctrine of double jeopardy is a protection against prosecution twice for the same offence. Under Articles 20-22 of the Indian Constitution, provisions are made relating to personal liberty of citizens and others….. Offences such as criminal breach of trust, misappropriation, cheating, defamation etc., may give rise to prosecution on criminal side and also for action in civil court/ other forum for recovery of money by way of damages etc., unless there is a bar created by law. In the proceedings before General Court Martial, a person is tried for an offence of misconduct and whereas in passing order under Regulation 16 (a) for forfeiting pension, a person is not tried for the same offence of misconduct after the punishment is imposed for a proven misconduct by the General Court Martial resulting in cashiering, dismissing or removing from service. Only further action is taken under Regulation 16 (a) in relation to forfeiture of pension. Thus, punishing a person under Section 71 of the Army Act and making order under Regulation 16 (a) are entirely different. Hence, there is no question of applying principle of double jeopardy to the present cases."

21. In *State of Rajasthan v. Hat Singh & Ors.* AIR 2003 SC 791, this Court held that as the offence of glorification of Sati under Section 5 of the Rajasthan Sati (Prevention) Act,

1987, is different from the offence of violation of prohibitory order issued under Section 6 thereof, the doctrine of double jeopardy was not attracted for the reason that even if prohibitory order is promulgated, a subsequent criminal act even if falls under Section 5 could not be covered under Section 6(3) of the said Act. Doctrine of double jeopardy is enshrined in Section 300 Cr.P.C. and Section 26 of the General Clauses Act. Both the provisions employ the expression "same offence".

22. Similar view has been reiterated by this Court in *State of Haryana v. Balwant Singh,* AIR 2003 SC 1253, observing that there may be cases of misappropriation, cheating, defamation etc. which may give rise to prosecution on criminal side and also for action in civil court/other forum for recovery of money by way of damages etc. Therefore, it is not always necessary that in every such case the provision of Article 20(2) of the Constitution may be attracted.

23. In *Hira Lal Hari Lal Bhagwati v. C.B.I., New Delhi,* AIR 2003 SC 2545, this Court while considering the case for quashing the criminal prosecution for evading the customs duty, where the matter stood settled under the Kar Vivad Samadhan Scheme 1988, observed that once the tax matter was settled under the said Scheme, the offence stood compounded, and prosecution for evasion of duty, in such a circumstance, would amount to double jeopardy.

24. In view of the above, the law is well settled that in order to attract the provisions of Article 20(2) of the Constitution i.e. doctrine of autrefois acquit or Section 300 Cr.P.C. or Section 71 IPC or Section 26 of General Clauses Act, ingredients of the offences in the earlier case as well as in the latter case must be the same and not different. The test to ascertain whether the two offences are the same is not identity of the allegations but the identity of the ingredients of the offence. Motive for committing offence cannot be termed as ingredients of offences to determine the issue. The plea of autrefois acquit is not proved unless it is shown that the judgment of acquittal

in the previous charge necessarily involves an acquittal of the latter charge.

25. In *Radheshyam Kejriwal v. State of West Bengal & Anr.,* (2011) 3 SCC 581, while dealing with the proceedings under the provisions of Foreign Exchange Regulation Act, 1973, this Court quashed the proceedings (by a majority of 2:1) under Section 56 of the said Act because adjudication under Section 51 stood finalised. The Court held :

"The ratio which can be culled out from these decisions can broadly be stated as follows:

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the

person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases."

The ratio of the aforesaid judgment is not applicable in this case for the reason that proceedings under Section 138 of N.I. Act are still sub judice as the appeal is pending and the matter has not attained finality.

26. Learned counsel for the appellant has further placed reliance on the judgment in *G. Sagar Suri & Anr. v. State of U.P. & Ors.,* (2000) 2 SCC 636, wherein during the pendency of the proceedings under Section 138 N.I. Act, prosecution under Sections 406/420 IPC had been launched. This Court quashed the criminal proceedings under Sections 406/420 IPC, observing that it would amount to abuse of process of law. In fact, the issue as to whether the ingredients of both the offences were same, had neither been raised nor decided. Therefore, the ratio of that judgment does not have application on the facts of this case.

