RASHTRIYA ISPAT NIGAM LTD.
v.
M/S. DEWAN CHAND RAM SARAN
(Civil Appeal No. 3905 of 2012)

APRIL 25, 2012

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

Contract – Work contract – Payment of service tax – Liability of – Whether of the availer of service or the service provider – Service availer deducting service tax from the bill of the service provider – Dispute referred to arbitrator – Arbitrator holding that service tax was rightly deducted from the bills of the service provider in terms of the contractual obligation – In arbitration petition Single Judge of High Court holding that availer of service was liable since it was the assessee – Order of Single Judge confirmed by Division Bench of High Court – On appeal, held: Service provider under contractual obligation was liable to pay the service tax – Availer of service became the assessee after amendment by Finance Act 2000 – The liability arose out of the services rendered prior to 2000 amendment when the liability was on the service provider – Even when the service availer becomes liable to pay the service tax after 2000 amendment, there is no bar from entering into an agreement and passing on the tax liability on the service provider – Award of the arbitrator is upheld – Arbitration – Finance Act, 1994 – s. 65 – Finance Act, 2000 – s. 116.

Doctrine/Principle – Doctrine of contra proferentem – Applicability of.

The appellant-manufacturer of steel products, appointed the respondent as the handling contractor for transportation of its materials. The parties entered into a contract on 17.6.1998. Clause 9.3, thereof provided that

contractor had to bear all taxes, duties and other liabilities in connection with discharge of his obligations.

By Finance Act, 1997, the service tax was extended to 'handling contractor'. The service tax was brought into force w.e.f. 16.11.1997. Consequent thereto, the appellant deducted service tax on the bills of the respondent for the period 30.11.1997 to 6.8.1999. The respondent refused to accept the deductions and raised a dispute for arbitration.

By Finance Act, 2000, an amendment was brought in whereby 'assessee' would be the person who availed the services and not the service provider.

The arbitrator dismissed the claim petition, holding that though the party who availed the service (appellant herein) was the 'assessee', in view of the agreement in clause 9.3 of the contract, it is contractual obligation of the claimant (respondent herein) to pay the service tax and the same was rightly deducted from the bills of the claimant in terms of the contractual obligation.

Respondent filed arbitration petition. Single Judge of High Court set aside the award holding that availer of service (appellant herein), as 'assessee' was liable to pay the tax. Appeal against the order was dismissed by Division Bench of the High Court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The respondent as the contractor had to bear the service tax under clause 9.3 as the liability in connection with the discharge of his obligations under the contract. The appellant could not be faulted for deducting the service tax from the bills of the respondent under clause 9.3, and there was no reason for the High

Court to interfere in the view taken by the arbitrator which was based, in any case on a possible interpretation of clause 9.3. The Single Judge as well as the Division Bench clearly erred in interfering with the award rendered by the arbitrator. The award made by the arbitrator is upheld. [Paras 30 and 31] [23-C-E]

2. If the evolution of the service tax law is seen, initially the liability to pay the service tax was on the service provider, though it is now provided by the amendment of 2000 that the same is on the person who avails of the service. The agreement between the parties was entered into on 7.6.1998. The appellant had deducted 5% service tax on the bills of the respondent for the period 30.11.1997 to 6.8.1999 which in fact it was required to deduct under the service tax law as it then stood. Subsequently, by the amendment of the definition of assessee effected on 12.5.2000 (though retrospectively effective from 16.7.1997) the liability to pay the service tax was shifted to the person who was availing the service as the assessee. [Para 22] [18-G-H; 19-A-C]

3. Since clause 9.3 of the contract refers to the liabilities of the contractor in connection with discharge of his obligations, one will have to refer to clause 6 of the "Terms and Conditions for Handling of Iron and Steel Materials of RINL, VSP" which was an integral part of the contract between the petitioner and the respondent, and which was titled "Obligations of the Contractor". The said paragraph 6 deals in great details with the work which was required to be done by the respondent as clearing and forwarding agent. It is therefore absolutely clear that the term "his obligations under this order" in clause 9.3 of the contract denoted the contractor's responsibilities under clause 6 in relation to the work which he was required to carry out as handling contractor. [Para 23] [19-D-F]

4. If the clause 9.3 and the contract are read as a whole and various provisions thereof are harmonized, clause 9.3 will have to be held as containing the stipulation of the contractor accepting the liability to pay the service tax, since the liability did arise out of the discharge of his obligations under the contract. It appears that the rationale behind clause 9.3 was that the petitioner as a Public Sector Undertaking should be thereby exposed only to a known and determined liability under the contract, and all other risks regarding taxes arising out of the obligations of the contractor are assumed by the contractor. [Para 25] [20-C-E]

5. Service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax. Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out

of obligations of the respondent under the contract would be borne by the respondent. It is conventional and accepted commercial practice to shift such liability to the contractor. [Paras 26 and 28] [20-E-H; 21-A-B, G]

Laghu Udyog Bharati vs. Union of India **1999 (6) SCC 418: 1999 (3) SCR 1199;** *Numaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd.* **2007 (8) SCC 466: 2007 (9) SCR 724 – relied on.**

6. Even, assuming that clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator. [Para 29] [22-C-D]

SAIL vs. Gupta Brother Steel Tubes Ltd. **2009 (10) SCC 63: 2009 (14) SCR 253;** *Sumitomo Heavy Industries Ltd. vs. ONGC Ltd.* **2010 (11) SCC 296 – relied on.**

7. If clause 9.3 was to be read as meaning that the respondent would be liable only to honour his own tax liabilities, and not the liabilities arising out of the obligations under the contract, there was no need to make such a provision in a bilateral commercial document executed by the parties, since the respondent would be otherwise also liable for the same. A clause in a commercial contract is a bilateral document mutually agreed upon, and hence the principle of *contra proferentem* can have no application. Therefore, clause 9.3 will have to be read as incorporated only with a view to provide for contractor's acceptance of the tax liability arising out of his obligations under the contract. [Para 27] [21-C-F]

Bank of India vs. K. Mohan Das **2009 (5) SCC 313: 2009 (5) SCR 118 – distinguished.**

H.P. State Electricity Board vs. R.J. Shah **1999 (4) SCC 214: 1999 (2) SCR 643;** *M/s Sudarsan Trading Co. vs. Govt. of Kerala* **1989 (2) SCC 38: 1989 (1) SCR 665;** *Gujarat Ambuja Cements Ltd. vs. Union of India* **2005 (4) SCC 214: 2000 (2) SCR 594 – referred to.**

Case Law Reference:

1999 (2) SCR 643	**Referred to.**	**Para 16**
1989 (1) SCR 665	**Referred to.**	**Para 17**
2000 (2) SCR 594	**Referred to.**	**Para 18**
1999 (3) SCR 1199	**Relied on.**	**Para 26**
2009 (5) SCR 118	**Distinguished.**	**Para 27**
2007 (9) SCR 724	**Relied on.**	**Para 28**
2009 (14) SCR 253	**Relied on.**	**Para 29**
2010 (11) SCC 296	**Relied on.**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3905 of 2012.

From the Judgment & Order dated 25.02.2008 of the High Court of Judicature at Bombay in Appeal No. 188 of 2006.

S. Ganesh, Pratap Venugopal, Surekha Raman, Namrata Sood, Gaurav Nair, Varun Singh (for K.J. John & Co.) for the Appellant.

K.K. Rai, S.K. Pandey, Awanish Kumar, Krishnanand Pandeya for the Respondent.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 25.2.2008 rendered by a Division Bench of the Bombay High Court in Appeal No.188/2006 confirming the decision of a single Judge of that court dated 4.7.2005 in Arbitration Petition No.364/2004, whereby the High Court has set aside the award dated 25.5.2004 passed by a sole arbitrator which award had dismissed the Claim Petition of the respondent against the appellant herein.

3. The questions involved in this appeal are two-fold, (i) firstly, whether under the relevant clause 9.3 of the terms and conditions of the contract between the parties, the appellant was right in deducting the service tax from the bills of the respondent and, (ii) secondly, whether the interpretation of this clause and the consequent award rendered by the arbitrator was against the terms of the contract and therefore illegal as held by the High Court, or whether the view taken by the arbitrator was a possible, if not a plausible view.

The contract and the relevant clause:

4. The appellant - a Govt. of India undertaking is engaged in the manufacture of steel products and pig-iron for sale in the domestic and export markets. The respondent is a partnership firm carrying on the business of transportation of goods. In the year 1997, the appellant appointed the respondent as the handling contractor in respect of appellant's iron and steel materials from their stockyard at Kalamboli, Navi Mumbai. A formal contract was entered into between the two of them on 17.6.1998. 'Terms and conditions for handling of iron and steel materials' though recorded in a separate document, formed a part of this contract. Clause 9.0 of these terms and conditions was concerning the payment of bills. Clause 9.3 thereof read as follows:-

> "9.3. The Contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the Tax Authorities for the account of the Contractor and the Company shall provide the Contractor with required Tax Deduction Certificate."

Evolution of service tax:

5. Service Tax was introduced for the first time under Chapter V of the Finance Act, 1994. Section 66 of the Act was the charging section and it provided for the levy of service tax at the rate of five per cent of the value of the taxable services. "Taxable service" was defined in Section 65 to include only three services namely any service provided to an investor by a stockbroker, to a subscriber by the telegraph authority, and to a policy-holder by an insurer carrying on general insurance business. Section 68 required every person providing taxable service to collect the service tax at specified rates. Section 69 of the Finance Act, 1994 provided for registration of the persons responsible for collecting service tax. Sub-sections (2) and (5) indicated that it was the provider of the service who was responsible for collecting the tax and obliged to get registered.

6. By the Finance Act, 1997 the first amendment to Section 65 of the Finance Act, 1994 was made, inter alia, by extending the meaning of "taxable service" from three services to 18 different services categorised in Section 65(41), sub-clauses (a) to (r). Sub-clause (j) made service to a client by clearing and forwarding agents in relation to clearing and forwarding operations, a taxable service. Similarly, service to a customer of a goods transport operator in relation to carriage of goods by road in a goods carriage was, by sub-clause (m), also included within the umbrella of taxable service. The phrases "clearing and forwarding agent" and "goods transport operator" were defined as follows:

> "65. (10) 'clearing and forwarding agent' means any person who is engaged in providing any service, either

directly or indirectly, connected with clearing and forwarding operations in any manner to any other person and includes a consignment agent;

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(17) 'goods transport operator' means any commercial concern engaged in the transportation of goods but does not include a courier agency;"

7. The service tax was brought into force on 5.11.1997 vide Notification No.44/77 with effect from 16.11.1997. Consequent thereupon, the appellant deducted 5% tax on the bills of the respondent for the period 30.11.1997 to 6.8.1999. The respondent, however, refused to accept the deductions, and raised a dispute for arbitration under clause 15 of the terms and conditions mentioned above. This dispute was referred for the arbitration of a sole arbitrator, a retired Judge of the Delhi High Court.

8. Rules 2 (xii) and 2 (xvii) of the Service Tax Rules, 1994 as amended in 1997 made the customers or clients of clearing and forwarding agents and of goods transport operators as assesses. These amended rules were challenged and were held ultra vires the Act by this Court in *Laghu Udyog Bharati vs. Union of India* reported in 1999 (6) SCC 418. The Court examined the provisions of the Act and particularly Section 68 and the definition of "person responsible for collecting the service tax" in Section 65(28) and in terms held in paragraph 9 that "the service tax is levied by reason of the services which are offered. The imposition is on the person rendering service."

9. To overcome the law laid down in *Laghu Udyog Bharati* (supra), the Finance Act 2000 brought in an amendment on 12.5.2000 (effective from 16.7.1997) in the manner indicated in Section 116 which reads as follows:

"116. Amendment of Act 32 of 1994. - During the period

commencing on and from the 16th day of July, 1997 and ending with the 16th day of October, 1998, the provisions of Chapter V of the Finance Act, 1994 shall be deemed to have had effect subject to the following modifications, namely-

(a) in Section 65,-

(i) for clause (6), the following clause had been substituted, namely-

'(6) "assessee" means a person liable for collecting the service tax and includes-

(i) his agent; or

(ii) in relation to services provided by a clearing and forwarding agent, every person who engages a clearing and forwarding agent and by whom remuneration or commission (by whatever name called) is paid for such services to the said agent; or

(iii) in relation to services provided by a goods transport operator, every person who pays or is liable to pay the freight either himself or through his agent for the transportation of goods by road in a goods carriage;'

(ii) after clause (18), the following clauses had been substituted, namely-

'(18-A) "goods carriage" has the meaning assigned to it in clause (14) of Section 2 of the Motor Vehicles Act, 1988;

(18-B) "goods transport operator" means any commercial concern engaged in the transportation of goods but does not include a courier agency;';

(iii) in clause (48), after sub-clause (m), the following sub-clause had been inserted, namely-

'(m-a) to a customer, by a goods transport operator in relation to carriage of goods by road in a goods carriage;';

(b) in Section 66, for sub-section (3), the following sub-section had been substituted, namely-

'(3) On and from the 16th day of July, 1997, there shall be levied a tax at the rate of five per cent of the value of taxable services referred to in sub-clauses (g), (h), (i), (j), (k), (l), (m), (m-a), (n) and (o) of clause (48) of Section 65 and collected in such manner as may be prescribed.';

(c) in Section 67, after clause (k), the following clause had been inserted, namely-

'(k-a) in relation to service provided by goods transport operator to a customer, shall be the gross amount charged by such operator for services in relation to carrying goods by road in a goods carriage and includes the freight charges but does not include any insurance charges'."

Proceedings prior to this appeal:

10. The respondent contended before the learned arbitrator that its dominant work was of transporting and forwarding of goods by road, and not of a handling contractor, and that the mere fact that it may be required to handle the goods in a manner and to the extent provided in the contract between the parties, was merely incidental. The learned arbitrator, however, noted that the contract between the parties dated 17.6.1998 referred the respondent as the 'handling contractor', who shall undertake the job of handling iron and steel materials at the yard of the company on the terms and conditions stipulated therein as also in the manner and in all respects as mentioned in the contract. He referred to the notice inviting tender, the declaration of particulars relating to the tender, the schedule of rates, the provision relating to scope of work and the obligations of the contractor detailed in clause

6. In that connection, he referred to the letter dated 27.11.1997 received from the office of Commissioner of Central Excise, Chennai wherein he had also held the work of the handling contractor as that of the clearing and forwarding agent liable to pay service tax. The arbitrator therefore held that the respondent was forwarding and clearing contractor.

11. Thereafter, he dealt with the question of liability to pay the service tax, and by a detailed award dated 25.5.2004 rejected the contentions of the respondent and dismissed the Claim Petition. In the penultimate paragraph, the learned arbitrator held as follows:-

"Clause 9.3 of the Tender Terms and Conditions of the Contract, to my mind is clear & unambiguous. Thus it is the Respondent who is the assessee. It is also true that liability is of the Respondent to pay the tax. But then, under the contract, under clause 9.3 to be more precise, it was agreed that it would be the claimant who shall bear "all taxes, duties and other liabilities" which accrue or become payable "In connection with the discharge of his obligation." Service tax was one such tax/duty or a liability which was directly connected with "the discharge of his obligation" as the clearing & forwarding agent. It is this contractual obligation which binds the claimant and though under the law it is the respondent who is the assessee, it can & rightly did deduct the service tax from the bills of the claimant in terms of the said contractual obligation, the validity and legality of which has not been challenged before me."

12. This award led the respondent to file a petition under Section 34 of the Arbitration and Conciliation Act, 1996 being Arbitration Petition No.364/2004 before the High Court of Judicature at Bombay. A Learned Single Judge of the High Court allowed that petition, and set aside the award with costs by judgment and order dated 4.7.2005. The learned Judge while arriving at that conclusion referred to the definition of the

term "assessee" and held that insofar as service tax under the Finance Act, 1994 is concerned, the appellant as the assessee was liable to pay the tax. The learned Judge observed as follows:-

> "The purpose of clause 9.3 is not to shift the burden of taxes from the assessee who is liable under the law to pay the taxes to a person who is not liable to pay the taxes under the law. In my opinion, the award therefore suffers from total non-application of mind and therefore, it is required to be set aside."

13. The appellant preferred an appeal to a Division Bench of Bombay High Court against the said judgment and order. The appeal was numbered as Appeal No. 188/2006. The Division Bench dismissed the appeal by holding as follows:

> "16. ……..As noted, the Respondents are not "Assessee" under the Service Tax Act. The Appellants are, being recipients, resisted and have filed the return. It is, therefore, the appellant's obligation to pay the Service Tax and not that of the Respondents, there is no specific clause that such service tax, liability would be deductible from the amount payable by the Appellants to the Respondent pursuant to the contract in question. The deduction as claimed and as directed by the award in absence of any agreement or clause, therefore, is not correct."

14. Being aggrieved by the said judgment and order, the present appeal has been filed. Mr. S. Ganesh, learned Senior Counsel has appeared for the appellant, and Mr. K.K. Rai, learned Senior Counsel has appeared for the respondent.

Submissions on behalf of the appellant:

15. As stated at the outset, the question involved before the arbitrator and in the offshoots therefrom, is with respect to interpretation of the above referred clause No.9.3. Mr. Ganesh,

learned counsel for the appellant submitted that the entire purpose in providing this clause was to provide that the contractor will be responsible for the taxes, duties and the liabilities which would arise in connection with discharge of the obligations of the contractor. The obligations of the contractor were laid down in clause 6.0 of the terms and conditions, referred to above. This clause provides the details of contractor's responsibility for clearance of the consignments of the appellant. The liability to pay the service tax arises out of the service provided by the respondent. There is no dispute that in view of the above referred amendment of 2000, the appellant as the recipient of the service is the assessee under the service tax law. However, there is no prohibition in the law against shifting the burden of the tax liability. In the instant case, the tax liability will depend upon the value of the taxable service provided by the respondent, and therefore clause 9.3 required the respondent to take the burden. Mr. Ganesh cited the example of sales tax which the assessee can shift to the customer. In his submission, the phrase, "liabilities in connection with the discharge of his obligations" under this clause will have to be construed in that context.

16. The learned counsel submitted that interpretation of clause 9.3 by the arbitrator was the correct one, and in any case, was a possible if not a plausible one. The Courts were, therefore, not expected to interfere therein. He submitted that the dispute in the present case was concerning the interpretation of a term of the contract. It has been laid down by this Court that in such situations, even if one is of the view that the interpretation rendered by the arbitrator is erroneous, one is not expected to interfere therein if two views were possible. Mr. Ganesh referred to the following observations of this Court in *H.P. State Electricity Board vs. R.J. Shah* reported in [1999 (4) SCC 214] at the end of paragraph 27, which are to the following effect:-

> "27. ……..The dispute before the arbitrators,

therefore, clearly related to the interpretation of the terms of the contract. The said contract was being read by the parties differently. The arbitrators were, therefore, clearly called upon to construe or interpret the terms of the contract. The decision thereon, even if it be erroneous, cannot be said to be without jurisdiction. It cannot be said that the award showed that there was an error of jurisdiction even though there may have been an error in the exercise of jurisdiction by the arbitrators."

17. It was also submitted by the learned counsel that the court is not expected to substitute its evaluation of the conclusion of law or fact arrived at by the arbitrator and referred to the following observation in paragraph 31 in *M/s Sudarsan Trading Co. vs. Govt. of Kerala* reported in [1989 (2) SCC 38].

> "…….in the instant case the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decision, the arbitrator had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties……."

Submissions on behalf of the respondent

18. Learned senior counsel for the respondent Mr. Rai, on the other hand, submitted that the concerned clause cannot be read to imply a right to shift the tax liability. He submitted that the appellant was the assessee for the payment of service tax, and the concerned clause merely laid down that the contractor will have to pay all taxes, duties and other liabilities which he was otherwise required to pay if they arise in connection with discharge of his obligations under the contract. The appellant was entitled to deduct only the income tax and other taxes or duties which it was so required by law to deduct. The disputed

deductions would mean that the contractor had taken over the tax liability of the appellant as if the liability was on the contractor. He referred to the judgment of this Court in *Gujarat Ambuja Cements Ltd. vs. Union of India* reported in [2005 (4) SCC 214]. This judgment discusses the evolution of the service tax as to how service tax was introduced by the Finance Act, 1994, how the meaning of taxable service was extended in 1997, and how the definition of assessee subsequently included the person who engages a clearing and forwarding agent, or a goods transport operator.