Same remained the position so far as the judgment in *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao & Anr.,* (2011) 2 SCC 703, is concerned. It has been held therein that once the conviction under Section 138 of N.I. Act has been recorded, the question of trying a same person under Section 420 IPC or any other provision of IPC or any other statute is not permissible being hit by Article 20(2) of the Constitution and Section 300(1) Cr.P.C.

27. Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Section 138 N.I. Act and the case is sub judice before the High Court. In the instant case, he is involved under Sections 406/420 read with Section 114 IPC. In the prosecution under Section 138 N.I. Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However,

in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under Section 420 IPC is a serious one as the sentence of 7 years can be imposed. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under N.I. Act can only be initiated by filing a complaint. However, in a case under the IPC such a conditio is not necessary.

28. There may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provisions.

The appeal is devoid of any merit and accordingly dismissed.

D.G. Appeal dismissed.

SANTOSH DEVI

v.

NATIONAL INSURANCE COMPANY LTD. AND OTHERS

(Civil Appeal No. 3723 of 2012)

APRIL 23, 2012

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

Motor Vehicles Act, 1988:

s.166 – Motor accident – Death of a self employed person aged 45 years – Claim petition – Dependents including 2 unemployed major sons – Benefit of increment in annual income – Deductions towards personal expenses – Multiplier – Held: Keeping in view the challenges posed by high cost of living, the formula of 30% increase in the total income also deserves to be applied for calculating the amount of compensation of a self-employed person or a person engaged on fixed salary, who dies in a motor accident – Ordinarily, deductions towards personal expenses of such a person earning Rs.1500/- per month and the family consisting of 5 persons, should be 10% from his monthly income – It cannot be said that in the absence of any source of sustenance, the two major sons were not dependent on the deceased – High Court rightly applied the multiplier of 14 – Claimant also held entitled to charges for transportation of the dead body, funeral expenses and towards loss of consortium – Compensation enhanced accordingly with 7% interest on enhanced amount from the date of application – Precedent – Judicial notice.

Precedent:

Compensation – Held: The judgments which have bearing on socio-economic conditions of citizens and issues

relating to compensation payable to victims of motor accidents, those who are deprived of their lands and in similar matters need to be frequently revisited keeping in view the fast changing social values and price rise – The victims or their dependents should be awarded just compensation – Social justice.

The appellant's husband, who was aged about 45 years and running a dairy as also doing agriculture, died in a car accident. The Tribunal held that the accident was caused by rash and negligent driving of the car by 'VS', who also died in the said accident. It assumed the monthly income of the deceased as Rs.1500/- and deducted Rs.500/- towards personal expenses of the deceased and applying the multiplier of 11, awarded Rs.1,32,000/- as compensation with 12% interest from the date of application. The Tribunal also held that two major sons of the deceased could not be treated as dependents. The High Court relying upon *Sarla Verma's*[1] **case, applied the multiplier of 14 and enhanced the compensation to Rs. 1,77,500/- with 7% interest on the enhanced compensation from the date of the appeal.**

In the instant appeal by the claimant, it was contended for the appellant that the High Court erred in not giving the benefit of 30 per cent increase in the income of the deceased. It was also contended that a deduction of 1/3rd of monthly income towards personal expenses of the deceased was totally disproportionate to the size of the family.

Allowing the appeal, the Court

HELD: 1.1. Although, the legal jurisprudence developed in the country in last five decades is somewhat precedent-centric, the judgments which have

1. *Sarla Verma v. Delhi Transport Corporation* 2009 (5) SCR 1098..

bearing on socio-economic conditions of the citizens and issues relating to compensation payable to the victims of motor accidents, those who are deprived of their land and similar matters need to be frequently revisited keeping in view the fast changing societal values, the effect of globalisation on the economy of the nation and their impact on the life of the people. The victims of the road accidents and/or their family members should be awarded just compensation. [para 11-12] [1185-E-F, H]

R.K. Malik v. Kiran Pal **2009 (10) SCR 87 = (2009) 14 SCC 1;** *M.S. Grewal v. Deep Chand Sood* **2001 (2) Suppl. SCR 156 = (2001) 8 SCC 151,** *Lata Wadhwa v. State of Bihar* **2001 (1) Suppl. SCR 578 = (2001) 8 SCC 197,** *Kerala SRTC v. Susamma Thomas* **(1994) 2 SCC 176,** *Sarla Dixit v. Balwant Yadav* **(1996) 3 SCC 179; and** *U.P. SRTC v. Trilok Chandra* **1996 (2) Suppl. SCR 443 = (1996) 4 SCC 362 – referred to.**