19. He drew our attention to paragraph 21 of *Gujarat Ambuja Cement Ltd.* (supra) wherein this Court observed as follows:

> "21. As is apparent from Section 116 of the Finance Act, 2000, all the material portions of the two sections which were found to be incompatible with the Service Tax Rules were themselves amended so that now in the body of the Act by virtue of the amendment to the word "assessee" in Section 65(5) and the amendment to Section 66(3), the liability to pay the tax is not on the person providing the taxable service but, as far as the services provided by clearing and forwarding agents and goods transport operators are concerned, on the person who pays for the services. As far as Section 68(1-A) is concerned by virtue of the proviso added in 2003, the persons availing of the services of goods transport operators or clearing and forwarding agents have explicitly been made liable to pay the service tax."

20. The respondent relied upon the judgment of this Court in *Bank of India vs. K. Mohan Das* reported in [2009 (5) SCC 313] by one of us (Lodha, J.). The issue in that matter was with respect to the interpretation of some of the provisions of the voluntary retirement scheme of 2000 of the appellant bank. In paragraph 32 thereof this Court has observed as follows:-

"….32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulation, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (verba chartarum fortius accipiuntur contra proferentem)."

Based on this paragraph, it was submitted that the arbitrator was bound to follow the principle of contra proferentem in the present case. It was contended that since the propounder of the contract was the petitioner in case of vagueness, the rule of contra proferentem will have to be applied in interpreting the present contract. Therefore, the liability to pay service tax was on the appellant as the assessee, and it could not be contended that under Clause 9.3 that liability was accepted by the respondent. The judgment in *Bank of India* (supra) was also pressed into service to submit that clause 9.3 and the contract must be read as a whole, and an attempt should be made to harmonise the provisions.

21. It was submitted by the respondent that this Hon'ble Court very succinctly summarised the legal principles for setting aside an award in *SAIL vs. Gupta Brother Steel Tubes Ltd.* (by one of us - Lodha J.) reported in [2009 (10) SCC 63] in paragraph 18 wherefrom principles (i) and (iv) would be attracted. As against that, the appellant stressed sub-paras (ii) & (vi) of the same paragraph 18. We may therefore quote the entire paragraph which reads as follows:-

"….18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions o this Court can be summarised thus:

(i) In a case where an arbitrator travels beyond the

contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal."

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award."

Consideration of the rival submissions:

22. We have noted the submissions of both the learned counsel. If we see the evolution of the service tax law, initially the liability to pay the service tax was on the service provider, though it is now provided by the amendment of 2000 that the same is on the person who avails of the service. It is relevant

to note that the agreement between the parties was entered into on 7.6.1998. The appellant had deducted 5% service tax on the bills of the respondent for the period 30.11.1997 to 6.8.1999 which in fact it was required to deduct under the service tax law as it then stood. Subsequently, by the amendment of the definition of assessee effected on 12.5.2000 (though retrospectively effective from 16.7.1997) the liability to pay the service tax was shifted to the person who was availing the service as the assessee. We must note that it is thereafter that the parties have gone for arbitration, and the respondent has relied upon the changed definition of assessee to contend that the tax liability was that of the appellant.

23. We are concerned with the question as to what was the intention of the parties when they entered into the contract on 7.6.1998, and how the particular clause 9.3 is to be read. Since clause 9.3 of the contract refers to the liabilities of the contractor in connection with discharge of his obligations, one will have to refer to clause 6 of the "Terms and Conditions for Handling of Iron and Steel Materials of RINL, VSP" which was an integral part of the contract between the petitioner and the respondent, and which was titled "Obligations of the Contractor". The said paragraph 6 deals in great details with the work which was required to be done by the respondent as clearing and forwarding agent. It is therefore absolutely clear that the term "his obligations under this order" in clause 9.3 of the contract denoted the contractor's responsibilities under clause 6 in relation to the work which he was required to carry out as handling contractor.

24. If we look into this clause 6.0, we find that the obligations of the contractor are defined and spelt out in minute details. Clause 6.0 is split into 33 sub-clauses, and it provides for obligations of the contractor in various situations concerning the clearance of consignments, and the services to be provided by the respondent as the handling contractor wherefrom the tax liability arises. The contractor is made responsible for

pilferage, any loss or misplacement of the consignments also. Clause 9.0 which deals with payment of bills, provides in clauses 9.1 and 9.2 that the bills will be prepared on the basis of the actual operations performed and the materials accounted on the basis of weight carried and received. Clause 9.3 has to be seen on this background. The tax liability will depend upon the value of the taxable service provided, which will vary depending upon the volume of the goods handled.

25. It was submitted on behalf of the respondent that clause 9.3 and the contract must be read as a whole and one must harmonise various provisions thereof. However, in fact when that is done as above, clause 9.3 will have to be held as containing the stipulation of the contractor accepting the liability to pay the service tax, since the liability did arise out of the discharge of his obligations under the contract. It appears that the rationale behind clause 9.3 was that the petitioner as a Public Sector Undertaking should be thereby exposed only to a known and determined liability under the contract, and all other risks regarding taxes arising out of the obligations of the contractor are assumed by the contractor.

26. As far as the submission of shifting of tax liability is concerned, as observed in paragraph 9 of *Laghu Udyog Bharati* (Supra), service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax. Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this

amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.

27. If this clause was to be read as meaning that the respondent would be liable only to honour his own tax liabilities, and not the liabilities arising out of the obligations under the contract, there was no need to make such a provision in a bilateral commercial document executed by the parties, since the respondent would be otherwise also liable for the same. In *Bank of India* (supra) one party viz. the bank was responsible for the formulation of the Voluntary Retirement Scheme, and the employees had only to decide whether to opt for it or not, and the principle of contra proferentem was applied. Unlike the VRS scheme, in the present case we are concerned with a clause in a commercial contract which is a bilateral document mutually agreed upon, and hence this principle can have no application. Therefore, clause 9.3 will have to be read as incorporated only with a view to provide for contractor's acceptance of the tax liability arising out of his obligations under the contract.

28. It was pointed out on behalf of the appellant that it is conventional and accepted commercial practice to shift such liability to the contractor. A similar clause was considered by this Court in the case of *Numaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd.,* reported in [2007 (8) SCC 466]. In that matter, the question was as to whether the contractor was liable to pay and bear the countervailing duty on the imports though this duty came into force subsequent to the relevant contract. The relevant clause 2(b) read as follows:

"2(b) All taxes and duties in respect of job mentioned in the aforesaid contracts shall be the entire responsibility of the contractor…"

Reading this clause and the connected documents, this Court held that they leave no manner of doubt that all the taxes and levies shall be borne by the contractor including this countervailing duty.

29. In any case, assuming that clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator. The legal position in this behalf has been summarized in paragaph 18 of the judgment of this court in *SAIL vs. Gupta Brother Steel Tubes Ltd.* (supra) and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. vs. ONGC Ltd.* reported in [2010 (11) SCC 296] to which one of us (Gokhale J.) was a party. The observations in paragraph 43 thereof are instructive in this behalf. This paragraph 43 reads as follows:

"43. …….The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn**. The Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire

is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

*[2009 (5) SCC 142]

30. In view of what is stated above, the respondent as the contractor had to bear the service tax under clause 9.3 as the liability in connection with the discharge of his obligations under the contract. The appellant could not be faulted for deducting the service tax from the bills of the respondent under clause 9.3, and there was no reason for the High Court to interfere in the view taken by the arbitrator which was based, in any case on a possible interpretation of clause 9.3. The learned single Judge as well as the Division Bench clearly erred in interfering with the award rendered by the arbitrator. Both those judgments will, therefore, have to be set-aside.

31. Accordingly, the appeal is allowed and the impugned judgments of the learned Single Judge as well as of the Division Bench, are hereby set aside. The award made by the arbitrator is upheld. The parties will bear their own costs.

K.K.T. Appeal allowed.

MEHRAWAL KHEWAJI TRUST (REGD.), FARIDKOT & ORS.

v.

STATE OF PUNJAB & ORS.

(Civil Appeal No. 4005 of 2012)

APRIL 27, 2012

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

Land Acquisition Act, 1894:

Compensation – Interest on solatium and additional market value – Sale exemplars – Annual increase – Deduction – Held: When there are several exemplars with reference to similar lands, it is the general rule that the highest of the exemplars, if it is satisfied that it is a bona fide transaction, has to be considered and accepted – It is not desirable to take an average of various sale deeds placed before the authority/court for fixing fair compensation – Sale exemplar being of 2½ years prior to s.4 Notification in the instant case, annual increase is fixed at 12% - However, the exemplar being of a smaller plot, a 20% deduction will be allowed from the market value – Compensation awarded accordingly – Claimant shall also be entitled to other statutory benefits including interest on solatium and additional market value.

The subject land admeasuring 33 acres, was acquired in terms of Notification dated 22.12.1979 u/s 4 of the Land Acquisition Act, 1894 (the Act). Dissatisfied by the award dated 27.10.1982, passed by the Collector, the appellants filed an application for reference u/s 18 of the Act. The reference court enhanced the compensation to Rs.1,00,000/- per acre. The High Court declined to interfere.

In the instant appeals, the appellants claimed compensation in terms of higher exemplar, namely, Ext. A-61, instead of averaging the prices, and interest on solatium.

Allowing the appeal, the Court

HELD: 1.1 The reference court failed to take note of the highest exemplar, namely, the sale transaction under Ext. A-61 dated 22.07.1977. When the land is being compulsorily taken away from a person, he is entitled to the highest value which similar land in the locality is shown to have fetched in a *bona fide* transaction entered into between a willing purchaser and a willing seller near about the time of the acquisition. When there are several exemplars with reference to similar lands, it is the general rule that the highest of the exemplars, if it is satisfied that it is a *bona fide* transaction, has to be considered and accepted. It is not desirable to take an average of various sale deeds placed before the authority/court for fixing fair compensation. Therefore, the market value as per Ext.A-61 dated 22.07.1977 was Rs. 1,39,130.43 per acre (approx. Rs.1.40 lakhs per acre). The said sale deed was two and a half years prior in time than s. 4(1) notification dated 22.12.1979. There is no reason to eschew the above sale transaction. It is also pointed out that the lands covered under Ext.A-61 are nearer to the lands of the appellants under acquisition. [para 12 and 15] [32-C-D]

Sri Rani M. Vijayalakshmamma Rao Bahadur, Ranee of Vuyyur vs. *Collector of Madras*, **(1969) 1 MLJ 45 (SC);** *State of Punjab and Another* vs. *Hansraj (Dead) by LRS. Sohan Singh and Others*, **(1994) 5 SCC 734;** *Anjani Molu Dessai vs. State of Goa and Another* **2010 (14) SCR 997 = (2010) 13 SCC 710 – relied on.**

1.2 This Court has time and again granted 10% to 15% increase per annum. The annual increase is fixed at

12% per annum and with that rate of increase, the market value of the appellants' land would come to Rs.1,82,000 per acre as on the date of notification. [para 16] [32-G; 33-C]

Ranjit Singh vs. Union Territory of Chandigarh **(1992) 3 SCC 659;** *Delhi Development Authority* vs. *Bali Ram Sharma & Ors.* **(2004) 6 SCC 533;** *ONGC Ltd.* vs. *Rameshbhai Jivanbhai Patel* **2008 (11) SCR 927 = (2008) 14 SCC 745;** *Union of India* vs. *Harpat Singh & Ors.* **(2009) 14 SCC 375 – relied on**

1.3 The exemplar Ext.A-61 dated 22.07.1977 is quite reasonable and acceptable. However, considering the fact that the area of land under Ext. A-61 dated 22.07.1977 is a smaller one, it is but proper that appropriate deduction should be made for the same. Thus, the market value for the acquired land is fixed at Rs.1,82,000/- minus Rs.36,400/- (towards 20% deduction) equivalent to Rs.1,45,600/- rounded at Rs.1,45,000/- per acre which is quite fair, reasonable and acceptable. [para 17] [33-F, H; 34-A]

Trishala Jain & Anr. vs. *State of Uttaranchal & Anr.,* **2011 (8) SCR 520 =2011 (6) SCC 47;** *State of Madhya Pradesh & Ors.* vs. *Kashiram (dead) by L.Rs. & Ors.,* **2010 (14) SCC 506 and** *Prabhakar Raghunath Patil & Ors.* vs. *State of Maharashtra,* **2010 (13) SCR 586 = 2010 (13) SCC 107 – relied on.**

2. The claimant is also entitled to get interest on solatium and additional market value. [para 18] [34-B]

Sunder vs. *Union of India*, **(2001) 7 SCC 211;** *Gurpreet Singh* vs. *Union of India*, **(2006) 8 SCC 457 – followed.**

State of Haryana vs. *Kailashwati*, **AIR 1980 P&H 117 – referred to.**

Case Law Reference:

(1969) 1 MLJ 45 (SC)	**relied on**	**para 12**
(1994) 5 SCC 734	**relied on**	**para 12**
2010 (14) SCR 997	**relied on**	**para 14**
(1992) 3 SCC 659	**relied on**	**para 16**
(2004) 6 SCC 533	**relied on**	**para 16**
2008 (11) SCR 927	**relied on**	**para 16**
(2009) 14 SCC 375	**relied on**	**para 16**
2011 (8) SCR 520	**relied on**	**para 17**
2010 (14) SCC 506	**relied on**	**para 17**
2010 (13) SCR 586	**relied on**	**para 17**
(2001) 7 SCC 211	**followed**	**para 18**
(2006) 8 SCC 457	**followed**	**para 18**
AIR 1980 P&H 117	**referred to**	**para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4005 of 2012.

From the Judgment & Order dated 06.01.2009 of the High Court of Punjab & Haryana at Chandigarh in R.F.A. No. 998 of 1988 (O & M).

Dhruv Mehta, Bijoylashmi, Raghav Pandey, Hema Shekhawat, Shobha for the Appellants.

T.S. Doabia, Vivek Goyal, AAG, Jagjit Singh Chhabra, Manindra Dubey, Ametesh Gaurav, Kuldip Singh 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 06.01.2009 passed by the High Court of Punjab and Haryana at Chandigarh in R.F.A. No. 998 of 1988 (O&M) along with seven other appeals by which the High Court declined to interfere with the order dated 11.02.1988 of the Additional District Judge, Faridkot in L.R. No. 20 of 1984.

3. Brief facts:

(a) Colonel Sir Harindar Singh, since deceased, was the former ruler of the State of Faridkot. In 1979, 259 Kanals and 16 Marlas (33 acres) of land owned by him had been acquired by the Punjab Government for extension of existing Grain Market at Faridkot vide Notification No. 14(68)M-iv-78/17315 dated 22.12.1979 under Section 4 of the Land Acquisition Act,1894 (hereinafter referred to as "the Act") which was published in the Punjab Government Gazette. Notification under Section 6 of the Act was issued on 19.02.1982. The award by the Collector was announced on 02.10.1982 and possession of the land was also taken on that day. The Collector awarded compensation at the rate of Rs.15,000/- per acre for Nehri land, Rs.10,000/- per acre for Barani land and Rs.25,000/- per acre for Banjar Kadim land and Ghair Mumkin land. The total compensation awarded including solatium at 15% was Rs.4,85,202.86/-.

(b) Aggrieved by the award passed by the Collector, on 27.10.1982, the appellants filed an application for reference under Section 18 of the Act. The Additional District Judge, Faridkot, by order dated 11.02.1988 in L.R. No. 20 of 1984 disposed of the reference by enhancing the compensation to Rs.1,00,000/- per acre.

(c) Against the aforesaid order, the appellants preferred R.F.A. No.998 of 1988 before the High Court. The High Court, by the impugned common order and judgment dated

06.01.2009, declined to interfere with the order passed by the Additional District Judge and did not enhance the compensation as claimed by the appellants.

(d) Aggrieved by the order passed by the High Court, the appellants have filed this appeal by way of special leave before this Court.

4. Heard Mr. Dhruv Mehta, learned senior counsel for the appellants, Mr. Vivek Goyal, learned Additional Advocate General for the State of Punjab and Mr. T.S. Doabia, learned senior counsel for respondent No.2.

5. The only point for consideration in this appeal is whether the appellants have made out a case for higher compensation as claimed.

6. The materials placed before the Land Acquisition Collector and the Reference Court show that the land is of great potential value inasmuch as the same being strategically located at a commercial hub abutting main roads and surrounded by commercial building including that of Canal Colony, Godowns of Food Corporation of India, private and Government Residential Colonies, Red Cross Bhawan, Government Medical College, existing Grain Market and Godown of Warehousing Corporation. It was also pointed out that one pocket of the land known as "Tikoni" is having main roads on three sides.

7. In support of their claim for higher compensation, the appellants have relied upon various sale deeds in the reference under Section 18 of the Act. It was further seen that the Reference Court discarded all the sale instances related to area less than one kanal and proceeded to consider other sale instances. It was pointed out that the State of Punjab did not challenge the said criteria adopted by the Reference Court. By pointing out the same, it was argued on the side of the

appellants that the exemplars for sale of one kanal or more are available to be relied upon.

8. The Reference Court has taken into consideration three sale exemplars which are Ext.A-48, Ext. A-52 and Ext.A-61. It is the grievance of the appellants that in the place of relying upon the highest exemplars, the Reference Court erroneously determined the market price of the appellants land by averaging the prices of all the three exemplars and thereby awarded a compensation of Rs. 1 lakh per acre. The High Court upheld the said order of the Reference Court.

9. The appellants are aggrieved on two aspects, firstly the highest exemplar, namely, Ext. A-61 should have been relied upon in the place of averaging the prices and secondly, the Reference Court did not grant interest on solatium.

10. The Reference Court held the following three sale transactions relied upon by the appellants as relevant for determination of the market value of the land in dispute:

Sale Deed	**Date**	**Area (K-M)**	**Price (Rs.K-M)**	**(Rs./acre)**
Ex. A-48	29.05.1979	3-4	31,000	77,500
Ex.A-52	20.03.1978	1- 5.25	19,000	1,21,600
Ex.A-61	22.07.1977	1-3	20,000	1,39,130

Considering all these transactions including other references, the Reference Court disposed of the matter by a common order whereby the compensation was enhanced to Rs.1,00,000/- per acre.

11. Since the measurements of the land under acquisition

are in kanals and marlas in the State of Punjab, the conversion of these units in acres and square yards is being set out as under:

20 marlas	=	1 kanal
8 kanals	=	1 acre
160 marlas	=	1 acre
1 acre	=	4840 sq. yds.
1 kanal	=	605 sq. yds.
1 marla	=	30.25 sq. yds.

12. As pointed out above, the Reference Court failed to take note of the highest exemplar, namely, the sale transaction under Ext.A-61 dated 22.07.1977. In this regard, it is useful to refer the decision of this Court in *Sri Rani M. Vijayalakshmamma Rao Bahadur, Ranee of Vuyyur vs. Collector of Madras,* (1969) 1 MLJ 45 (SC). In this case, this Court has held thus:

> "… where sale deeds pertaining to different transactions are relied on behalf of the Government, that representing the highest value should be preferred to the rest unless there are strong circumstances justifying a different course. In any case we see no reason why an average of two sale deeds should have been taken in this case."

13. In *State of Punjab and Another vs. Hansraj (Dead) by LRS. Sohan Singh and Others,* (1994) 5 SCC 734, this Court has held that method of working out the 'average price' paid under different sale transactions is not proper and that one should not have, ordinarily recourse to such method. This Court further held that the bona fide sale transactions proximate to the point of acquisition of the lands situated in the neighbourhood of the acquired lands are the real basis to determine the market value.

14. This Court in *Anjani Molu Dessai vs. State of Goa and Another,* (2010) 13 SCC 710, after relying upon the earlier decisions of this Court in *M. Vijayalakshmamma Rao*

Bahadur (supra) and *Hansraj* (supra) held in para 20 as under:

> "20. The legal position is that even where there are several exemplars with reference to similar lands, usually the highest of the exemplars, which is a bona fide transaction, will be considered."

Again, in para 23, it was held that "the averaging of the prices under the two sale deeds was not justified."

15. It is clear that when there are several exemplars with reference to similar lands, it is the general rule that the highest of the exemplars, if it is satisfied, that it is a bona fide transaction has to be considered and accepted. When the land is being compulsorily taken away from a person, he is entitled to the highest value which similar land in the locality is shown to have fetched in a bona fide transaction entered into between a willing purchaser and a willing seller near about the time of the acquisition. In our view, it seems to be only fair that where sale deeds pertaining to different transactions are relied on behalf of the Government, the transaction representing the highest value should be preferred to the rest unless there are strong circumstances justifying a different course. It is not desirable to take an average of various sale deeds placed before the authority/court for fixing fair compensation.

16. Based on the above principles, the market value as per Ext.A-61 dated 22.07.1977 was Rs. 1,39,130.43 per acre (approx. Rs.1.40 lakhs per acre). The said sale deed was two and a half years prior in time than Section 4(1) notification dated 22.12.1979. There is no reason to eschew the above sale transaction. It is also pointed out that the lands covered under Ext.A-61 are nearer to the lands of the appellants under acquisition. This Court has time and again granted 10% to 15% increase per annum. In *Ranjit Singh vs. Union Territory of Chandigarh* (1992) 3 SCC 659, this Court applied the rule of 10% yearly increase for award of higher compensation. In *Delhi Development Authority vs. Bali Ram Sharma & Ors.*

(2004) 6 SCC 533, this Court considered a batch of appeals and applied the rule of annual increase for grant of higher compensation. In *ONGC Ltd. vs. Rameshbhai Jivanbhai Patel* (2008) 14 SCC 745, this Court held that where the acquired land is in urban/semi-urban areas, increase can be to the tune of 10% to 15% per annum and if the acquired land is situated in rural areas, increase can be between 5% to 7.5% per annum. In *Union of India vs. Harpat Singh & Ors.* (2009) 14 SCC 375, this Court applied the rule of 10% increase per annum. Based on the above principle, we fix the annual increase at 12% per annum and with that rate of increase, the market value of the appellants' land would come to Rs.1,82,000 per acre as on the date of notification.

17. Though the Reference Court relied on the sale transaction covered under Ex. A-48 dated 29.05.1979 and fixed compensation @ Rs.1 lakh per acre inasmuch as under Ex. A-61 dated 22.07.1977, i.e., even two and a half years prior to notification under Section 4(1) of the Act, the adjacent lands have fetched higher price and in the light of the principles laid down in the above decisions, we are of the view that exemplar Ex.A-61 dated 22.07.1977 is quite reasonable and acceptable. However, as rightly pointed out by the learned counsel for Respondent No.2 and considering the fact that the area of land under Ex. A-61 dated 22.07.1977 is a smaller one, it is but proper that appropriate deduction should be made for the same. In *Trishala Jain & Anr. vs. State of Uttaranchal & Anr.,* 2011 (6) SCC 47, this Court has held that the value of sale of small pieces of land can be taken into consideration for determining the value of large tract of land but with a rider that the Court while taking such instances into consideration has to make a reasonable deduction keeping in view of other attendant circumstances. Similar view has been expressed in *State of Madhya Pradesh & Ors. vs. Kashiram (dead) by L.Rs. & Ors.,* 2010 (14) SCC 506 and *Prabhakar Raghunath Patil & Ors. vs. State of Mah*arashtra, 2010 (13) SCC 107. In view of the same, it would be just and reasonable to allow deduction @ 20%. By applying the above method, the market value for the

acquired land is fixed at Rs.1,82,000/- minus Rs.36,400/- (towards 20% deduction) equivalent to Rs.1,45,600/- rounded at Rs.1,45,000/- per acre which is quite fair, reasonable and acceptable.

18. The other grievance of the appellants is that interest on solatium and additional market value was not granted. This aspect has been considered and answered by the Constitution Bench in the case of *Sunder vs. Union of India,* (2001) 7 SCC 211. While considering various decisions of the High Courts and approving the decision of the Punjab and Haryana High Court rendered in *State of Haryana vs. Kailashwati,* AIR 1980 P&H 117, this Court held that the interest awardable under Section 28 would include within its ambit both the market value and the statutory solatium. In view of the same, it is clear that the person entitled to the compensation awarded is also entitled to get interest on the aggregate amount including solatium. The above position has been further clarified by a subsequent Constitution Bench judgment in *Gurpreet Singh vs. Union of India,* (2006) 8 SCC 457. Based on the earlier Constitution Bench decision in *Sunder* (supra), the present Constitution Bench held that the claimants would be entitled for interest on solatium and additional market value if the award of the Reference Court or that of the appellate Court does not specifically refer to the question of interest on solatium and additional market value or where the claim had not been rejected either expressly or impliedly. In view of the same, we hold that the appellants are entitled to interest on solatium and additional market value as held in the above referred two Constitution Bench judgments.

19. In the light of the above discussion, the appellants have made out a case for enhancement of compensation. Accordingly, the same is fixed at Rs.1,45,000/- per acre with all other statutory benefits including interest on solatium and additional market value. The appeal is allowed to the extent mentioned above. No order as to costs.

R.P. Appeal allowed.

AVISHEK GOENKA
v.
UNION OF INDIA AND ANR.
(Writ Petition (C) No. 265 of 2011)

APRIL 27, 2012

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

Motor Vehicles Rules, 1989:

r.100 – Black films on safety glass of the windscreen and windows of motor vehicle – Use of, permissibility – Held: Alteration to the conditions of the vehicle in a manner contravening the Motor Vehicles Act is not permissible in law – r.100(2) provides that the glass of the windscreen and rear window of every motor vehicle shall be such and shall be maintained in such a condition that VLT is not less than 70% and on side windows not less than 50% and would conform to Indian Standards [IS:2553-Part2-1992] – r.100 of the Rules is a valid piece of legislation and is on the statute book – Once such provision exists, directions cannot be issued contrary to the provision of law – Thus, in face of the language of the Rule, the relief prayed for in the instant writ petition that there should be 100% VLT cannot be granted – However, prayer relating to issuance of directions prohibiting use of black films on the glasses of vehicles certainly has merit – On the plain reading of r.100, it is clear that car must have safety glass having VLT at the time of manufacturing 70% for windscreen and 50% for side windows – It should be so maintained in that condition thereafter – The Rule and the explanation do not contemplate or give any leeway to the manufacturer or user of the vehicle to, in any manner, tamper with the VLT – The Rule and the IS only specify the VLT of the glass itself – If the glass so manufactured already has the VLT as specified, then the question of further reducing it by any means shall be in clear

violation of r.100 as well as the prescribed IS – Motor Vehicles Act, 1988 – ss.52, 53, 190.

r.100 – Interpretation of – Ban on use of black films on glass of the windscreen and windows of motor vehicle – Held: r.100 has to be interpreted in such a manner that it serves the legislative intent and the object of framing such rules, in preference to one which would frustrate the very purpose of enacting the Rules as well as undermining the public safety and interest – On the plain reading of r.100, it is clear that use of black films on the glasses of vehicles is prohibited – Such use of the black films have been proved to be criminal's paradise and a social evil and has jeopardized the security and safety interests of the State and public at large – If the crimes can be reduced by enforcing the prohibition of law, it would further the cause of Rule of Law and Public Interest as well – The private interest would stand subordinate to public good – The Rules are mandatory and nobody has the authority in law to mould these rules for the purposes of convenience or luxury and certainly not for crime – Interpretation of statutes.

Use of black films on vehicles of certain VIPs/VVIPs for security reasons – Permissibility – Held: Although this practice is not supported by law, as there is no notification by the competent authority giving exemption to such vehicles from the operation of r.100 or any of its provisions, the cases of the persons who have been provided with Z and Z+ security category may be considered by a Committee consisting of the Director General of Police/Commissioner of Police of the concerned State and the Home Secretary of that State/Centre – It will be for that Committee to examine such cases for grant of exemption in accordance with law and upon due application of mind – The appropriate government is free to make any regulations that it may consider appropriate in this regard.

r.100 – Tinted glass and glass coated with black film – Distinction between.

The instant writ petition was filed seeking direction for use of safety glasses on the windows/wind shields in vehicles having 100% Visual Light Transmission (VLT) only and to that extent, the petitioner challenged the correctness of Rule 100 of the Motor Vehicles Rules, 1989. The petitioner also prayed for prohibition on use of black films on the glasses of the vehicles, proper implementation of law in that behalf and finally, for taking stringent actions against the offenders, using vehicles with black filmed glasses. He also prayed that a larger police force should be deputed to monitor such offences.

Partly allowing the writ petition, the Court

HELD: 1. The word 'tinted' means shade or hue as per the dictionary. The rear and front and side glasses of vehicles are provided with such shade or tint, and therefore, they are widely referred to as 'tinted glasses', which is different from 'black films'. The glasses of the vehicles having a coating of black films cannot be termed as 'tinted glasses' because they are not manufactured as such. [Para 3] [45-B-C]

2. The Motor Vehicle Act, 1939 was enacted to consolidate and amend the laws relating to motor vehicles. This Act was subjected to various amendments. Finally, the Motor Vehicles Act, 1988 was enacted, *inter alia,* with the object and reason being to provide for quality standards for pollution control devices, provisions for issuing fitness certificate of the vehicle and effective ways of tracking down traffic offenders. Section 190 of the Act provides that any person who drives or causes or allows to be driven in any public place a motor vehicle or a trailer which has any defect, or violates the standards prescribed in relation to road safety, or violates the provisions of the Act or the Rules made therein, is punishable as per the provisions of the

Act. In other words, alteration to the conditions of the vehicle in a manner contravening the Act is not permissible in law. Section 52 of the Act declares that no owner of a motor vehicle shall so alter the vehicle that the particulars contained in the certificate of registration are at variance with those originally specified by the manufacturer. However, certain changes are permissible in terms of the proviso to this Section and that too with the approval of the Central Government/competent authority. In terms of Section 53 of the Act, if any registering authority or other prescribed authority has reason to believe that any motor vehicle within its jurisdiction is in such a condition that its use in a public place would constitute a danger to the public, or that it fails to comply with the requirements of the Act or the Rules made thereunder, whether due to alteration of vehicle violative of Section 52 of the Act or otherwise, the Authority may, after giving opportunity of hearing, suspend the registration certificate for the period required for rectification of such defect, and if the defect is still not removed, for cancellation of registration. In exercise of its power, under various provisions of the Act, the Central Government has framed the Rules. Chapter V of the Rules deals with construction, equipment and maintenance of motor vehicles. Rule 92 mandates that no person shall use or cause or allow to be used in any public place any motor vehicle which does not comply with the provisions of this Chapter. There are different Rules which deal with various aspects of construction and maintenance of vehicles including lights, brakes, gears and other aspects including overall dimensions of the vehicles. Rule 100 of the Rules concerns itself with the glass of windscreen and VLT of light of such glass windscreen. It specifically provides for fixation of glasses made of laminated safety glass conforming to Indian standards IS: 2553-Part 2 – 1992 and even for the kind of windscreen wipers required to be fixed on the front

screen of the vehicle. The Rules deal with every minute detail of construction and maintenance of a vehicle. In other words, the standards, sizes and specifications which the manufacturer of a vehicle is required to adhere to while manufacturing the vehicle are exhaustively dealt with under the Rules. What is permitted has been specifically provided for and what has not been specifically stated would obviously be deemed to have been excluded from these Rules. It would neither be permissible nor possible for the Court to read into these statutory provisions, what is not specifically provided for. These are the specifications which are in consonance with the prescribed IS No. 2553-Part 2 of 1992 and nothing is ambiguous or uncertain. Rules 104, 104A, 119 and 120 demonstrate the extent of minuteness in the Rules and the efforts of the framers to ensure, not only the appropriate manner of construction and maintenance of vehicle, but also the safety of other users of the road. [Paras 10-12] [47-A-H; 48-A-B; 49-E-H; 50-D]

4. Rule 100 provides for glass of windscreen and windows of every motor vehicle. The glass used has to be 'safety glass'. Then it provides for the inner surface angle on the windscreen. Rule 100(2) provides that the glass of the windscreen and rear window of every motor vehicle shall be such and shall be maintained in such a condition that VLT is not less than 70 per cent and on side windows not less than 50 per cent and would conform to Indian Standards [IS:2553-Part2-1992]. The said IS, under clause 5.1.7, deals with VLT standards and it provides for the same percentage of VLT through the safety glass, as referred to in Rule 100(2) itself. In face of the language of the Rule, the relief prayed for that there should be 100 per cent VLT cannot be granted. Rule 100 of the Rules is a valid piece of legislation and is on the statute book. Once such provision exists, this Court

cannot issue directions contrary to the provision of law. However, the prayer relating to issuance of directions prohibiting use of black films on the glasses of vehicles certainly has merit. On the plain reading of the Rule, it is clear that car must have safety glass having VLT at the time of manufacturing 70 per cent for windscreen and 50 per cent for side windows. It should be so maintained in that condition thereafter. In other words, the Rule not impliedly, but specifically, prohibits alteration of such VLT by any means subsequent to its manufacturing. How and what will be a "safety glass" has been explained in Explanation to Rule 100. The Explanation while defining 'laminated safety glass' makes it clear that two or more pieces of glass held together by an intervening layers of plastic materials so that the glass is held together in the event of impact. The Rule and the explanation do not contemplate or give any leeway to the manufacturer or user of the vehicle to, in any manner, tamper with the VLT. The Rule and the IS only specify the VLT of the glass itself. If the glass so manufactured already has the VLT as specified, then the question of further reducing it by any means shall be in clear violation of Rule 100 as well as the prescribed IS. The Rule requires a manufacturer to manufacture the vehicles with safety glasses with prescribed VLT. It is the minimum percentage that has been specified. The manufacturer may manufacture vehicle with a higher VLT to the prescribed limit or even a vehicle with tinted glasses, if such glasses do not fall short of the minimum prescribed VLT in terms of Rule 100. None can be permitted to create his own device to bring down the percentage of the VLT thereafter. Thus, on the plain reading of the Rule and the IS standards, use of black films of any density is impermissible. Another adverse aspect of use of black films is that even if they reflect tolerable VLT in the day time, still in the night it would clearly violate the prescribed VLT limits and would

result in poor visibility, which again would be impermissible. [Paras 13-18] [50-E-G; 51-B-H; 52-A-B]

6. Whatever are the rights of an individual, they are regulated and controlled by the statutory provisions of the Act and the Rules framed thereunder. The citizens at large have a right to life i.e. to live with dignity, freedom and safety. This right emerges from Article 21 of the Constitution of India. As opposed to this constitutional mandate, a trivial individual protection or inconvenience, if any, must yield in favour of the larger public interest. The legislative intent attaching due significance to the 'public safety' is evident from the object and reasons of the Act, the provisions of the Act and more particularly, the Rules framed thereunder. Rule 100 has to be interpreted in such a manner that it serves the legislative intent and the object of framing such rules, in preference to one which would frustrate the very purpose of enacting the Rules as well as undermining the public safety and interest. Use of these black films have been proved to be criminal's paradise and a social evil. The petitioner rightly brought on record the unanimous view of various police authorities right from the States of Calcutta, Tamil Nadu and Delhi to the Ministry of Home Affairs that use of black films on vehicles has jeopardized the security and safety interests of the State and public at large. This certainly helps the criminals to escape from the eyes of the police and aids in commission of heinous crimes like sexual assault on women, robberies, kidnapping, etc. If these crimes can be reduced by enforcing the prohibition of law, it would further the cause of Rule of Law and Public Interest as well. The private interest would stand subordinate to public good. In the instant case as well, even if some individual interests are likely to suffer, such individual or private interests must give in to the larger public interest. It is the duty of all

citizens to comply with the law. The Rules are mandatory and nobody has the authority in law to mould these rules for the purposes of convenience or luxury and certainly not for crime. [Paras 7, 19, 21] [46-B-C; 52-C-G; 53-E]

Hira Tikoo v. Union Territory of Chandigarh **(2004) 6 SCC 765: 2004(1) Suppl. SCR 65;** *Friends Colony Development Committee v. Stateof Orissa* **AIR 2005 SC 1 – relied on.**

7. Rule 100(2) specifies the VLT percentage of the glasses at the time of manufacture and to be so maintained even thereafter. In Europe, Regulation No. 43 of the Economic Commission for Europe of the United Nations (UN/ECE) and in Britain, the Road Vehicles (Construction and Use) Regulations, 1986, respectively, refer to the International Standard ISO 3538 on this issue, providing for VLT percentage of 70 and 75 per cent respectively. Use of black films or any other material upon safety glass, windscreen and side windows is impermissible. In terms of Rule 100(2), 70 per cent and 50 per cent VLT standard are relatable to the manufacture of the safety glasses for the windshields (front and rear) and the side windows respectively. Use of films or any other material upon the windscreen or the side windows is impermissible in law. It is the VLT of the safety glass without any additional material being pasted upon the safety glasses which must conform with manufacture specifications. [Paras 22, 23] [53-H; 54-A-D]

8. Another issue raised in the instant writ petition was regarding use of black films on vehicles of certain VIPs/ VVIPs for security reasons. Even this practice is not supported by law, as no notification by the competent authority has been brought to court's notice, giving exemption to such vehicles from the operation of Rule 100 or any of its provisions. The cases of the persons who have been provided with Z and Z+ security category

may be considered by a Committee consisting of the Director General of Police/Commissioner of Police of the concerned State and the Home Secretary of that State/ Centre. It will be for that Committee to examine such cases for grant of exemption in accordance with law and upon due application of mind. These certificates should be provided only in relation to official cars of VIPs/VVIPs, depending upon the category of security that such person has been awarded by the competent authority. The appropriate government is free to make any regulations that it may consider appropriate in this regard. The competent officer of the traffic police or any other authorized person shall challan such vehicles for violating Rules 92 and 100 of the Rules with effect from the specified date and thereupon shall also remove the black films from the offending vehicles. The manufacturer of the vehicle may manufacture the vehicles with tinted glasses which have Visual Light Transmission (VLT) of safety glasses windscreen (front and rear) as 70 per cent VLT and side glasses as 40 per cent VLT, respectively. No black film or any other material can be pasted on the windscreens and side glasses of a vehicle. For the reasons afore-stated, the use of black films of any VLT percentage or any other material upon the safety glasses, windscreens (front and rear) and side glasses of all vehicles throughout the country is prohibited. The Home Secretary, Director General/Commissioner of Police of the respective States/Centre shall ensure compliance with this direction. The directions contained in this judgment shall become operative and enforceable with effect from 4th May, 2012. [Paras 24-27] [54-E-H; 55-A-E]

Case Law Reference:

2004 (1) Suppl. SCR 65	**referred to**	**Para 20**
AIR 2005 SC 1	**referred to**	**Para 20**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 265 of 2011.

Under Article 32 of the Constitution of India.

Avishek Goenka Petitioner-In-Person.

Gaurab Banerji, ASG, T.A. Khan, S.A. Haseeb, B.K. Prasad for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Alarming rise in heinous crimes like kidnapping, sexual assault on women and dacoity have impinged upon the right to life and the right to live in a safe environment which are within the contours of Article 21 of the Constitution of India. One of the contributory factors to such increase is use of black films on windows/windshields of four-wheeled vehicles. The petitioner, as a public spirited person, has invoked the extraordinary jurisdiction of this Court under Article 32 of the Constitution in the present public interest litigation, praying for certain directions to stop this menace. According to the petitioner, this Court should issue a writ or direction requiring use of such safety glasses on the windows/ windshields in vehicles having 100 per cent Visual Light Transmission (for short 'VLT') only and, to that extent, the petitioner challenges the correctness of Rule 100 of the Motor Vehicles Rules, 1989 (for short "the Rules"). He also prays for prohibition on use of black films on the glasses of the vehicles, proper implementation of law in that behalf and finally, for taking stringent actions against the offenders, using vehicles with black filmed glasses. He also prays that a larger police force should be deputed to monitor such offences.

2. The use of black films upon the vehicles gives immunity to the violators in committing a crime and is used as a tool of criminality, considerably increasing criminal activities. At times, heinous crimes like dacoity, rape, murder and even terrorist acts are committed in or with the aid of vehicles having black

films pasted on the side windows and on the screens of the vehicles. It is stated that because of nonobservance of the norms, regulations and guidelines relating to the specifications for the front and rear windscreens and the side windows of the vehicles, the offenders can move undetected in such vehicles and commit crimes without hesitation.

3. The word 'tinted' means shade or hue as per the dictionary. The rear and front and side glasses of vehicles are provided with such shade or tint, and therefore, they are widely referred to as 'tinted glasses', which is different from 'black films'. The glasses of the vehicles having a coating of black films cannot be termed as 'tinted glasses' because they are not manufactured as such.