Nance v. British Columbia Electric Railway Co. Ltd. **1951 AC 601,** *Davies v. Powell Duffryn Associated Collieries Ltd*. **1942 AC 601 – referred to.**

1.2. It will be naïve to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life. Judicial notice can be taken of the fact that with a view to meet the challenges posed by high cost of living, such persons periodically increase the cost of their labour. Therefore, it cannot be said that while making the observations in the last three lines of paragraph 24 of *Sarla Verma's* judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent

increase in his total income over a period of time and if he / she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation. [para 14] [1188-E; 1189-D-G]

Sarla Verma v. Delhi Transport Corporation **2009 (5) SCR 1098 = (2009) 6 SCC 121- referred to.**

1.3. The deduction of 1/3rd of the total income of the deceased i.e., Rs. 500/-, towards personal expenses cannot be approved. It will be impossible for a person whose monthly income is Rs.1,500/- to spend 1/3rd on himself leaving 2/3rd for the family consisting of five persons. Ordinarily, such a person would, at best, spend 1/10th of his income on himself or use that amount as personal expenses and leave the rest for his family. [para 15] [1189-H; 1190-A]

1.4. In the absence of any source of sustenance of the two sons of the deceased, there was no reason for the Tribunal to assume that the sons who had become major could no longer be regarded dependant on the deceased. [para 16] [1190-C]

1.5. The impugned judgment as also the award of the Tribunal are set aside and it is declared that the claimants shall be entitled to compensation of Rs.2,94,840. Besides, the claimant shall also be entitled to Rs.5,000/- for transportation of the body, Rs.10,000/- as funeral expenses and Rs.10,000/- in lieu of loss of consortium. The enhanced amount of compensation shall carry interest of 7% from the date of application till realisation. [para 17-18] [1190-D-E]

Case Law Reference:

2009 (5) SCR 1098	**referred to**	**para 8**
2009 (10) SCR 87	**referred to**	**para 12**

2001 (1) Suppl. SCR 578	**referred to**	**para 12**
2001 (2) Suppl. SCR 156	**referred to**	**para 12**
(1994) 2 SCC 176	**referred to**	**para 12**
(1996) 3 SCC 179	**referred to**	**para 12**
1996 (2) Suppl. SCR 443	**referred to**	**para 13**
1951 AC 601	**referred to**	**para 13**
1942 AC 601	**referred to**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3723 of 2012.

From the Judgment & Order dated 06.05.2010 of the High Court of Punjab & Haryana at Chandigarh in F. A. O. No. 362 of 1998 (O & M).

Vikas K. Sangwan, Ansar Ahamad Chaudhary for the Appellant.

S.L. Gupta, Ram Ashray, Darsham Singh, P.K. Singh, Shalu Sharma for the Respondents.

The Judgment of the Court was delivered by

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

2. Feeling dissatisfied with the enhancement granted by the Punjab and Haryana High Court in the amount of compensation determined by Motor Accident Claims Tribunal, Gurdaspur (for short, 'the Tribunal') in MACT Case No. 97 of 1995, the appellant has filed this appeal.

3. Shri Swaran Singh (the appellant's husband) died in a road accident when the Maruti car in which he was travelling with Varinder Singh (husband of respondent No. 2 and the father of respondent Nos. 3 and 4) went out of control. Varinder Singh, who was driving the vehicle also suffered multiple injuries and died on the spot.

4. The appellant and other legal representatives of Swaran Singh filed a petition under Section 166 of the Motor Vehicles Act, 1988 (for short, 'the Act') for award of compensation to the tune of Rs. 4 lacs. They pleaded that the accident was caused due to rash and negligent driving of the Maruti car by Varinder Singh; that at the time of his death, the age of the deceased was about 45 years and that he was earning Rs. 5,000/- per month by running a milk dairy and doing agriculture. The legal representatives of Varinder Singh denied that the accident had occurred due to rash and negligent driving of the Maruti car. In the written statement filed on behalf of respondent No. 1, it was pleaded that the claim petition was not maintainable because the deceased, who was travelling in the car cannot be treated as a third party and that the person driving the vehicle did not have valid driving licence. Respondent No.1 also controverted the claimant's assertion about the income of Swaran Singh.