4. Besides aiding in commission of crimes, black films on the vehicles are also at times positively correlated with motor accidents on the roads. It is for the reason that the comparative visibility to that through normal/tinted glasses which are manufactured as such is much lesser and the persons driving at high speed, especially on highways, meet with accidents because of use of black filmed glasses.

5. The use of black films also prevents the traffic police from seeing the activity in the car and communicating with the driver of the vehicle. The petitioner also cites that the number of fatal accidents of vehicles having black films is much higher in India than in other parts of the world. The black filmed vehicles have lower visibility and therefore, the chances of accident are increased by 18 per cent to 38 per cent due to low visibility. He has also referred to the World Health Organization's data, pertaining to deaths caused on roads, which, in India have crossed that of China, though the latter has more vehicles, population and area in comparison to India. A device called luxometer can measure the level of opaqueness in windows owing to the application of black films but this device is a scarce resource and is very scantily available with the police personnel in India.

6. The Court can take a judicial notice of the fact that even as per the reports, maximum crimes are committed in such vehicles and there has been a definite rise in the commission of heinous crimes, posing a threat to security of individuals and the State, both.

7. Whatever are the rights of an individual, they are regulated and controlled by the statutory provisions of the Act and the Rules framed thereunder. The citizens at large have a right to life i.e. to live with dignity, freedom and safety. This right emerges from Article 21 of the Constitution of India. As opposed to this constitutional mandate, a trivial individual protection or inconvenience, if any, must yield in favour of the larger public interest.

8. The petitioner claims to have received various replies from the police department of different States like Tamil Nadu, West Bengal, Delhi and Ministry of Home Affairs, New Delhi. On the basis of the replies received under the provisions of the Right to Information Act, 2005, copies of which have been annexed to the writ petition, it is averred that these authorities are of the unanimous opinion that black films should be banned. Black filmed glasses help in commission of crime as well as hiding the criminals even during vehicle checks at 'Naka' points. Non-availability of electronic devices to measure violations and lack of police force to enforce the Rules are also apparent from these replies. The petitioner also states that the use of black films is not prevalent in developed and/or developing countries all over the world. In fact, in some of the countries, it is specifically banned. In Afghanistan, Belarus, Nigeria, Uganda and even in Pakistan, use of black films on the vehicle glasses is banned. Use of black films is not prevalent in United States of America, United Kingdom, Germany and other countries as well.

9. In order to examine the merits of the prayers made by the petitioner in the present application, it will be necessary for us to refer to the relevant laws.

10. The Motor Vehicle Act, 1939 was enacted to consolidate and amend the laws relating to motor vehicles. This Act was subjected to various amendments. Finally, the Motor Vehicles Act, 1988 (for short 'the Act') was enacted, inter alia, with the object and reason being, to provide for quality standards for pollution control devices, provisions for issuing fitness certificate of the vehicle and effective ways of tracking down traffic offenders. Section 190 of the Act provides that any person who drives or causes or allows to be driven in any public place a motor vehicle or a trailer which has any defect, or violates the standards prescribed in relation to road safety, or violates the provisions of the Act or the Rules made therein, is punishable as per the provisions of the Act. In other words, alteration to the conditions of the vehicle in a manner contravening the Act is not permissible in law. Section 52 of the Act declares that no owner of a motor vehicle shall so alter the vehicle that the particulars contained in the certificate of registration are at variance with those originally specified by the manufacturer. However, certain changes are permissible in terms of the proviso to this Section and that too with the approval of the Central Government/competent authority. In terms of Section 53 of the Act, if any registering authority or other prescribed authority has reason to believe that any motor vehicle within its jurisdiction is in such a condition that its use in a public place would constitute a danger to the public, or that it fails to comply with the requirements of the Act or the Rules made thereunder, whether due to alteration of vehicle violative of Section 52 of the Act or otherwise, the Authority may, after giving opportunity of hearing, suspend the registration certificate for the period required for rectification of such defect, and if the defect is still not removed, for cancellation of registration. In exercise of its power, under various provisions of the Act, the Central Government has framed the Rules. Chapter V of the Rules deals with construction, equipment and maintenance of motor vehicles. Rule 92 mandates that no person shall use or cause or allow to be used in any public place any motor vehicle which does not comply with the provisions of this Chapter. There

are different Rules which deals with various aspects of construction and maintenance of vehicles including lights, brakes, gears and other aspects including overall dimensions of the vehicles. Rule 100 of the Rules concerns itself with the glass of windscreen and VLT of light of such glass windscreen. It specifically provides for fixation of glasses made of laminated safety glass conforming to Indian standards IS:2553-Part 2 – 1992 and even for the kind of windscreen wipers required to be fixed on the front screen of the vehicle. Relevant part of Rule 100, with which we are concerned, reads as under:-

> **"100. Safety glass.**—(1) The glass of windscreens and the windows of every motor vehicle 188[other than agricultural tractors] shall be of safety glass:
>
> Provided that in the case of three-wheelers and vehicles with hood and side covers, the windows may be of 189[acrylic or plastic transparent sheet.]
>
> Explanation.—For the purpose of this rule,—
>
> (i) "safety glass" means glass conforming to the specifications of the Bureau of Indian Standards or any International Standards and so manufactured or treated that if fractured, it does not fly or break into fragments capable of causing severe cuts;
>
> (ii) any windscreen or window at the front of the vehicle, the inner surface of which is at an angle more than thirty degrees to the longitudinal axis of the vehicle shall be deemed to face to the front.
>
> [(2) The glass of the windscreen and rear window of every motor vehicle shall be such and shall be maintained in such a condition that the visual transmission of light is not less than 70%. The glasses used for side windows are such and shall be maintained in such condition that the visual transmission of light is not less than 50%, and shall conform to Indian Standards [IS: 2553— Part 2—1992];

(3) The glass of the front windscreen of every motor vehicle [other than two wheelers and agricultural tractors] manufactured after three years from the coming into force of the Central Motor Vehicles (Amendment) Rules, 1993 shall be made of laminated safety glass:

Provided that on and from three months after the commencement of the Central Motor Vehicles (Amendment) Rules, 1999, the glass of the front windscreen of every motor vehicle other than two-wheelers and agricultural tractors shall be made of laminated safety glass conforming to the Indian Standards IS: 2553—Part 2—1992.

Explanation.—For the purpose of these sub-rules "laminated safety glass" shall mean two or more pieces of glass held together by an intervening layer or layers of plastic materials. The laminated safety glass will crack and break under sufficient impact, but the pieces of the glass tend to adhere to the plastic material and do not fly, and if a hole is produced, the edges would be less jagged than they would be in the case of an ordinary glass."

11. From the above provisions, it is clear that the Rules deal with every minute detail of construction and maintenance of a vehicle. In other words, the standards, sizes and specifications which the manufacturer of a vehicle is required to adhere to while manufacturing the vehicle are exhaustively dealt with under the Rules. What is permitted has been specifically provided for and what has not been specifically stated would obviously be deemed to have been excluded from these Rules. It would neither be permissible nor possible for the Court to read into these statutory provisions, what is not specifically provided for. These are the specifications which are in consonance with the prescribed IS No. 2553-Part 2 of 1992 and nothing is ambiguous or uncertain. Let us take a few examples. Rule 104 requires that every motor vehicle, other than three wheelers and motor cycles shall be fitted with two

red reflectors, one each on both sides at their rear. Every motor cycle, shall be fitted with at least one red reflector at the rear. Rule 104A, provides that two white reflex in the front of the vehicle on each side and visible to on-coming vehicles from the front at night. Rule 106 deals with deflections of lights and requires that no lamp showing a light to the front shall be used on any motor vehicle including construction equipment vehicle unless such lamp is so constructed, fitted and maintained that the beam of light emitted therefrom is permanently deflected downwards to such an extent that it is not capable of dazzling any person whose eye position is at a distance of 8 metres from the front of lamp etc. Rules 119 and 120 specify the kind, size and manner in which the horn and silencer are to be fixed in a vehicle.

12. These provisions demonstrate the extent of minuteness in the Rules and the efforts of the framers to ensure, not only the appropriate manner of construction and maintenance of vehicle, but also the safety of other users of the road.

13. Rule 100 provides for glass of windscreen and windows of every motor vehicle. The glass used has to be 'safety glass'. Then it provides for the inner surface angle on the windscreen. Rule 100 (2) provides that the glass of the windscreen and rear window of every motor vehicle shall be such and shall be maintained in such a condition that VLT is not less than 70 per cent and on side windows not less than 50 per cent and would conform to Indian Standards [IS:2553-Part2-1992].

14. The said IS, under clause 5.1.7, deals with VLT standards and it provides for the same percentage of VLT through the safety glass, as referred to in Rule 100(2) itself.

15. Having dealt with the relevant provisions of law, we may also refer to a statistical fact that the number of violators of Rule 100 has gone up from 110 in the year 2008 to 1234 in the year

2010, in Delhi alone. This itself shows an increasing trend of offenders in this regard.

16. In face of the language of the Rule, we cannot grant the petitioner the relief prayed for, that there should be 100 per cent VLT. This Court cannot issue directions that vehicles should have glasses with 100 per cent VLT. Rule 100 of the Rules is a valid piece of legislation and is on the statute book. Once such provision exists, this Court cannot issue directions contrary to the provision of law. Thus, we decline to grant this prayer to the petitioner.

17. However, the prayer relating to issuance of directions prohibiting use of black films on the glasses of vehicles certainly has merit. On the plain reading of the Rule, it is clear that car must have safety glass having VLT at the time of manufacturing 70 per cent for windscreen and 50 per cent for side windows. It should be so maintained in that condition thereafter. In other words, the Rule not impliedly, but specifically, prohibits alteration of such VLT by any means subsequent to its manufacturing. How and what will be a "safety glass" has been explained in Explanation to Rule 100. The Explanation while defining 'laminated safety glass' makes it clear that two or more pieces of glass held together by an intervening layers of plastic materials so that the glass is held together in the event of impact. The Rule and the explanation do not contemplate or give any leeway to the manufacturer or user of the vehicle to, in any manner, tamper with the VLT. The Rule and the IS only specify the VLT of the glass itself.

18. Two scenarios must be examined. First, if the glass so manufactured already has the VLT as specified, then the question of further reducing it by any means shall be in clear violation of Rule 100 as well as the prescribed IS. Secondly, the rule requires a manufacturer to manufacture the vehicles with safety glasses with prescribed VLT. It is the minimum percentage that has been specified. The manufacturer may manufacture vehicle with a higher VLT to the prescribed limit

or even a vehicle with tinted glasses, if such glasses do not fall short of the minimum prescribed VLT in terms of Rule 100. None can be permitted to create his own device to bring down the percentage of the VLT thereafter. Thus, on the plain reading of the Rule and the IS standards, use of black films of any density is impermissible. Another adverse aspect of use of black films is that even if they reflect tolerable VLT in the day time, still in the night it would clearly violate the prescribed VLT limits and would result in poor visibility, which again would be impermissible.

19. The legislative intent attaching due significance to the 'public safety' is evident from the object and reasons of the Act, the provisions of the Act and more particularly, the Rules framed thereunder. Even if we assume, for the sake of argument, that Rule 100 is capable of any interpretation, then this Court should give it an interpretation which would serve the legislative intent and the object of framing such rules, in preference to one which would frustrate the very purpose of enacting the Rules as well as undermining the public safety and interest. Use of these black films have been proved to be criminal's paradise and a social evil. The petitioner has rightly brought on record the unanimous view of various police authorities right from the States of Calcutta, Tamil Nadu and Delhi to the Ministry of Home Affairs that use of black films on vehicles has jeopardized the security and safety interests of the State and public at large. This certainly helps the criminals to escape from the eyes of the police and aids in commission of heinous crimes like sexual assault on women, robberies, kidnapping, etc. If these crimes can be reduced by enforcing the prohibition of law, it would further the cause of Rule of Law and Public Interest as well.

20. This Court in the case of *Hira Tikoo v. Union Territory of Chandigarh* [(2004) 6 SCC 765], while dealing with the provisions of town planning and the land allotted to the allottees, upon which the allotees had made full payment, held that such

allotment was found to be contravening other statutory provisions and the allotted area was situated under the reserved forest land and land in periphery of 900 meters of Air Force Base. The Court held that there was no vested right and public welfare should prevail as the highest law. Thus, this Court, while relying upon the maxim "salus populi est suprema lex", modified the order of the High Court holding that the allottees had no vested right and the land forming part of the forest area could not be taken away for other purposes. Reference can also be made to the judgment of this Court in *Friends Colony Development Committee v. State of Orissa* [AIR 2005 SC 1], where this Court, while referring to construction activity violative of the regulations and control orders, held that the regulations made under Orissa Development Authorities Act, 1982 may meddle with private rights but still they cannot be termed arbitrary or unreasonable. The private interest would stand subordinate to public good.

21. In the present case as well, even if some individual interests are likely to suffer, such individual or private interests must give in to the larger public interest. It is the duty of all citizens to comply with the law. The Rules are mandatory and nobody has the authority in law to mould these rules for the purposes of convenience or luxury and certainly not for crime. We may also note that a Bench of this Court, vide its Order dated 15 th December, 1998 in Civil Appeal No. 3700 of 1999 titled *Chandigarh Administration and Others v. Namit Kumar & Ors.,* had permitted the use of 'light coloured tinted glasses' only while specifically disapproving use of films on the vehicles. Subsequently, in the same case, but on a different date, another Bench of this Court vide its order reported at [(2004) 8 SCC 446] made a direction that mandate of sub-Rule (2) of Rule 100 shall be kept in mind while dealing with such cases.

22. Rightly so, none of the orders of this Court have permitted use of black films. Rule 100(2) specifies the VLT percentage of the glasses at the time of manufacture and to

be so maintained even thereafter. In Europe, Regulation No. 43 of the Economic Commission for Europe of the United Nations (UN/ECE) and in Britain, the Road Vehicles (Construction and Use) Regulations, 1986, respectively, refer to the International Standard ISO 3538 on this issue, providing for VLT percentage of 70 and 75 per cent respectively.

23. In light of the above discussion, we have no hesitation in holding that use of black films or any other material upon safety glass, windscreen and side windows is impermissible. In terms of Rule 100(2), 70 per cent and 50 per cent VLT standard are relatable to the manufacture of the safety glasses for the windshields (front and rear) and the side windows respectively. Use of films or any other material upon the windscreen or the side windows is impermissible in law. It is the VLT of the safety glass without any additional material being pasted upon the safety glasses which must conform with manufacture specifications.

24. Another issue that has been raised in the present Writ Petition is that certain VIPs/VVIPs are using black films on their vehicles for security reasons. Even this practice is not supported by law, as no notification by the competent authority has been brought to our notice, giving exemption to such vehicles from the operation of Rule 100 or any of its provisions. Be that as it may, we do not wish to enter upon the arena of the security and safety measures when the police department and Home Ministry consider such exemption appropriate. The cases of the persons who have been provided with Z and Z+ security category may be considered by a Committee consisting of the Director General of Police/Commissioner of Police of the concerned State and the Home Secretary of that State/Centre. It will be for that Committee to examine such cases for grant of exemption in accordance with law and upon due application of mind. These certificates should be provided only in relation to official cars of VIPs/VVIPs, depending upon the category of security that such person has been awarded

by the competent authority. The appropriate government is free to make any regulations that it may consider appropriate in this regard.

25. The competent officer of the traffic police or any other authorized person shall challan such vehicles for violating Rules 92 and 100 of the Rules with effect from the specified date and thereupon shall also remove the black films from the offending vehicles.

26. The manufacturer of the vehicle may manufacture the vehicles with tinted glasses which have Visual Light Transmission (VLT) of safety glasses windscreen (front and rear) as 70 per cent VLT and side glasses as 40 per cent VLT, respectively. No black film or any other material can be pasted on the windscreens and side glasses of a vehicle.

27. For the reasons afore-stated, we prohibit the use of black films of any VLT percentage or any other material upon the safety glasses, windscreens (front and rear) and side glasses of all vehicles throughout the country. The Home Secretary, Director General/Commissioner of Police of the respective States/Centre shall ensure compliance with this direction. The directions contained in this judgment shall become operative and enforceable with effect from 4th May, 2012.

28. With the above directions, we partially allow this writ petition and prohibit use of black films of any percentage VLT upon the safety glasses, windscreens (front and rear) and side glasses. However, there shall be no order as to costs.

D.G. Writ Petition partly allowed.

P.A. MOHAMMED RIYAS
v.
M.K. RAGHAVAN & ORS.
(Civil Appeal No. 10262 of 2010)

APRIL 27, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

Representation of the People Act, 1951 – s. 83(1) proviso and s. 81 r/w ss. 100, 101 and 123 – Election petition alleging corrupt practice – Maintainability of – In absence of affidavit in Form 25 as required under s. 83(1) r/w. r. 94A of Conduct of Election Rules – Held: In the absence of proper verification as contemplated in s. 83, cause of action cannot be said to be complete – Thus the petition is not maintainable – In a case where proviso to s. 83(1) was attracted, a single affidavit would not be sufficient and two affidavits would be required one under Or. VI r. 15(4) CPC and the other in Form 25 – Conduct of Election Rules, 1961 – r. 94A – Code of Civil Procedure, 1908 – Or. VI r. 15 (4).

The question for consideration in the present appeal was whether an election petition u/s. 81 r/w ss. 100, 101 and 123 of Representation of the People Act, 1951 is not maintainable for want of complete cause of action in absence of the requisite affidavit in Form 25 as required under proviso to s. 83(1) of the Act r/w r. 94A of the Conduct of Election Rules, 1961.