5. On the pleadings of the parties the Tribunal framed the following issues:

"1) Whether the death of Swaran Singh not amounting to culpable homicide took place on account of the rash and negligent driving of Maruti Car No. PB-035A-0090 driven by Varinder Singh?

2) To what amount of compensation the applicants are entitled? If so, from whom?

3) Relief."

6. In support of the claim petition, the appellant examined herself and two other witnesses, namely, Bakhshish Singh and Surain Singh. Respondent No.1 examined Milap Chand, Clerk, in the office of the District Transport Officer, Gurdaspur. On behalf of the legal representatives of Varinder Singh copies of driving licence, insurance policy and registration certificate were produced and marked as Exhibits R1 to R3.

7. After analysing the evidence produced by the parties, the Tribunal decided issue No.1 in the affirmative and held that

the accident was caused due to rash and negligent driving of Maruti car by Varinder Singh. While dealing with issue No.2, the Tribunal adverted to the statement made by the appellant in her cross-examination that the deceased did not own any agricultural land and that he was cultivating land on lease basis and proceeded to determine the amount of compensation by assuming his income as Rs. 1,500/- per month. The Tribunal was also of the view that two sons of the appellant, namely, Sulakhan Singh and Surjit Singh cannot be treated as dependants of the deceased because their age was 26 years and 23 years respectively. The Tribunal deducted Rs. 500/- towards personal expenses of the deceased and held that dependency of the appellant and other family members would Rs.1,000/- per month. The Tribunal then applied the multiplier of 11 and declared that the claimants are entitled to compensation of Rs. 1,32,000/- with interest at the rate of 12 per cent per annum from the date of application.

8. The High Court relied upon the judgment of this Court in *Sarla Verma v. Delhi Transport Corporation* (2009) 6 SCC 121, applied the multiplier of 14 and held that the claimants are entitled to total compensation of Rs.1,77,500/- with interest at the rate of 7 per cent per annum on the enhanced amount from the date of appeal till realisation.

9. Learned counsel for the appellant relied upon the judgment in Sarla Verma's case and argued that the Tribunal and the High Court committed serious error by not giving the benefit of 30 per cent increase in the income of the deceased which he would have earned for the next 25 years. Learned counsel further argued that the deduction of Rs.500/- towards personal expenses of the deceased was totally disproportionate to size of his family and the Tribunal and the High Court overlooked stark reality that it is impossible for a person having meagre earning of Rs. 1,500/- per month to spend 1/3rd on himself and leave 2/3rd of his income for five dependants including three children. He criticised the observations made by the Tribunal that Sulakhan Singh and

Surjit Singh could not be treated as dependant of the deceased because they were major and argued that in the absence of any evidence to the contrary, there was no reason to discard the testimony of the appellant that in all five family members were dependant on the deceased.

10. Learned counsel for respondent No.1 submitted that the rule of 30 per cent addition in the income of the deceased as laid down in Sarla Verma's case cannot be applied to a case like the present one because the deceased was neither in Government service nor he was a permanent employee of a corporation or company which may have ensured increase in his income from time to time. He argued that those employed in unorganized sectors cannot be placed at par with Government employees and those employed in agencies/ instrumentalities of the State or private corporations/ companies.

11. We have considered the respective arguments. Although, the legal jurisprudence developed in the country in last five decades is somewhat precedent-centric, the judgments which have bearing on socio-economic conditions of the citizens and issues relating to compensation payable to the victims of motor accidents, those who are deprived of their land and similar matters needs to be frequently revisited keeping in view the fast changing societal values, the effect of globalisation on the economy of the nation and their impact on the life of the people.

12. In *R.K. Malik v. Kiran Pal* (2009) 14 SCC 1, the two Judge Bench while dealing with the case involving claim of compensation under Section 163-A of the Act, noticed the judgments in *M.S. Grewal v. Deep Chand Sood* (2001) 8 SCC 151, *Lata Wadhwa v. State of Bihar* (2001) 8 SCC 197, *Kerala SRTC v. Susamma Thomas* (1994) 2 SCC 176, *Sarla Dixit v. Balwant Yadav* (1996) 3 SCC 179 and made some of the following observations, which are largely reflective of the philosophy that victims of the road accidents and/or their family members should be awarded just compensation:

> "In cases of motor accidents the endeavour is to put the dependants/claimants in the pre-accidental position. Compensation in cases of motor accidents, as in other matters, is paid for reparation of damages. The damages so awarded should be adequate sum of money that would put the party, who has suffered, in the same position if he had not suffered on account of the wrong. Compensation is therefore required to be paid for prospective pecuniary loss i.e. future loss of income/dependency suffered on account of the wrongful act. However, no amount of compensation can restore the lost limb or the experience of pain and suffering due to loss of life. Loss of a child, life or a limb can never be eliminated or ameliorated completely.
>
> To put it simply—pecuniary damages cannot replace a human life or limb lost. Therefore, in addition to the pecuniary losses, the law recognises that payment should also be made for non-pecuniary losses on account of, loss of happiness, pain, suffering and expectancy of life, etc. The Act provides for payment of "just compensation" vide Sections 166 and 168. It is left to the courts to decide what would be "just compensation" in the facts of a case."

13. In *Sarla Verma's* case (supra), another two Judge Bench considered various factors relevant for determining the compensation payable in cases involving motor accidents, noticed apparent divergence in the views expressed by this Court in different cases, referred to large number of precedents including the judgments in *U.P. SRTC v. Trilok Chandra* (1996) 4 SCC 362, *Nance v. British Columbia Electric Railway Co. Ltd.* 1951 AC 601, *Davies v. Powell Duffryn Associated Collieries Ltd.* 1942 AC 601 and made an attempt to limit the exercise of discretion by the Tribunals and the High Courts in the matter of award of compensation by laying down straightjacket formula under different headings, some of which are enumerated below:

"**(i) Addition to income for future prospects**

In Susamma Thomas this Court increased the income by nearly 100%, in Sarla Dixit the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words "actual salary" should be read as "actual salary less tax"). The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardise the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.

(ii) Deduction for personal and living expenses

Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members

exceeds six.

(iii) Selection of multiplier

We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

14. We find it extremely difficult to fathom any rationale for the observation made in paragraph 24 of the judgment in Sarla Verma's case that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the Courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances. In our view, it will be naïve to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self-employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put extra efforts to generate additional income necessary for sustaining their families. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for

providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of those in higher echelons of service will cross the figure of rupees one lac. Although, the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc. Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he / she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation.

15. It is also not possible to approve the view taken by the Tribunal which has been reiterated by the High Court albeit without assigning reasons that the deceased would have spent 1/3rd of his total earning, i.e., Rs. 500/-, towards personal expenses. It seems that the Presiding Officer of the Tribunal and

the learned Single Judge of the High Court were totally oblivious of the hard realities of the life. It will be impossible for a person whose monthly income is Rs.1,500/- to spend 1/3rd on himself leaving 2/3rd for the family consisting of five persons. Ordinarily, such a person would, at best, spend 1/10th of his income on himself or use that amount as personal expenses and leave the rest for his family.

16. The Tribunal's observation that the two sons of the appellant cannot be treated dependant on their father because they were not minor is neither here nor there. In the cross-examination of the appellant, no question was put to her about the source of sustenance of her two sons. Therefore, there was no reason for the Tribunal to assume that the sons who had become major can no longer be regarded dependant on the deceased.

17. In the result, the appeal is allowed, the impugned judgment as also the award of the Tribunal are set aside and it is declared that the claimants shall be entitled to compensation of Rs.2,94,840 [Rs.1,500 + 30% of Rs.1,500 = Rs.1,950 less 1/10th towards personal expenses = Rs.1,755 x 12 x 14 =Rs.2,94,840]. The claimants shall also be entitled to Rs.5,000/- for transportation of the body, Rs.10,000/- as funeral expenses and Rs.10,000/- in lieu of loss of consortium. Thus, the total amount payable to the claimants will be Rs.3,19,840/-. The enhanced amount of compensation i.e. Rs.1,42,340/- (Rs.3,19,840 - Rs.1,77,500) shall carry interest of 7 per cent from the date of application till realisation.

18. Respondent No.1 – Insurance Company is directed to pay to the appellant the total amount of compensation within a period of three months by getting prepared a demand draft in her name which shall be delivered to her at the address given in the claim petition filed before the Tribunal. While doing so, respondent No.1 shall be free to deduct the amount already paid to the appellant.

R.P. Appeal allowed.