Dismissing the appeal, the Court

HELD: 1. As is evident from Section 83 of Representation of the People Act, 1951, the election petitioner is required to set forth full particulars of any corrupt practice that he alleges and the names of the parties involved therein and it further provides that the

same is to be signed by the petitioner and verified in the manner laid down in CPC for the verification of proceedings. The proviso makes it clear that where the election petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof and the schedule or annexures to the petition shall also be signed by the petitioner and verified in the same manner as the petition. In other words, when corrupt practices are alleged in an election petition, the source of such allegations has to be disclosed and the same has to be supported by an affidavit in support thereof. [Para 23] [71-F-H; 72-A]

2. In the present case, although allegations as to corrupt practices alleged to have been employed by the respondent had been mentioned in the body of the petition, the petition itself had not been verified in the manner specified in Or. VI r. 15 CPC. Sub-Section (4) of Section 123 of the Act defines "corrupt practice" and the publication of various statements against the respondent which were not supported by affidavit, could not, therefore, have been taken into consideration by the High Court while considering the election petition. In the absence of proper verification, the election petition was incomplete as it did not contain a complete cause of action. [Para 24] [72-B-D]

3. It is not correct to say that it could not have been the intention of the legislature that two affidavits would be required, one under Or. VI r. 15(4) CPC and the other in Form 25. It is also not correct to say that even in a case where the proviso to Section 83(1) was attracted, a single affidavit would be sufficient to satisfy the requirements of both the provisions. Filing of two affidavits in respect of the self-same matter, would not render one of them redundant. [Para 25] [72-F-H; 73-A]

4. In the absence of proper verification, as contemplated in Section 83, it cannot be said that the cause of action was complete. The consequences of Section 86 of the Act come into play immediately in view of Sub-Section (1) which relates to trial of election petitions and provides that the High Court shall dismiss the election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act. Although, Section 83 has not been mentioned in Sub-Section (1) of Section 86, in the absence of proper verification, it must be held that the provisions of Section 81 had also not been fulfilled and the cause of action for the Election Petition remained incomplete. The Petitioner had the opportunity of curing the defect, but it chose not to do so. [Para 26] [73-D-F]

Hardwari Lal vs. Kanwal Singh **(1972) 1 SCC 214: 1972 (3) SCR742;** *M. Kamalam vs. Dr. V. A. Syed Mohammed* **1978 (2) SCC 659: 1978(3) SCR 446;** *R.P. Moidutty vs. P.T. Kunju Mohammad and Anr.* **(2000) 1 SCC 481;** *V. Narayanaswamy vs. C.P.Thirunavukkarasu* **(2000) 2 SCC 294: 2000 (1) SCR 292;** *RavinderSingh vs. Janmeja Singh and Ors.* **2000) 8 SCC 191: 2000 (3) Suppl. SCR 331;** *Azhar Hussain vs. Rajiv Gandhi* **1986 Supp SCC 315;***Samant N. Balkrishna and Anr. vs. George Fernandez and Ors.* **(1969) 3 SCC 238: 1969 (3) SCR 603;** *Dhartipakar Madan Lal Agarwal vs. RajivGandhi* **(1987) Supp SCC 93;** *Anil Vasudev Salgaonkar vs. NareshKushali Shigaonkar* **(2009) 9 SCC 310: 2009 (14) SCR 10;** *Dev Kanta Barooah vs. Golok Chandra Baruahand Ors.***(1970) 1 SCC 392: 1970 (3) SCR 662 – relied on.**

Murarka Radhey Shyam Ram Kumar vs. Roop Singh Rathore and Ors. **AIR 1964 SC 1545: 1964 SCR 573;** *F.A. Sapa and Ors. vs. Singora and Ors.* **(1991) 3 SCC 375: 1991 (2) SCR 752;** *Sardar Harcharan Singh Brar vs. Sukh Darshan Singh and Ors.* **(2004) 11 SCC 196: 2004 (5) Suppl. SCR 682;** *K.K. Ramachandran Master vs. M.V.*

Sreyamakumar and Ors. **(2010) 7 SCC 428: 2010 (7) SCR 712 – referred to.**

Prasanna Kumar vs. G.M. Siddeshwar **AIR 2010 Karnataka 113;** *V. Narayanaswamy vs. C.P. Thirunavukkarasu* **(2000) 2 SCC 294: 2000 (1) SCR 292;** *Ashwani Kumar Sharma vs. Yaduvansh Singh and Ors* **(1998) 1 SCC 416: 1997 (5) Suppl. SCR 616;** *Raj Narain vs. Indira Nehru Gandhi and Anr.* **(1972) 3 SCC 850: 1972 (3) SCR 841 – cited.**

Case Law Reference:

AIR 2010 Karnataka 113	**Cited**	**Para 9**
2000 (1) SCR 292	**Cited**	**Para 11**
1997 (5) Suppl. SCR 616	**Cited**	**Para 12**
1972 (3) SCR 841	**Cited**	**Para 12**
1978 (3) SCR 446	**Relied on**	**Para 14**
2000 (1) SCC 481	**Relied on**	**Para 14**
2000 (1) SCR 292	**Relied on**	**Para 15**
2000 (3) Suppl. SCR 331	**Relied on**	**Para 15**
1972 (3) SCR 742	**Relied on**	**Para 17**
1986 Supp SCC 315	**Relied on**	**Para 17**
1969 (3) SCR 603	**Relied on**	**Para 17**
(1987) Supp SCC 93	**Relied on**	**Para 17**
2009 (14) SCR 10	**Relied on**	**Para 17**
1970 (3) SCR 662	**Relied on**	**Para 18**
1964 SCR 573	**Referred to**	**Para 25**
1991 (2) SCR 752	**Referred to**	**Para 25**
2004 (5) Suppl. SCR 682	**Referred to**	**Para 25**
2010 (7) SCR 712	**Referred to**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10262 of 2010.

From the Judgment & Order dated 17.05.2010 of the High Court of Kerala in Election Petition No. 6 of 2009.

Krishnan Venugopal, V.K. Biju, Mannan, Gaurav, V.K. Verma for the Appellant.

P.P. Rao, S. Udaya Kumar Sagar, Karan Kanwal, Apeksha Sharan, Utsav Sidhu, Abhimanya T., Vineeti Sasidharan (for Lawyers'S Knit & Co.) for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The appellant herein, who contested the parliamentary elections held on 16th April, 2009 for the No.05 - Kozhikode Constituency of the Lok Sabha, challenged the election of the Respondent, Shri M.K. Raghavan, who was the returned candidate from the said constituency, by way of an Election Petition filed under Section 81 read with Sections 100, 101 and 123 of the Representation of the People Act, 1951, hereinafter referred to as the "1951 Act". The Appellant contested the election as the official candidate of the Communist Party of India (Marxist), hereinafter referred to as the "CPI(M)" led by the Left Democratic Front, hereinafter referred to as the "LDF", whereas the Respondent No.1 was a candidate of the Indian National Congress and he contested the election as the candidate of the United Democratic Front, hereinafter referred to as the "UDF".

2. The ground on which the election of the Respondent No.1 was challenged was that he had published false

statements with regard to the Appellant and thereby committed corrupt practice within the meaning of Section 123(4) of the 1951 Act, which provides that the publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false in relation to the personal character, conduct of any candidate, shall be deemed to be guilty of corrupt practice within the meaning of Section 123 of the 1951 Act. The details of the publications have been set out in paragraph 4 of the impugned judgment and are as follows :

""A. "Corrupt practice" by the publication of allegedly false statements in the form of -

(1) Annexure A ("Jagratha" ("Be careful") Newsletter bearing no date) allegedly published on 14-4-2009 and distributed on 15-4-2009

(2) Annexure H (Anonymous notice allegedly published on 14-4-2009 and 15-4-2009

(3) Annexure K (Report in the Mathrubhumi daily dated 31-3-2009 of the speech of M.P. Veerendra Kumar

(4) Annexure L Hand Bill dated 11-4-2009 allegedly distributed on 14-4-2009

(5) Annexure M Wall poster allegedly published on 14-4-2009 & 15-4-2009

(6) Annexure N Wall poster -do- -do-

AND

B. Fielding of other candidates having similarity in names."

3. The highlights of the six publications have also been shown in a tabular chart in paragraph 5 of the impugned judgment and speak for themselves.

4. During the hearing of the petition, a question was raised with regard to the maintainability of the petition for want of a complete cause of action. After considering the submissions made on such ground, the High Court accepted the objection taken with regard to the maintainability of the Election Petition and dismissed the same.

5. Appearing for the Appellant, Mr. Krishnan Venugopal, learned Senior Advocate, submitted that the learned Single Judge of the High Court had dismissed the Election Petition on two grounds :

(i) The Election Petition did not make out a complete cause of action in so far as it did not contain averments regarding the knowledge of the Respondent No.1 about the falsity of the statements in relation to each of the publications; and

(ii) The false statements did not relate to the personal character or candidature of the candidate within the meaning of false statements in section 123(4) of the Act.

6. On behalf of the Respondent No.1, a preliminary objection was raised at the time of hearing that the Election Petition was incomplete and was liable to be dismissed as it did not contain the requisite affidavit in Form 25, as required under the proviso to Section 83(1) of the 1951 Act read with Rule 94A of the Conduct of Election Rules, 1961. Mr. Venugopal contended that the trial of an Election Petition was a quasi-criminal proceeding which entailed that the statutory requirements for an Election Petition had to be strictly construed. Of course, it is also necessary to protect the purity and sobriety of elections by ensuring that the candidates did not secure vote by undue influence, fraud, communal propaganda, bribery or other corrupt practices, as mentioned in the 1951 Act. Mr.Venugopal submitted that the importance of Section 123(4) of the above Act lies in the fact that voters

should not be misled at the time of casting of their votes by a vicious and defamatory campaign against candidates. Mr.Venugopal submitted that the common refrain in all these various decisions is that while the requirements of the election laws are strictly followed, at the same time, the purity of the election process had to be maintained at all costs.

7. In addition to the above, Mr. Venugopal urged that the argument which had not been advanced earlier and had been orally raised for the first time before this Court, should not be taken into consideration. The preliminary objection taken at the time of final hearing that the Election Petition was not supported by an affidavit in Form 25, ought not to have been taken by the Respondent No.1 either in his Written Statement or in the Additional Written Statement filed in the High Court, or even in the reply to the Election Appeal before this Court. Accordingly, such an objection ought not to have been entertained and is liable to be ignored. Apart from the above, the learned Single Judge had already taken the Appellant's affidavit on record on 15th December, 2009, wherein it was expressly noted that the Respondent No.1 did not oppose the same being taken on record. Mr. Venugopal submitted that once the affidavit had been taken on record, it was no longer open to the Respondent No.1 to contend that the Election Petition was defective on the ground of absence of affidavit in support thereof. Mr. Venugopal submitted that the affidavit was in substantial compliance with the requirements of Order VI Rule 15(4) read with Order XIX of the Code of Civil Procedure, 1908, hereinafter referred to as "CPC" , and with Form 25 appended to the Conduct of Election Rules, 1961.

8. Mr. Venugopal urged that an Election Petition could not be dismissed in limine on the ground of non-compliance with the requirements of Section 83(1) thereof. It was also pointed out that Section 86(1) of the Act requires dismissal of an Election Petition only when it did not satisfy the requirements of Sections 81, 92 and 117. Section 83 has not been included

in the said provision. Mr. Venugopal submitted that this Court has repeatedly held that non-compliance of Section 83(1), which includes the requirement of verification under Section 83(1)(c), is a "curable" defect. In support of the said proposition, Mr. Venugopal referred to the decisions of this Court in (i*) Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore & Others* [AIR 1964 SC 1545]; (ii) *F.A. Sapa & Ors. Vs. Singora & Ors.* [(1991) 3 SCC 375]; (iii) *Sardar Harcharan Singh Brar Vs. Sukh Darshan Singh & Ors.* [(2004) 11 SCC 196] and *K.K. Ramachandran Master Vs. M.V. Sreyamakumar & Ors.* [(2010) 7 SCC 428]. Mr. Venugopal submitted that the submission made on behalf of the Respondent No.1 that an affidavit in Form 25 is an integral part of an Election Petition has been considered and rejected by a Bench of three learned Judges of this Court in *F.A. Sapa's* case (supra). Learned counsel submitted that as a general proposition, this Court has held that the affidavit of an Election Petition is not an integral part of a petition.

9. Mr. Venugopal next urged that it had been contended on behalf of the Respondent No.1 that the Election Petitioner/ Appellant had filed only one affidavit under Order VI Rule 15(4) of the CPC and had not filed a separate and second affidavit in Form 25, as provided under Section 94A of the Conduct of Election Rules, 1961, which is also required to be filed under the proviso to Section 83(1) of the Act in support of an allegation of a corrupt practice. Referring to the provisions of Section 83(1)(c) of the 1951 Act and Order VI Rule 15(4) CPC, Mr. Venugopal drew our attention to the Proviso to Section 83(1) which states that where the petitioner alleges a corrupt practice, the Election Petition shall "also be accompanied by an affidavit in the prescribed form". Learned counsel submitted that two affidavits would be necessary only where an Election Petitioner wanted the election to be set aside both on grounds of commission of one or more corrupt practices under Section 100(1)(b) of the Act and other grounds as set out in Section 100(1). In such a case, two affidavits could possibly be

required, one under Order VI Rule 15(4) CPC and another in Form 25. However, even in such a case, a single affidavit that satisfies the requirements of both the provisions could be filed. In any event, when the Election Petition was based entirely on allegations of corrupt practices, filing of two affidavits over the self-same matter would render one of them otiose, which proposition was found acceptable by the Karnataka High Court in *Prasanna Kumar Vs. G.M. Siddeshwar* [AIR 2010 Karnataka 113]. Learned counsel urged that even non-mentioning and wrong mentioning of a provision in an application is not a ground to reject the application.

10. Mr. Venugopal submitted that the object of the affidavit under the Proviso to Section 83(1) is to fix responsibility with a person making the allegations. Referring to the decision of this Court in the case of *F.A. Sapa* (supra), Mr. Venugopal pointed out that this Court had held that while there is sufficient justification for the law to be harsh who indulged in such practices, there is also the need to ensure that such allegations are made with the sense of responsibility and concern and not merely to vex the returned candidate.

11. Mr. Venugopal also urged that it has been held by this Court in *V. Narayanaswamy Vs. C.P. Thirunavukkarasu* [(2000) 2 SCC 294], that a petition levelling a charge of corrupt practice is required by law to be supported by an affidavit and the Election Petitioner is obliged to disclose his source of information in respect of the commission of the corrupt practice. He has to indicate that which of the allegations were true to his knowledge and which to his belief on information received and believed by him to be true. It was further observed that it was not the form of the affidavit but the substance that matters. Mr. Venugopal submitted that in the instant case, contrary to what had been argued on behalf of the Respondent No.1, read as a whole, the affidavit is in substantial compliance with the requirements of Form 25 because it clearly specifies the source of information, personal knowledge as well as the

names of the person from whom information was received by the Appellant in respect of each of the paragraphs and schedules annexed to the Election Petition.

12. On the question of finding of learned Single Judge that the Election Petitioner failed to state that a complete cause of action was incorrect, since the information sought for was available in different parts of the Election Petition. Mr. Venugopal submitted that the law laid down by this Court is that pleadings should not be read in isolation but must be read as a whole and construed reasonably to determine whether they did state a cause of action. Learned counsel submitted that it is now well-settled that material particulars, as opposed to material facts, need not be set out in the Election Petition and may be supplied at a later date. In this regard, learned counsel referred to the decision of this Court in *Ashwani Kumar Sharma Vs. Yaduvansh Singh & Ors.* [(1998) 1 SCC 416], and certain other decisions which only served to multiply the decisions rendered on the said subject. Further submission was made that a "clumsy drafting" of an Election Petition should not result in its dismissal so long as the petition could make out a charge of a head of corrupt practice when it is read as a whole and construed reasonably, as was observed in the case of *Raj Narain Vs. Indira Nehru Gandhi & Anr.* [(1972) 3 SCC 850].

13. Mr. Venugopal submitted that in the present Election Appeal the requirements of a proper pleading have been fully met but the learned Single Judge failed to appreciate that there is just one single head of corrupt practice alleged under Section 123(4) of the 1951 Act, relating to the publication of false statements about the personal character and candidature of the Appellant that were calculated to prejudice his election. Learned counsel submitted that the onus of proving a particular ingredient of Section 123(4) of the 1951 Act was not very onerous, since the Appellant is only required to plead and prove that the statements made by the Respondent No.1 or his election agent or any person acting with the consent of either the Respondent No.1 or his agent are false. Once such

statement is made on oath, the onus shifts to Respondent No.1 to demonstrate that he was not aware that the statements were not false. Various decisions were cited in support of such submission, to which reference may be made, if required, at the later stage of the judgment. The learned counsel submitted that the learned Single Judge had erred in concluding that the allegations in various publications were not against the personal character or candidature of the Appellant. It was submitted that the statement published in the newspapers was certainly sufficient to effect the private or personal character of the candidate. Mr. Venugopal submitted that the order of the Hon'ble High Court was required to be set aside with the direction to expedite the appeal of the Election Petitioner and to render its verdict at an early date.

14. The submissions of Mr. P.P. Rao, learned Senior Advocate, appearing for the Respondent No.1, were on expected lines. Mr. Rao reiterated the submissions which have been made before the High Court that the Proviso to Section 83(1)(c) of the 1951 Act, requires a separate affidavit to be filed in Form 25 in support of each allegation of corrupt practice made in the Election Petition. Mr. Rao submitted that in the instant case, no such affidavit had been filed at all. He also urged that it was settled law that the affidavit required to be filed, by the Proviso to Section 83(1)(c), is an integral part of the Election Petition and in the absence thereof, such petition did not disclose a cause of action and could not, therefore, be regarded as an Election Petition, as contemplated under Section 81 of the aforesaid Act. Mr. Rao urged that the Election Petition filed by the Appellant was, therefore, liable to be dismissed under Section 86(1) of the 1951 Act read with Order VII Rule 11(a) CPC. Reference was made to the decision of this Court in *M. Kamalam Vs. Dr. V.A. Syed Mohammed* [(1978) 2 SCC 659], in which this Court had held that if the Election Petition did not comply with Section 81 of the 1951 Act, the High Court was required to dismiss the same under Section 86(1) thereof. Learned counsel then referred to the

decision of this Court rendered in *R.P. Moidutty Vs. P.T. Kunju Mohammad & Anr.* [(2000) 1 SCC 481], wherein also the provision of verification of an election petition fell for consideration and it was held that for non-compliance with the requirements of the Proviso to Section 83(1) of the 1951 Act and Form 25 appended to the Rules, the election petition was liable to be dismissed at the threshold. It was also held that the defect in verification was curable, but failure to cure the defects would be fatal. It was further held that the object of requiring verification of an election petition is to clearly fix the responsibility for the averments and allegations in the petition on the person signing the verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts.

15. In regard to his aforesaid submission that the Election Petition must disclose the cause of action and that in respect of allegations in relation to corrupt practice, the same had to be supported by affidavit disclosing source of information and stating that the allegations are true to the petitioner's knowledge and belief by him to be true, Mr. Rao also referred to two other decisions of this Court in : (i) *V. Narayanaswamy Vs. C.P. Thirunavukkarasu* [(2000) 2 SCC 294] and (ii) *Ravinder Singh Vs. Janmeja Singh & Ors.* [(2000) 8 SCC 191].

16. Mr. Rao contended that Section 83(1)(c) of the above Act requires the Election Petition to be signed by the petitioner and verified in the manner specified in the CPC for the verification of pleadings. Referring to Order VI Rule 15 of the Code, Mr. Rao submitted that Sub-Rule (4) requires that the person verifying the pleading shall also furnish an affidavit in support of his pleadings, which was a requirement independent of the requirement of a separate affidavit with respect to each corrupt practice alleged, as mandated by the Proviso to Section 83(1)(c) of the above Act. Mr. Rao submitted that in the body of the Election Petition, there is no averment that the

Respondent No.1 believed the statements made in the publications to be false and did not believe them to be true, which, Mr. Rao submitted, was an essential ingredient of the corrupt practice alleged under Section 123(4) of the 1951 Act. Mr. Rao, however, admitted that in ground A of the Election Petition there is a submission based on the advice of the petitioner's counsel as per the verification made in the affidavit filed under Order VI Rule 15(4) CPC, which stands incorporated in Section 83(1)(c) of the 1951 Act by reference. According to Mr. Rao, there was no factual foundation laid for the alleged corrupt practice and the Election Petition was, therefore, liable to be dismissed.

17. Learned senior counsel further contended that omission to state a single material fact would lead to an incomplete cause of action and an Election Petition without material facts relating to a corrupt practice was not an Election Petition at all and such omission would amount to non-compliance of the mandate of Section 83(1)(a) of the above Act, which rendered the Election Petition ineffective. Beginning with the decision of this Court in *Hardwari Lal Vs. Kanwal Singh* [(1972) 1 SCC 214], Mr. Rao also referred to various other decisions on the same lines, including that of *Azhar Hussain Vs. Rajiv Gandhi* [1986 Supp SCC 315], which had relied on the decision in *Samant N. Balkrishna & Anr. Vs. George Fernandez & Ors.* [(1969) 3 SCC 238], *Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi* [(1987) Supp SCC 93] and *Anil Vasudev Salgaonkar Vs. Naresh Kushali Shigaonkar* [(2009) 9 SCC 310], to which reference may be made, if required, at a later stage.

18. Mr. Rao also urged that no corrupt practice could be made out in terms of Section 123(4) of the 1951 Act, if the allegations did not relate to the personal character, conduct or candidature of the concerned candidate and in support thereof, he relied on the decision of this Court in the case of *Dev Kanta Barooah Vs. Golok Chandra Baruah & Ors.* [(1970) 1 SCC 392] and several other cases, to which reference, if required, may be made at a later stage.

19. Attempting to distinguish the decisions cited by Mr. Venugopal, Mr. Rao submitted that all the said case laws were distinguishable on facts and had no application to the facts of the present case. In fact, Mr. Rao submitted that in *F.A. Sapa's* case (supra), it has been clearly indicated that the petition which did not strictly comply with the requirements of Section 83 of the 1951 Act, could not be said to be an Election Petition in contemplation of Section 81 and attract dismissal under Section 86(1) of the said Act.

20. Mr. Rao submitted that the Appellant had not been able to refute the findings of fact recorded by the High Court, which had elaborately considered the decisions of this Court and correctly applied to the facts of the present case. Mr. Rao submitted that the present appeal has no merit and is liable to be dismissed with costs.

21. Although, during the hearing of the Petition, a question was raised regarding the maintainability of the Petition for want of a complete cause of action and the same was accepted by the High Court which dismissed the Election Petition, the learned Single Judge of the High Court took the view that the Election Petition did not make out a complete cause of action as it was not in conformity with Form 25 annexed to the Rules.

22. This brings us to the next question that in order to protect the purity of elections in the manner indicated, it was the duty of the State to ensure that the candidates in the elections did not secure votes either by way of an undue influence, fraud, communal propaganda, bribe or other types of corrupt practices, as specified in the 1951 Act.

23. The provisions of Chapter II of the 1951 Act relate to the presentation of election petitions to the High Court and Section 83 which forms part of Chapter II deals with the contents of the Election Petition to be filed. For the purpose of reference, Section 83 is extracted hereinbelow :-

83. Contents of petition. (1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

As will be seen from the Section itself, the Election Petitioner is required to set forth full particulars of any corrupt practice that he alleges and the names of the parties involved therein and it further provides that the same is to be signed by the Petitioner and verified in the manner laid down in the Code of Civil Procedure for the verification of proceedings. What is important is the proviso which makes it clear that where the Election Petitioner alleges any corrupt practice, the Petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof and the schedule or annexures to the Petition shall also be signed by the Petitioner and verified in the same

manner as the Petition. In other words, when corrupt practices are alleged in an Election Petition, the source of such allegations has to be disclosed and the same has to be supported by an affidavit in support thereof.

24. In the present case, although allegations as to corrupt practices alleged to have been employed by the Respondent had been mentioned in the body of the Petition, the Petition itself had not been verified in the manner specified in Order VI Rule 15 of the Code of Civil Procedure. Sub-Section (4) of Section 123 of the 1951 Act defines "corrupt practice" and the publication of various statements against the Respondent which were not supported by affidavit, could not, therefore, have been taken into consideration by the High Court while considering the Election Petition. In the absence of proper verification, it has to be accepted that the Election Petition was incomplete as it did not contain a complete cause of action.

25. Of course, it has been submitted and accepted that the defect was curable and such a proposition has been upheld in the various cases cited by Mr. Venugopal, beginning with the decision in *Murarka Radhey Shyam Ram Kumar's* case (supra) and subsequently followed in *F.A. Sapa's* case (supra), Sardar Harcharan *Singh Brar's* case (supra) and *K.K. Ramachandran Master's* case (supra), referred to hereinbefore. In this context, we are unable to accept *Mr. Venugopal's* submission that despite the fact that the proviso to Section 83(1) of the 1951 Act provides that where corrupt practices are alleged, the Election Petition shall also be accompanied by an affidavit in the prescribed form, it could not have been the intention of the legislature that two affidavits would be required, one under Order VI Rule 15(4) CPC and the other in Form 25. We are also unable to accept Mr. Venugopal's submission that even in a case where the proviso to Section 83(1) was attracted, a single affidavit would be sufficient to satisfy the requirements of both the provisions. Mr. Venugopal's submission that, in any event, since the Election

Petition was based entirely on allegations of corrupt practices, filing of two affidavits in respect of the self-same matter, would render one of them redundant, is also not acceptable. As far as the decision in *F.A. Sapa's* case (supra) is concerned, it has been clearly indicated that the Petition, which did not strictly comply with the requirements of Section 86(1) of the 1951 Act, could not be said to be an Election Petition as contemplated in Section 81 and would attract dismissal under Section 86(1) of the 1951 Act. On the other hand, the failure to comply with the proviso to Section 83(1) of the Act rendered the Election Petition ineffective, as was held in *Hardwari Lal's* case (supra) and the various other cases cited by Mr. P.P. Rao.

26. In our view, the objections taken by Mr. P.P. Rao must succeed, since in the absence of proper verification as contemplated in Section 83, it cannot be said that the cause of action was complete. The consequences of Section 86 of the 1951 Act come into play immediately in view of Sub-Section (1) which relates to trial of Election Petitions and provides that the High Court shall dismiss the Election Petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the 1951 Act. Although, Section 83 has not been mentioned in Sub-Section (1) of Section 86, in the absence of proper verification, it must be held that the provisions of Section 81 had also not been fulfilled and the cause of action for the Election Petition remained incomplete. The Petitioner had the opportunity of curing the defect, but it chose not to do so.

27. In such circumstances, we have no other option, but to dismiss the appeal.

28. The Appeal is, accordingly, dismissed, but there will be no order as to costs.

K.K.T. Appeal dismissed.

A. SHANMUGAM

v.

ARIYA KSHATRIYA RAJAKULA VAMSATHU MADALAYA NANDHAVANA PARIPALANAI SANGAM REPRESENTED BY ITS PRESIDENT ETC.

(Civil Appeal Nos. 4012-13 of 2012)

APRIL 27, 2012

[DALVEER BHANDARI AND DIPAK MISARA, JJ.]

Suit – Suit for permanent injunction – Claiming possession of suit property – By the watchman who was engaged for taking care of the suit property – Claimant taking plea of adverse possession – Cross suit also by the owner of the suit property – Original court deciding in favour of the owner – First appellate court deciding in favour of the claimant – Second appeal decided against the claimant – On appeal, held: Watchman, caretaker or a servant employed to look after the property can never acquire interest in the property irrespective of his long possession – Such person holds the property of the principal only on behalf of the principal – Courts are not justified in protecting possession of such person.

Administration of Justice – Abuse of process of law – Watchman of suit property – Claiming possession of the property by filing suit – Held: The claimant is guilty of misuse of process of law – It is example of delayed administration of civil justice in the courts as the matter took 17 years to be finally decided by High Court – The claimant is guilty of suppressing material facts and introducing false pleas and irrelevant documents to mislead the court – Every litigant is expected to state truth in its pleadings, affidavits and evidence – Once the court discovers falsehood, concealment, distortion, obstruction or confession in pleadings and

documents, it should in addition to full restitution impose appropriate costs – It is obligation of the court to neutralize unjust and undeserved advantage obtained by abusing the judicial process – In the instant case ordinarily heavy cost would have been imposed, but in view of the fact that the claimant is a watchman, nominal cost of Rs. 25,000 imposed – Costs.

Respondent-society was the owner of the suit property which was a Dharmshala. Father of the appellant was engaged as a watchman of the said Dharmshala on a monthly salary by the respondent-society and he lived there with his family (including the appellant) in that capacity.

Appellant filed a suit in the year 1994 for permanent injunction against the respondent-society, alleging that the society tried to dispossess him. The suit was dismissed. But the appeal against the same was allowed decreeing the suit.

The cross suit of the respondent-society was decreed. The decree was reversed by first appellate court. In second appeals, in both the suits, High Court set aside the judgments of first appellate courts. Hence the present appeals, by the appellant.

Dismissing the appeals, the Court

HELD: 1.1 A well-reasoned judgment and a decree passed by the trial court ought not to have been reversed by the first appellate court. The appellant's father was engaged as a Watchman on a monthly salary and in that capacity he was allowed to stay in the suit premises and after his death his son (the appellant herein) continued to serve the respondent-society as a watchman and was allowed to live in the premises. The property is admittedly owned by the respondent-society. [Para 19] [88-C-D]

1.2 The appellant has also failed to prove the adverse possession of the suit property. Only by obtaining the ration card and the house tax receipts, the appellant cannot strengthen his claim of adverse possession. The High Court was fully justified in reversing the judgment of the first appellate court and restoring the judgment of the trial court. [Para 20] [88-E-F]

1.3 Watchman, caretaker or a servant employed to look after the property can never acquire interest in the property irrespective of his long possession. The watchman, caretaker or a servant is under an obligation to hand over the possession forthwith on demand. According to the principles of justice, equity and good conscience, courts are not justified in protecting the possession of a watchman, caretaker or servant who was only allowed to live into the premises to look after the same. The watchman, caretaker or agent holds the property of the principal only on behalf the principal. He acquires no right or interest whatsoever in such property irrespective of his long stay or possession. The protection of the court can be granted or extended to the person who has valid subsisting rent agreement, lease agreement or licence agreement in his favour. [Para 42] [116-H; 117-A-D]

2.1 The present case demonstrates widely prevalent state of affairs where litigants raise disputes and cause litigation and then obstruct the progress of the case only because they stand to gain by doing so. It is a matter of common experience that the Court's otherwise scarce resources are spent in dealing with non-deserving cases and unfortunately those who were waiting in the queue for justice in genuine cases usually suffer. This case is a typical example of delayed administration of civil justice in the courts. A small suit, where the appellant was directed to be evicted from the premises in 1994, took 17

years, before the matter was decided by the High Court. Unscrupulous litigants are encouraged to file frivolous cass to take undue advantage of the judicial system. [Para 21] [88-G-H; 89-A]

2.2 The purity of pleadings is immensely important and relevant. The pleadings need to be critically examined by the judicial officers or judges both before issuing the *ad interim* injunction and/or framing of issues. The entire journey of a judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system. [Paras 23 and 24] [93-E-F]

Maria Margarida Sequeria Fernandes and Ors. v. Erasmo Jack deSequeria (Dead) through L.Rs. **(2012) 3 SCALE 550;** *Dalip Singh v. State of U.P. and* Ors. **(2010) 2 SCC 114: 2009 (16) SCR 111 – relied on.**

2.3 The pleadings are foundation of litigation but sufficient attention is not paid to the pleadings and documents by the judicial officers before dealing with the case. It is the bounden duty and obligation of the parties to investigate and satisfy themselves as to the correctness and the authenticity of the matter pleaded. [Para 26] [101-B-C]

2.4 The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands. [Para 27] [101-D]

2.5 It is imperative that judges must have complete

grip of the facts before they start dealing with the case. That would avoid unnecessary delay in disposal of the cases. [Para 28] [101-E]

2.6 Ensuring discovery and production of documents and a proper admission/denial is imperative for deciding civil cases in a proper perspective. In relevant cases, the courts should encourage interrogatories to be administered. [Para 29] [101-F]

2.7 If issues are properly framed, the controversy in the case can be clearly focused and documents can be properly appreciated in that light. The relevant evidence can also be carefully examined. Careful framing of issues also helps in proper examination and cross-examination of witnesses and final arguments in the case. [Para 32] [102-G-H]

2.8 A large number of cases are filed on false claims or evasive pleas are introduced by the defendant to cause delay in the administration of justice and this can be sufficiently taken care of, if the courts adopt realistic approach granting restitution. Unless wrongdoers are denied profit or undue benefit from frivolous litigations, it would be difficult to control frivolous and uncalled for litigations. The courts have been very reluctant to grant the actual or realistic costs. The cases need to be decided while keeping pragmatic relaties in view. It is to be ensured that unscrupulous litigant is not permitted to derive any benefit by abusing the judicial process. [Paras 34 and 35] [104-D-E; 105-C-D]

Ramrameshwari Devi v. Nirmala Devi **(2011) 8 SCC 249: 2011 (8) SCR 992 ;** *Indian Council for Enviro-Legal Action v. Union of India and Ors.* **(2011) 8 SCC 161: 2011 (9) SCR 146 – relied on.**

2.9 False averments of facts and untenable

contentions are serious problems faced by the courts. The other problem is that litigants deliberately create confusion by introducing irrelevant and minimally relevant facts and documents. The court cannot reject such claims, defences and pleas at the first look. It may take quite sometime, at times years, before the court is able to see through, discern and reach to the truth. More often than not, they appear attractive at first blush and only on a deeper examination, the irrelevance and hollowness of those pleadings and documents come to light. [Para 37] [114-G-H; 115-A]

2.10 The courts are usually short of time because of huge pendency of cases and at times the courts arrive at an erroneous conclusion because of false pleas, claims, defences and irrelevant facts. A litigant could deviate from the facts which are liable for all the conclusions. In the journey of discovering the truth, at times, Supreme Court, on later stage, but once discovered, it is the duty of the court to take appropriate remedial and preventive steps so that no one should derive benefits or advantages by abusing the process of law. The court must effectively discourage fraudulent and dishonest litigants. [Para 38] [115-B-C]

2.11 It is the bounden duty of the Court to uphold the truth and do justice. Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts. The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful. [Para 42] [116-C-E]

2.12 Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition

to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrong doer in the temple of justice. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice. It is the bounden obligation of the court to neutralize any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process. [Para 42] [116-E-G]

2.13 In the facts of the case, it is quite evident that the appellant is guilty of suppressing material facts and introducing false pleas and irrelevant documents. The appellant has also clouded the entire case with pleas which have nothing to do with the main controversy involved in the case. [Para 39] [115-D-E]

2.14 All documents filed by the appellant along with the plaint have no relevance to the controversy involved in the case. The documents have been filed to mislead the court. The first appellate court has, in fact, got into the trap and was misled by the documents and reached to an entirely erroneous finding that resulted in undue delay of disposal of a small case for almost 17 years. [Para 40] [115-F-G]

2.15 The appellant is also guilty of introducing untenable pleas. The plea of adverse possession which has no foundation or basis in the facts and circumstances of the case was introduced to gain undue benefit. The court must be cautious in granting relief to a party guilty of deliberately introducing irrelevant and untenable pleas responsible for creating unnecessary confusion by introducing such documents and pleas. These factors must be taken into consideration while granting relief and/or imposing the costs. [Para 41] [115-H; 116-A-B]

3. In the instant case, the court would have ordinarily

imposed heavy costs and would have ordered restitution but looking to the fact that the appellant is a watchman and may not be able to bear the financial burden, the appeals are dismissed with very nominal costs of Rs. 25,000/- to be paid within a period of two months and the appellant is directed to vacate the premises within two months from the date of the judgment and handover peaceful possession of the suit property to the respondent-society. [Para 43] [117-E-F]

Alagi Alamelu Achi v. Ponniah Mudaliar **AIR 1962 Madras 149 – referred to.**

Case Law Reference:

AIR 1962 Madras 149	**Referred to**	**Para 13**
(2012) 3 SCALE 550	**Relied on**	**Para 22**
2009 (16) SCR 111	**Relied on**	**Para 24**
2011 (8) SCR 992	**Relied on**	**Para 34**
2011 (9) SCR 146	**Relied on**	**Para 36**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4012-13 of 2012.

From the Judgment & Order dated 20.04.2011 of the High Court of Judicature at Madras in S.A. Nos. 1973 of 2002 and 869 of 2009.

V. Prabhakar, R. Chandrachud, Jyoti Prashar, S. Natesan, Arul for the Appellant.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Delay condoned.

2. Leave granted.

3. These two appeals arise out of cross suits filed before

the High Court of Judicature at Madras in S.A. No. 1973 of 2002 and S.A. No. 869 of 2009 dated April 20, 2011. In both these appeals, A. Shanmugam is the appellant and Ariya Kshatriya Raja Kulavamsa Madalaya Nandhavana Paripalana Sangam is the respondent which for convenience hereinafter is referred to as the 'Society'.

4. The property in question belonged to one, Muthu Naicker, who dedicated the suit land for construction of a Dharamshala. In the southern part of India, it is called as 'choultry'. A 'Dharamshala' is commonly known as 'a place where boarding facilities are provided either free of cost or at a nominal cost'. In the instant case, a Dharamshala was to be constructed for the benefit of the Ariya Kshatriya community. The appellant's father, Appadurai Pillai was engaged as a Watchman on a monthly salary by the respondent-Society to look after the Dharamshala and in that capacity lived in the premises with his family including the appellant.

5. According to the appellant, in the year 1994, the respondent-Society claiming to be the owner of the suit property tried to dispossess the appellant by force necessitating the appellant to file a suit in O.S. No.1143 of 1994 on the file of the Second Additional District Munsif, Tiruvannamalai praying for issuance of permanent injunction against the respondent-Society. The said suit was, however, dismissed. As against that, the appellant preferred an appeal in A.S. No.94 of 2001 on the file of the Additional District Judge, Tiruvannamalai and the said appeal was allowed and consequently, the appellant's suit was decreed. The respondent-Society preferred a Second Appeal in S.A. No.1973 of 2002 before the High Court of Madras against the said judgment of the Additional District Judge.

6. The respondent-Society during the pendency of Second Appeal filed a suit in O.S. No.239 of 2003 before the Additional Subordinate Judge, Tiruvannamalai praying for declaration of title and recovery of possession of the suit property comprised

in T.S. No.1646/1 of Tiruvannamalai Town having an extent of 70 feet east to west and 30 feet north to south bearing Old Door No.116 and New Door No.65. The said suit was decreed as prayed for. Against that, the appellant preferred an appeal in A.S. No.19 of 2008 on the file of the Additional District Judge, Tiruvannamalai and the decision of the trial court was reversed in Appeal resulting in the dismissal of the suit filed by the respondent-Society. Aggrieved against the appeal being allowed and the suit being dismissed, the respondent-Society preferred a Second Appeal in S.A. No.869 of 2009 before the High Court of Madras. The learned Judge of the Madras High Court heard both the aforesaid Second Appeals together and by a common judgment set aside the well-considered judgments of the First Appellate Court. Aggrieved by the said common impugned judgment, the appellant has preferred these appeals by way of special leave.

7. It may be pertinent to mention that the appellant filed Original Suit No.1143 of 1994 and also filed the following documents :-

1.	20.11.1899	Certified copy of the registered agreement between Krishnasamy Raju and others
2.		Certified copy of the bye-law of the plaintiff Sangam(respondent-Society before us)
3.		Certified copy of Memorandum of Association of plaintiff-Sangam (respondent-Society before us)
4.		Certified copy of Registration Certificate
5.		Certified copy of field Map Book Plan

6.		Certified copy of Town Survey Field Register
7.		Certified copy of Demand Register Extent
8.		Certified copy of Tax receipts (9)
9.		Certified copy of Indemnity Card by Munusamy\
10.		Certified copy of Ration Card of Munusamy
11.		Certified copy of account of plaintiff Sangam (respondent-Society before us)
12.		Certified copy of photocopy of Silesasanam
13.	14.5.29	Copy of application by the President of plaintiff-Sangam to Municipal Chairman
14.	24.2.32	Copy of the application by the President of plaintiff-Sangam to Municipal Chairman
15.	17.8.2001	Certified copy of judgment in O.S. No. 1143/94 of District Munsif Court, Tiruvannamalai
16.	31.5.2002	Certified copy of judgment in A.S. No.94/2001 of Additional District Judge, Tiruvannamalai
17.	2000-02	House Tax Receipt
18.	2001-02	House Tax Receipt

19. 2002-03 House Tax Receipt

20. Xerox copy of the Minutes Book pages 13 to 19.

8. The trial court on the basis of the pleadings has framed the following issues:-

1. Whether the plaintiff has the right to possession and enjoyment of the suit property?

2. Whether the plaintiff and his father have obtained right of enjoyment through adverse enjoyment?

3. As per the averments on the defendant's side, is it true that the plaintiff's father in the capacity of the watchman of the suit property has been in enjoyment of the suit property?

4. Whether the plaintiff is entitled to a relief of permanent injunction as prayed for by him?

5. Other relief?

9. In Suit No. 239 of 2003 filed by the respondent-Society against the appellant seeking a decree for possession, the following issues were framed:-

1. Whether the plaintiff Association is competent to file this case?

2. Whether the plaint property belongs to the plaintiff's club?

3. Is it right that the defendant's father Appadurai Pillai in the capacity of a Watchman, has been maintaining the suit property?

4. When there is a Second Appeal pending before the High Court in S.A. No.1923 of 2002 against the judgment and decree of the Court of the District Munsif in O.S. No. 1143 of 1994 is sustainable.

5. Whether the defendant has acquired the right of possession in the plaint property due to adverse possession?

6. Whether this case has been procedurally evaluated for the court fee and jurisdiction?

7. Is the Court competent to try this Court?

8. To what other relief is the plaintiff entitled to?

10. The trial court in Suit No.1143 of 1994 has held that the appellant was in possession of the suit property in the capacity of a Watchman. Regarding Issue No. 3, the trial court has observed as under:

> "... ... ...As per the July 1949 register Ex.D5 it is established that the plaintiff's father has been employed as a watchman in the association. Further, it has already been decided that the suit property belongs to the defendants Association. Further it has also been decided that apart from that the plaintiff's father has only been a watchman to the suit property. Only source of the plaintiff's father had been a watchman, he was permitted to stay in a portion in the suit property only because of that he had not instituted a case for the total extent 110 x 56 feet but only for the extent of 70 x 30 feet. He admits that the remaining portion is in the possession of the association. It is true that only for this reason the defendants association has permitted that plaintiff and his family members to reside in the suit property. It is evident that only in the status of a watchman that the plaintiff's father has been occupying a portion in the suit survey number. This issue is decided accordingly."

11. Regarding Issue No. 2 of adverse possession, the trial court found that the appellant's father was employed by the

respondent-Society as a Watchman on a petty monthly salary and in that capacity he was allowed to stay in the suit property. The appellant did not acquire the suit property by adverse possession and the issue was rightly decided against the appellant by the trial court.

12. Regarding issue No. 4, the trial court found that the appellant's father was residing in the suit premises as a Watchman and after his death the appellant was also allowed to continue to stay in the suit property as a Watchman.

13. The trial court relied on a judgment of the Madras High Court reported in *Alagi Alamelu Achi v. Ponniah Mudaliar* AIR 1962 Madras 149. The Court held that a person in wrongful possession is not entitled to be protected against lawful owner by an order of injunction.

14. The trial court also came to a definite conclusion that the appellant has concealed certain vital facts and has not approached the Court with clean hands and consequently, he is not entitled to the grant of discretionary relief of injunction.

15. The First Appellate Court reversed the judgment of the trial court and held that the appellant was entitled to the relief of injunction because of his long possession of the suit property. The First Appellate Court also set aside the decree passed by the trial court in O.S. No.239 of 2003.

16. The Suit No. 239 was decreed against the appellant. Aggrieved by this, the appellant preferred First Appeal before the District Judge which was allowed on 3rd April, 2009. Aggrieved by this judgment, the respondent-Society filed a Second Appeal before the High Court which was allowed. The High Court heard both the appeals filed by the respondent-Society and the same were allowed by a common judgment dated 20th April, 2011.

17. The High Court by a detailed reasoning, set aside the

judgment of the First Appellate Court and held that the First Appellate Court was not justified in reversing the judgments passed by the trial court in both the abovementioned suits, O.S. No.1143 of 1994 and O.S. No.239 of 2003. The appellant, aggrieved by the said judgment, has preferred these two appeals. We propose to decide both these appeals by this common judgment.

18. We have heard the learned counsel for the appellant at length.

19. In our considered view, a well-reasoned judgment and a decree passed by the trial court ought not to have been reversed by the First Appellate Court. It is reiterated that the appellant's father was engaged as a Watchman on a monthly salary and in that capacity he was allowed to stay in the suit premises and after his death his son (the appellant herein) continued to serve the respondent-Society as a Watchman and was allowed to live in the premises. The property is admittedly owned by the respondent-Society.

20. The appellant has also failed to prove the adverse possession of the suit property. Only by obtaining the ration card and the house tax receipts, the appellant cannot strengthen his claim of adverse possession. The High Court was fully justified in reversing the judgment of the First Appellate Court and restoring the judgment of the trial court. In our considered opinion, no interference is called for.

21. This case demonstrates widely prevalent state of affairs where litigants raise disputes and cause litigation and then obstruct the progress of the case only because they stand to gain by doing so. It is a matter of common experience that the Court's otherwise scarce resources are spent in dealing with non-deserving cases and unfortunately those who were waiting in the queue for justice in genuine cases usually suffer. This case is a typical example of delayed administration of civil justice in our Courts. A small suit, where the appellant was

directed to be evicted from the premises in 1994, took 17 years before the matter was decided by the High Court. Unscrupulous litigants are encouraged to file frivolous cases to take undue advantage of the judicial system.

22. The question often arises as to how we can solve this menace within the frame work of law. A serious endeavour has been made as to how the present system can be improved to a large extent. In the case of *Maria Margarida Sequeria Fernandes and Others v. Erasmo Jack de Sequeria (Dead) through L.Rs.* (2012) 3 SCALE 550 (of which one of us, Bhandari, J. was the author of the judgment), this Court had laid stress on purity of pleadings in civil cases. We deem it appropriate to set out paras 61 to 79 of that judgment dealing with broad guidelines provided by the Court which are equally relevant in this case:-

> "61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.
>
> 62. Possession is an incidence of ownership and can be transferred by the owner of an immovable property to another such as in a mortgage or lease. A licensee holds possession on behalf of the owner.
>
> 63. Possession is important when there are no title documents and other relevant records before the Court, but, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it. Possession cannot be considered in vacuum.
>
> 64. There is a presumption that possession of a person, other than the owner, if at all it is to be called possession, is permissive on behalf of the title-holder. Further, possession of the past is one thing, and the right to remain or continue in future is another thing. It is the latter which

> is usually more in controversy than the former, and it is the latter which has seen much abuse and misuse before the Courts.
>
> 65. A suit can be filed by the title holder for recovery of possession or it can be one for ejectment of an ex-lessee or for mandatory injunction requiring a person to remove himself or it can be a suit under Section 6 of the Specific Relief Act to recover possession.
>
> 66. A title suit for possession has two parts – first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected.
>
> 67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.
>
> 68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place

before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

69. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim and details of subsequent conduct which establish his possession.

70. It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and not exhaustive.

(a) who is or are the owner or owners of the property;

(b) title of the property;

(c) who is in possession of the title documents

(d) identity of the claimant or claimants to possession;

(e) the date of entry into possession;

(f) how he came into possession - whether he purchased the property or inherited or got the same in gift or by any other method;

(g) in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, license fee or lease amount;

(h) if taken on rent, license fee or lease - then insist on rent deed, license deed or lease deed;

(i) who are the persons in possession/occupation or otherwise living with him, in what capacity; as family members, friends or servants etc.;

(j) subsequent conduct, i.e., any event which might have extinguished his entitlement to possession or caused shift therein; and

(k) basis of his claim that not to deliver possession but continue in possession.

71. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

73. Discovery and production of documents and answers to interrogatories, together with an approach of considering what in ordinary course of human affairs is more likely to have been the probability, will prevent many a false claims or defences from sailing beyond the stage for issues.

74. If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission.

75. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

76. In pleadings, whenever a person claims right to continue in possession of another property, it becomes necessary for him to plead with specificity about who was

the owner, on what date did he enter into possession, in what capacity and in what manner did he conduct his relationship with the owner over the years till the date of suit. He must also give details on what basis he is claiming a right to continue in possession. Until the pleadings raise a sufficient case, they will not constitute sufficient claim of defence.

77. XXXX XXXX XXXX

78. The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence.

79. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case."

23. We reiterate the immense importance and relevance of purity of pleadings. The pleadings need to be critically examined by the judicial officers or judges both before issuing the ad interim injunction and/or framing of issues.

ENTIRE JOURNEY OF A JUDGE IS TO DISCERN THE TRUTH

24. The entire journey of a judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system. This Court in *Dalip Singh v. State of U.P. and Others* (2010) 2 SCC 114 observed that truth constitutes an integral part of the justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system.

25. This Court in *Maria Margarida Sequeria Fernandes* (supra) had an occasion to deal with the same aspect.

According to us, observations in paragraphs 31 to 52 are absolutely germane as these paragraphs deal with relevant cases which have enormous bearing on the facts of this case, so these paragraphs are reproduced hereunder:-

"31. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies. The truth should be the guiding star in the entire judicial process.

32. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.

33. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

34. In *Mohanlal Shamji Soni v. Union of India* 1991 Supp (1) SCC 271, this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.

35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted

that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

36. In *Ritesh Tewari and Another v. State of Uttar Pradesh and Others* (2010) 10 SCC 677 this Court reproduced often quoted quotation which reads as under:

> "Every trial is a voyage of discovery in which truth is the quest"

37. This Court observed that the power is to be exercised with an object to subserve the cause of justice and public interest and for getting the evidence in aid of a just decision and to uphold the truth.

38. Lord Denning, in the case of *Jones v. National Coal Board* [1957] 2 QB 55 has observed that:

> "In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries."

39. Certainly, the above, is not true of the Indian Judicial System. A judge in the Indian System has to be regarded as failing to exercise his jurisdiction and thereby discharging his judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

40. Lord Denning further observed in the said case of *Jones* (supra) that "'It's all very well to paint justice blind,

but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth…"

41. World over, modern procedural Codes are increasingly relying on full disclosure by the parties. Managerial powers of the Judge are being deployed to ensure that the scope of the factual controversy is minimized.

42. In civil cases, adherence to Section 30 CPC would also help in ascertaining the truth. It seems that this provision which ought to be frequently used is rarely pressed in service by our judicial officers and judges. Section 30 CPC reads as under:-

> 30. **Power to order discovery and the like.** – Subject to such conditions and limitations as may be prescribed, the Court may, at any time either of its own motion or on the application of any party, -
>
> (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
>
> (b) issue summons to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
>
> (c) order any fact to be proved by affidavit

43. *"Satyameva Jayate"* (Literally: "Truth Stands Invincible") is a mantra from the ancient scripture Mundaka Upanishad. Upon independence of India, it was adopted as the national motto of India. It is inscribed in Devanagari

script at the base of the national emblem. The meaning of full mantra is as follows:

> "Truth alone triumphs; not falsehood. Through truth the divine path is spread out by which the sages whose desires have been completely fulfilled, reach where that supreme treasure of Truth resides."

44. Malimath Committee on Judicial Reforms heavily relied on the fact that in discovering truth, the judges of all Courts need to play an active role. The Committee observed thus:

> 2.2.....In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral judge. The judge acts like an umpire to see whether the prosecution has been able to prove the case beyond reasonable doubt. The State discharges the obligation to protect life, liberty and property of the citizens by taking suitable preventive and punitive measures which also serve the object of preventing private retribution so essential for maintenance of peace and law and order in the society doubt and gives the benefit of doubt to the accused. It is the parties that determine the scope of dispute and decide largely, autonomously and in a selective manner on the evidence that they decide to present to the court. The trial is oral, continuous and confrontational. The parties use cross-examination of witnesses to undermine the opposing case and to discover information the other side has not brought out. The judge in his anxiety to maintain his position of neutrality never takes any initiative to discover truth. He does not correct the aberrations in the investigation or in the matter of production of evidence before court……."

> 2.15 "The Adversarial System lacks dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive duty to discover truth as in the Inquisitorial System. When the investigation is perfunctory or ineffective, Judges seldom take any initiative to remedy the situation. During the trial, the Judges do not bother if relevant evidence is not produced and plays a passive role as he has no duty to search for truth….."
>
> 2.16.9. Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Criminal Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the courts to become active seekers of truth. It is of seminal importance to inject vitality into our system if we have to regain the lost confidence of the people. Concern for and duty to seek truth should not become the limited concern of the courts. It should become the paramount duty of everyone to assist the court in its quest for truth.

45. In *Chandra Shashi v. Anil Kumar Verma* (1995) 1 SCC 421 to enable the Courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, pre-variation and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any Court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. People would have faith in Courts when they would find that truth alone triumphs in Courts.

46. Truth has been foundation of other judicial systems,

such as, the United States of America, the United Kingdom and other countries.

47. In *James v. Giles et al. v. State of Maryland* 386 U.S. 66 (1967) 87, S.Ct. 793, the US Supreme Court, in ruling on the conduct of prosecution in suppressing evidence favourable to the defendants and use of perjured testimony held that such rules existed for a purpose as a necessary component of the search for truth and justice that judges, like prosecutors must undertake. It further held that the State's obligation under the Due Process Clause "is not to convict, but to see that so far as possible, truth emerges."

48. The obligation to pursue truth has been carried to extremes. Thus, in *United States v. J. Lee Havens* 446 U.S. 620, 100 St.Ct.1912, it was held that the government may use illegally obtained evidence to impeach a defendant's fraudulent statements during cross-examination for the purpose of seeking justice, for the purpose of "arriving at the truth, which is a fundamental goal of our legal system".

49. Justice Cardozo in his widely read and appreciated book "The Nature of the Judicial Process" discusses the role of the judges. The relevant part is reproduced as under:-

> "There has been a certain lack of candour," "in much of the discussion of the theme [of judges' humanity], or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations." I do not doubt the grandeur of conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial

> process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do."

50. Aharon Barak, President of Israeli Supreme Court from 1995 to 2006 takes the position that:

> "For issues in which stability is actually more important than the substance of the solution – and there are many such cases – I will join the majority, without restating my dissent each time. Only when my dissenting opinion reflects an issue that is central for me – that goes to the core of my role as a judge – will I not capitulate, and will I continue to restate my dissenting opinion: "Truth or stability – truth is preferable".
>
> "On the contrary, public confidence means ruling according to the law and according to the judge's conscience, whatever the attitude of the public may be. Public confidence means giving expression to history, not to hysteria. Public confidence is ensured by the recognition that the judge is doing justice within the framework of the law and its provisions. Judges must act – inside and outside the court – in a manner that preserves public confidence in them. They must understand that judging is not merely a job but a way of life. It is a way of life that does not include the pursuit of material wealth or publicity; it is a way of life based on spiritual wealth; it is a way of life that includes an objective and impartial search for truth."

51. In the administration of justice, judges and lawyers play equal roles. Like judges, lawyers also must ensure that truth triumphs in the administration of justice.

52. Truth is the foundation of justice. It must be the

endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth."

26. As stated in the preceding paragraphs, the pleadings are foundation of litigation but experience reveals that sufficient attention is not paid to the pleadings and documents by the judicial officers before dealing with the case. It is the bounden duty and obligation of the parties to investigate and satisfy themselves as to the correctness and the authenticity of the matter pleaded.

27. The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands.

28. It is imperative that judges must have complete grip of the facts before they start dealing with the case. That would avoid unnecessary delay in disposal of the cases.

29. Ensuring discovery and production of documents and a proper admission/denial is imperative for deciding civil cases in a proper perspective. In relevant cases, the Courts should encourage interrogatories to be administered.

FRAMING OF ISSUES

30. Framing of issues is a very important stage of a civil trial. It is imperative for a judge to critically examine the pleadings of the parties before framing of issues. Rule 2 of Order X CPC enables the Court, in its search for the truth, to go to the core of the matter and narrow down, or even eliminate

the controversy. Rule 2 of Order X reads as under:-

"2. Oral examination of party, or companion of party. – (1) At the first hearing of the suit, the Court -

(a) shall, with a view to elucidating matters in controversy in the suit, examine orally such of the parties to the suit appearing in person or present in Court, as it deems fit; and

(b) may orally examine any person, able to answer any material question relating to the suit, by whom any party appearing in person or present in Court or his pleader is accompanied.

(2) xxx xxx xxx

(3) xxx xxx xxx

31. It is a useful procedural device and must be regularly pressed into service. As per Rule 2 (3) of Order X CPC, the Court may if it thinks fit, put in the course of such examination questions suggested by either party. Rule 2 (3) of Order X CPC reads as under:-

"2. (1) xxx xxx xxx

(2) xxx xxx xxx

(3) The Court may, if it thinks fit, put in the course of an examination under this rule questions suggested by either party."

32. If issues are properly framed, the controversy in the case can be clearly focused and documents can be properly appreciated in that light. The relevant evidence can also be carefully examined. Careful framing of issues also helps in proper examination and cross-examination of witnesses and final arguments in the case.

GRANT OR REFUSAL OF INJUNCTION

33. In *Maria Margarida Sequeria Fernandes* (supra), this Court examined the importance of grant or refusal of an injunction in paras 86 to 89 which read as under:-

> "86. Grant or refusal of an injunction in a civil suit is the most important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the defendant. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness.
>
> 87. The safe and better course is to give short notice on injunction application and pass an appropriate order after hearing both the sides. In case of grave urgency, if it becomes imperative to grant an ex-parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the plaintiff will have no inherent interest in delaying disposal of injunction application after obtaining an ex-parte ad interim injunction. The Court, in order to avoid abuse of the process of law may also record in the injunction order that if the suit is eventually dismissed, the plaintiff undertakes to pay restitution, actual or realistic costs. While passing the order, the Court must take into consideration the pragmatic realities and pass proper order for mesne profits. The Court must make serious endeavour to ensure that even-handed justice is given to both the parties.
>
> 88. Ordinarily, three main principles govern the grant or refusal of injunction.

> (a) prima facie case;
>
> (b) balance of convenience; and
>
> (c) irreparable injury, which guide the Court in this regard.
>
> 89. In the broad category of prima facie case, it is imperative for the Court to carefully analyse the pleadings and the documents on record and only on that basis the Court must be governed by the prima facie case. In grant and refusal of injunction, pleadings and documents play vital role."

RESTITUTION AND MESNE PROFITS

34. Experience reveals that a large number of cases are filed on false claims or evasive pleas are introduced by the defendant to cause delay in the administration of justice and this can be sufficiently taken care of if the Courts adopt realistic approach granting restitution. This Court in the case of *Ramrameshwari Devi v. Nirmala Devi* (2011) 8 SCC 249 (of which one of us, Bhandari, J. was the author of the judgment) in paragraph 52 (C, D and G) of the judgment dealt with the aspect of imposition of actual or realistic costs which are equally relevant for this case reads as under:-

> "C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.
>
> D. The Court must adopt realistic and pragmatic

approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice."

35. Unless wrongdoers are denied profit or undue benefit from frivolous litigations, it would be difficult to control frivolous and uncalled for litigations. Experience also reveals that our Courts have been very reluctant to grant the actual or realistic costs. We would like to explain this by giving this illustration. When a litigant is compelled to spend Rs.1 lac on a frivolous litigation there is hardly any justification in awarding Rs. 1,000/- as costs unless there are special circumstances of that case. We need to decide cases while keeping pragmatic realities in view. We have to ensure that unscrupulous litigant is not permitted to derive any benefit by abusing the judicial process.

36. This Court in another important case in *Indian Council for Enviro-Legal Action v. Union of India and Others* (2011) 8 SCC 161 (of which one of us, Bhandari, J. was the author of the judgment) had an occasion to deal with the concept of restitution. The relevant paragraphs of that judgment dealing with relevant judgments are reproduced hereunder:-

193. This Court in *Grindlays Bank Limited v. Income Tax Officer, Calcutta* (1980) 2 SCC 191 observed as under :-

"…When passing such orders the High Court draws on its inherent power to make all such orders as are necessary for doing complete justice between the parties. The interests of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court, by the mere circumstance that it has initiated a proceeding in the court, must be neutralised. The simple fact of

the institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it. …"

194. In *Ram Krishna Verma and Others v. State of U.P. and Others* (1992) 2 SCC 620 this Court observed as under :-

"The 50 operators including the appellants/ private operators have been running their stage carriages by blatant abuse of the process of the court by delaying the hearing as directed in *Jeevan Nath Bahl's* case and the High Court earlier thereto. As a fact, on the expiry of the initial period of grant after Sept. 29, 1959 they lost the right to obtain renewal or to ply their vehicles, as this Court declared the scheme to be operative. However, by sheer abuse of the process of law they are continuing to ply their vehicles pending hearing of the objections. This Court in *Grindlays Bank Ltd. vs Income-tax Officer* - [1990] 2 SCC 191 held that the High Court while exercising its power under Article 226 the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised. It was further held that the institution of the litigation by it should not be permitted to confer an unfair advantage on the party responsible for it. In the light of that law and in view of the power under Article 142(1) of the Constitution this Court, while exercising its jurisdiction would do complete justice and neutralise the unfair advantage gained by the 50 operators including the appellants in dragging the litigation to run the stage carriages on the approved route or area or portion thereof and forfeited their right to hearing of the objections filed by them to the draft scheme dated Feb. 26, 1959. …"

195. This Court in *Kavita Trehan vs Balsara Hygiene Products* (1994) 5 SCC 380 observed as under :-

"The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words "Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, ...". The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court."

196. This Court in *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. and Another* (1999) 2 SCC 325 observed as under :-

"From the narration of the facts, though it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Because of the delay unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also known fact that after obtaining a decree for possession of immovable property, its execution takes long time. In such a situation for protecting the interest of judgment

creditor, it is necessary to pass appropriate order so that reasonable mesne profit which may be equivalent to the market rent is paid by a person who is holding over the property. In appropriate cases, Court may appoint Receiver and direct the person who is holding over the property to act as an agent of the Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the plaintiff in whose favour decree is passed and to protect the property including further alienation."

197. In *Padmawati v. Harijan Sewak Sangh* - CM (Main) No.449 of 2002 decided by the Delhi high Court on 6.11.2008, the court held as under:-

"The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."

198. We approve the findings of the High Court of Delhi

in the aforementioned case.

199. The Court also stated "Before parting with this case, we consider it necessary to observe that one of the main reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the *lis*, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts".

200. Against this judgment, Special Leave to Appeal (Civil) No 29197/2008 was preferred to this Court. The Court passed the following order:

> "We have heard learned counsel appearing for the parties. We find no ground to interfere with the well-considered judgment passed by the High Court. The Special Leave Petition is, accordingly, dismissed."

208. In *Marshall sons and Company (I) Limited v. Sahi Oretrans (P) Limited and Another* (1999) 2 SCC 325 this Court in para 4 of the judgment observed as under:

> "…It is true that proceedings are dragged for a long time on one count or the other and, on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and a person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes a long time. In such a situation, for protecting the interest of the judgment-creditor, it is necessary to pass appropriate orders so that reasonable mesne profit which may be equivalent to the market rent is paid by a person who is holding over the property. In appropriate cases, the court may appoint a Receiver and direct the person who is holding over the property to act as an agent of the Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the plaintiff in whose favour the decree is passed and to protect the property including further alienation. …"

209. In *Ouseph Mathai and Others v. M. Abdul Khadir (2002) 1 SCC 319* this Court reiterated the legal position that the stay granted by the Court does not confer a right upon a party and it is granted always subject to the final result of the matter in the Court and at the risk and costs of the party obtaining the stay. After the dismissal, of the *lis*, the party concerned is relegated to the position which

existed prior to the filing of the petition in the Court which had granted the stay. Grant of stay does not automatically amount to extension of a statutory protection.

210. This Court in *South Eastern Coalfields Limited v. State of M.P. and others (2003) 8 SCC 648* on examining the principle of restitution in para 26 of the judgment observed as under:

> "In our opinion, the principle of restitution takes care of this submission. The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see *Zafar Khan v. Board of Revenue, U.P - (1984) Supp SCC 505*) In law, the term "restitution" is used in three senses: (*i*) return or restoration of some specific thing to its rightful owner or status; (*ii*) compensation for benefits derived from a wrong done to another; and (*iii*) compensation or reparation for the loss caused to another."

211. The Court in para 28 of the aforesaid judgment very carefully mentioned that the litigation should not turn into a fruitful industry and observed as under:

> "… … …Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by

> swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."

212. The Court in the aforesaid judgment also observed that once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution. Such interest is not controlled by the provisions of the Interest Act of 1839 or 1978.

213. In a relatively recent judgment of this Court in *Amarjeet Singh and Others v. Devi Ratan and Others* (2010) 1 SCC 417 the Court in para 17 of the judgment observed as under:

> "No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim *actus curiae neminem gravabit*, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any

> undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court. … …"

215. In consonance with the concept of restitution, it was observed that courts should be careful and pass an order neutralizing the effect of all consequential orders passed in pursuance of the interim orders passed by the court. Such express directions may be necessary to check the rising trend among the litigants to secure the relief as an interim measure and then avoid adjudication on merits.

216. In consonance with the principle of equity, justice and good conscience judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legal process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.

217. The court's constant endeavour must be to ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The

object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases.

218. This Court in a very recent case *Ramrameshwari Devi and Others v. Nirmala Devi and Others* 2011(6) Scale 677 had an occasion to deal with similar questions of law regarding imposition of realistic costs and restitution. One of us (Bhandari, J.) was the author of the judgment. It was observed in that case as under:

> "While imposing costs we have to take into consideration pragmatic realities and be realistic what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.
>
> The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years."

37. False averments of facts and untenable contentions are serious problems faced by our courts. The other problem is that litigants deliberately create confusion by introducing irrelevant and minimally relevant facts and documents. The court cannot reject such claims, defences and pleas at the first look. It may take quite sometime, at times years, before the court is

able to see through, discern and reach to the truth. More often than not, they appear attractive at first blush and only on a deeper examination the irrelevance and hollowness of those pleadings and documents come to light.

38. Our courts are usually short of time because of huge pendency of cases and at times the courts arrive at an erroneous conclusion because of false pleas, claims, defences and irrelevant facts. A litigant could deviate from the facts which are liable for all the conclusions. In the journey of discovering the truth, at times, this Court, on later stage, but once discovered, it is the duty of the Court to take appropriate remedial and preventive steps so that no one should derive benefits or advantages by abusing the process of law. The court must effectively discourage fraudulent and dishonest litigants.

39. Now, when we revert to the facts of this case it becomes quite evident that the appellant is guilty of suppressing material facts and introducing false pleas and irrelevant documents. The appellant has also clouded the entire case with pleas which have nothing to do with the main controversy involved in the case.

IRRELEVANT DOCUMENTS:

40. All documents filed by the appellant along with the plaint have no relevance to the controversy involved in the case. We have reproduced a list of the documents to demonstrate that these documents have been filed to mislead the Court. The First Appellate Court has, in fact, got into the trap and was misled by the documents and reached to an entirely erroneous finding that resulted in undue delay of disposal of a small case for almost 17 years.

FALSE AND IRRELEVANT PLEAS:

41. The appellant is also guilty of introducing untenable pleas. The plea of adverse possession which has no foundation or basis in the facts and circumstances of the case was

introduced to gain undue benefit. The Court must be cautious in granting relief to a party guilty of deliberately introducing irrelevant and untenable pleas responsible for creating unnecessary confusion by introducing such documents and pleas. These factors must be taken into consideration while granting relief and/or imposing the costs.

42. On the facts of the present case, following principles emerge:

1. It is the bounden duty of the Court to uphold the truth and do justice.

2. Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts.

3. The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful.

4. Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrong doer in the temple of justice. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice.

5. It is the bounden obligation of the Court to neutralize any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process.

6. Watchman, caretaker or a servant employed to look after the property can never acquire interest in

the property irrespective of his long possession. The watchman, caretaker or a servant is under an obligation to hand over the possession forthwith on demand. According to the principles of justice, equity and good conscience, Courts are not justified in protecting the possession of a watchman, caretaker or servant who was only allowed to live into the premises to look after the same.

7. The watchman, caretaker or agent holds the property of the principal only on behalf the principal. He acquires no right or interest whatsoever in such property irrespective of his long stay or possession.

8. The protection of the Court can be granted or extended to the person who has valid subsisting rent agreement, lease agreement or licence agreement in his favour.

43. In the instant case, we would have ordinarily imposed heavy costs and would have ordered restitution but looking to the fact that the appellant is a Watchman and may not be able to bear the financial burden, we dismiss these appeals with very nominal costs of Rs. 25,000/- to be paid within a period of two months and direct the appellant to vacate the premises within two months from today and handover peaceful possession of the suit property to the respondent-Society. In case, the appellant does not vacate the premises within two months from today, the respondent-Society would be a liberty to take police help and get the premises vacated.

44. Both the appeals are, accordingly dismissed, leaving the parties to bear their own costs.

K.K.T. Appeals dismissed.

U.P. POWER CORPORATION LTD.
v.
RAJESH KUMAR & ORS.
(Civil Appeal No. 2608 of 2011 etc.)

APRIL 27, 2012

[DALVEER BHANDARI AND DIPAK MISRA, JJ.]

Constitution of India, 1950:

Arts. 16(1), 16(4), 16(4A) and 16(4B) – Reservation in promotion – Consequential/Accelerated seniority – Principles emerging from M. Nagraj – Culled out – Held: Articles 16(4A) and 16(4B) are enabling provisions and the State can make the provisions for the same on certain basis or foundation – In the instant case, the conditions precedent have not been satisfied – No exercise as per decision in M. Nagraj has been undertaken – Therefore, s.3(7) of the 1994 Act and r.8-A of the Rules are ultra vires as they run counter to the dictum in M. Nagraj – Uttar Pradesh Public Servants (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 – s. 3(7) – Uttar Pradesh Government Servants Seniority Rules, 1991 – r.8-A as inserted by Uttar Pradesh Government Servants Seniority (Third Amendment) Rules, 2007.

Judicial Discipline:

On a similar issue cases being heard by Lucknow Bench of Allahabad High Court – Another Division Bench at Allahabad entertained and decided a writ petition involving the same issue – Division Bench at Lucknow holding the said decision as per incurium – Held: When Allahabad Bench was apprised about the number of matters at Lucknow filed earlier in point of time which were being part heard and the hearing was in continuum, it would have been advisable to wait for the

verdict at Lucknow Bench or to bring it to the notice of the Chief Justice about the similar matters being instituted at both the places – The judicial courtesy and decorum warranted such discipline which was expected from the Judges – Similarly, the Division Bench at Lucknow erroneously treated the verdict of Allahabad Bench as per incuriam or not a binding precedent – Judicial discipline commands in such a situation when there is disagreement, to refer the matter to a larger Bench.

Writ petitions were filed before the Lucknow Bench of the Allahabad High Court challenging r.8-A as inserted by the U.P. Government Servants Seniority (3rd Amendment) Rules, 2007, in the U.P. Government Servants Seniority Rules, 1991. The assail was also to the constitutional validity of s. 3(7) of the Uttar Pradesh Public Servants (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994. It was the case of the writ petitioners that the State Government in gross violation of the constitutional provisions enshrined under Arts. 16(4A) and 16(4B) of the Constitution of India and the interpretation placed thereon by the Constitution Bench in *M. Nagraj*[1] **framed the Rules and the U.P. Power Corporation adopted the same by amending its Rules and introduced the concept of reservation in promotion with accelerated seniority. It was contended before the Lucknow Bench that neither the State Government nor the Corporation had carried out the exercise as per the decision in *M. Nagraj* and in the absence of the same, the provisions of the Act and the Rules caused discomfort to the constitutional provisions. While the said writ petitions were pending and were being dealt with on merit by a Division Bench at Lucknow, another Division Bench of the High Court at Allahabad entertained and decided writ petition No. 63217 of 2010**

1. *M. Nagaraj v. Union of India* 2006 (7) Suppl. SCR 336.

(*Mukund Kumar Srivastava vs. State of U.P. and Another*) upholding the validity of the provisions contained in r.8A of the 1991 Rules. However, when the said decision was brought to the notice of the Division Bench at Lucknow, the said Bench, in Writ Petition no. 1389 (S/B) of 2007 (*Prem Kumar Singh and others v. State of U.P. and others*), held that the decision in *Mukund Kumar Srivastava* **was per incurium and that s.3(7) of the 1994 Act and r.8-A of 1991 Rules were invalid, ultra vires and unconstitutional. It quashed the orders relating to seniority passed by the State Government and clarified that in case the State Government undertook to provide reservation in promotion to any class or classes of posts in the services under the State, it could do so after undertaking the exercise as required under the constitutional provisions in accordance with law laid down by this Court in *M. Nagraj.* The instant appeals were filed challenging both the judgments.**

Disposing of the appeals, the Court

HELD: 1.1 The Allahabad Bench was apprised about the number of matters at Lucknow filed earlier in point of time which were being part heard and the hearing was in continuum. It would have been advisable to wait for the verdict at Lucknow Bench or to bring it to the notice of the Chief Justice about the similar matters being instituted at both the places. The judicial courtesy and decorum warranted such discipline which was expected from the Judges. Similarly, the Division Bench at Lucknow erroneously treated the verdict of Allahabad Bench not to be a binding precedent on the foundation that the principles laid down by the Constitution Bench in *M. Nagraj** **are not being appositely appreciated and correctly applied by the Bench when there was reference to the said decision and number of passages were quoted and appreciated *albeit* incorrectly, the same could**

not have been a ground to treat the decision as *per incuriam* or not a binding precedent. Judicial discipline commands in such a situation when there is disagreement to refer the matter to a larger Bench. Instead of doing that, the Division Bench at Lucknow took the burden on themselves to decide the case. There are two decisions by two Division Benches from the same High Court. This Court expresses its concern about the deviation from the judicial decorum and discipline by both the Benches and expect that in future, they shall be appositely guided by the conceptual eventuality of such discipline as laid down by this Court from time to time. [para 12 and 14] [137-B-F; 138-G-H; 139-A]

Lala Shri Bhagwan and another v. Ram Chand and another **1965 SCR 218 =AIR 1965 SC 1767; and** *Sundarjas Kanyalal Bhathija and others v. The Collector, Thane, Maharashtra and others* **AIR 1991 SC 1893 – relied on.**

2.1 It is axiomatic in service jurisprudence that any promotions made wrongly in excess of any quota are to be treated as ad hoc. This applies to reservation quota as much as it applies to direct recruits and promotee cases. If a court decides that in order only to remove hardship such roster-point promotees are not to face reversions, then it would be necessary to hold – consistent with Arts. 14 and 16(1) – that such promotees cannot plead for grant of any additional benefit of seniority flowing from a wrong application of the roster. While courts can relieve immediate hardship arising out of a past illegality, courts cannot grant additional benefits like seniority which have no element of immediate hardship. [para 20] [146-D-F]

Ajit Singh and others (II) v. *State of Punjab and others* **1999 (2) Suppl. SCR 521 = 1999 (7) SCC 209; and** *Union of India and others* v. *Virpal Singh Chauhan and others* **1995 (4) Suppl. SCR 158 = 1995 (6) SCC 684 – relied on**

Indra Sawhney etc. v. *Union of India and others* **1992 (2) Suppl. SCR 454 =1992 Supp. (3) SCC 217 : AIR 1993 SC 477;** *General Manager, S. Rly.* v. *Rangachari* **1962 AIR 36 = 1962 SCR 586 =** *State of Punjab* v. *Hira Lal* **1971 (3) SCR 267 = 1970 (3) SCC 567;** *Akhil Bharatiya Soshit Karamchari Sangh* v. *Union of India* **1981 (2) SCR 185 = 1981 (1) SCC 246 and** *Comptroller and Auditor General* v. *K.S. Jagannathan* **1986 (2) SCR 17 = 1986 (2) SCC 679;** *R.K. Sabharwal* v. *State of Punjab* **1995 (2) SCR 35 = 1995 (2) SCC 745;** *Ajit Singh Januja and others* v. *State of Punjab and others* **1996 (3) SCR 125 = 1996 (2) SCC 715;** *Jagdish Lal and others* v. *State of Haryana and others* **1997 AIR 2366 – referred to.**

2.2 Arts. 16(4A) and 16 (4B) were inserted in the Constitution to confer promotion with consequential seniority and introduced the concept of carrying forward vacancies treating the vacancies meant for reserved category candidates as a separate class of vacancies. The validity of the said Articles were challenged under Art. 32 before this Court and the Constitution Bench in *M. Nagraj* upheld the validity of the said Articles with certain qualifiers/riders by taking recourse to the process of interpretation. [para 21, 22] [147-B; 148-G]

M. Nagaraj v. *Union of India* **2006 (7) Suppl. SCR 336 = (2006) 8 SCC 212 : AIR 2007 SC 71 – relied upon**

Avinash Singh Bagri and Ors. v. *Registrar IIT Delhi and Another* **2009 (13) SCR 258 = 2009 (8) SCC 220;** *Ashok Kumar Thakur* v. *Union of India* **2008 (4) SCR 1 = 2008 (6) SCC 1;** *E. V. Chinniah* v. *State of Andhra Pradesh* **2004 (5) Suppl. SCR 972 = 2005 (1) SCC 394;** *Suraj Bhan Meena and Another* v. *State of Rajasthan & Ors.* **2010 (14) SCR 532 = 2011 (1) SCC 467;** *Barium Chemicals* v. *Company Law Board* **1971 (3) SCR 267 = 1970 (3) SCC 567;** *Union of India* v. *Rakesh Kumar* **2010 (1) SCR 483 = 2010 (4) SCC 50;** *Ashok Kumar Thakur* v. *Union of India and*

others **2008 (4) SCR 1 = 2008 (6) SCC 1 – referred to.**

2.4 From the decision in *M. Nagraj*, the principles that emerge are: (i) Vesting of the power by an enabling provision may be constitutionally valid and yet 'exercise of power' by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335; (ii) Art. 16(4) which protects the interests of certain sections of the society has to be balanced against Art. 16(1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality under Art. 14; (iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate; (iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling-limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based; (v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of Art. 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Art. 16 applies only to SCs and STs. The said clause is carved out of Art. 16(4). Therefore, Clause (4A) will be governed by the two compelling reasons – "backwardness" and "inadequacy of representation", as mentioned in Art. 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced; (vi) If the ceiling-limit on the carry-over of unfilled vacancies is removed, the other alternative time-factor comes in and in that event, the time-scale has to be imposed in the interest of

efficiency in administration as mandated by Art. 335. If the time-scale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact-situation; (vii) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Art. 16(4) and Art. 335, then this Court will certainly set aside and strike down such legislation; (viii) The constitutional limitation under Art. 335 is relaxed and not obliterated. Be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case; (ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment; and (x) Art. 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Art. 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment. [para 38] [168-E-H; 169-A-H; 170-A-G]

2.5 There may be statutory rules or executive instructions to grant promotion but it cannot be forgotten that they are all subject to the pronouncement by this Court in *Vir Pal Singh Chauhan* and *Ajit Singh (II)* . This

Court is of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in *M. Nagaraj* is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Arts. 16(4A) and 16(4B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. It cannot be ignored on the ground that the concept of reservation in promotion was already in vogue. When the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein. [para 41] [172-F-H; 173-A-C]

3. This Court concludes and holds that s.3(7) of the 1994 Act and r. 8A of the 1991 Rules, as inserted by the 3rd Amendment Rules, 2007, are ultra vires as they run counter to the dictum in *M. Nagaraj*. Any promotion that has been given on the dictum of *Indra Sawhney* and without the aid or assistance of s. 3(7) and r. 8A shall remain undisturbed. [para 42] [173-D]

Case Law Reference:

2006 (7) Suppl. SCR 336	**relied on**	**para 2**
1992 (2) Suppl. SCR 454	**referred to**	**para 7 and 16**
1965 SCR 218	**relied on**	**para 13**
AIR 1991 SC 1893	**relied on**	**para 14**
1962 AIR 36	**referred to**	**para 16**

1962 SCR 586	**referred to**	**para 16**
1971 (3) SCR 267	**referred to**	**para 16**
1981 (2) SCR 185	**referred to**	**para 16**
1986 (2) SCR 17	**referred to**	**para 16**
1995 (4) Suppl. SCR 158	**relied on**	**para 17**
1995 (2) SCR 35	**referred to**	**para 17**
1996 (3) SCR 125	**referred to**	**para 17**
1996 (2) SCC 715	**referred to**	**para 19**
1999 (2) Suppl. SCR 521	**relied on**	**para 20**
2009 (13) SCR 258	**referred to**	**para 28**
2008 (4) SCR 1	**referred to**	**para 29**
2004 (5) Suppl. SCR 972	**referred to**	**para 29**
2010 (14) SCR 532	**referred to**	**para 30**
1971 (3) SCR 267	**referred to**	**para 31**
2010 (1) SCR 483	**referred to**	**para 31**
2008 (4) SCR 1	**referred to**	**para 35**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2608 of 2011 etc.

From the Judgment & Order dated 04.01.2011 of the High Court of Judicature at Allahabad, Lucknow Bench in Writ Petition No. 146 (S/B) of 2009.

WITH

C.A. Nos. 4009, 4022, 4027-4029 of 2012, 2605, 2607, 2609, 2610, 2614, 2616, 2629, 2675, 2676, 2677, 2678, 2679, 2729, 2730, 2737 of 2011, 4030, 4031, 4032, 4033, 4034,

4023, 4024, 4025 of 2012, 4691, 4697, 4699 of 2011, 4026, 4016, 4021, 4017, 4018, 4019, 4020 of 2012, 2622, 2611, 2612, 2613, 2623, 2624, 2682-83, 2684, 2881, 2884-85, 2886, 2908, 2909, 2944-2945 of 2011, 566 & 4067 of 2012.

P.S. Patwalia, Raju Ramachandran, P.P. Rao, Ranjit Kumar, Vijay Hansaria, Shanti Bhushan, Dr. Rajeev Dhawan, Vinod A. Bobde, Shail Kumar Dwivedi, AAG Aman Preet Singh Rahi, Ashok K. Mahajan, Ankur Talwar, Sanchit Asthana, Rajat Singh, Ankur Mittal, P.N. Gupta, Manoj Kumar Dwivedi, Vandana Mishra, Aviral Shukla, Abhinav Shrivastava, Ashutosh Sharma, Naresh Bakshi, Tushar Bakshi, S. Ranjith Kumar, Natasha Vinayak, Namrata Sharma, Ajay Singh, Ranjith, Jaiveer Shergill, Manoj Kumar Dwivedi, G. Venkateswara Rao, Abhinav Srivatava, P.N. Gupta, Aviral Shukla, Sanjay Singh, Rajeev Singh, Shaikh Chand Saheb, Moinuddin Ansari, R.K. Gupta, Apeksha Sharan, Abhimanyu Tiwari, S.K. Gupta, Utsav Sidhu, Shekhar Kumar, T. Srinivas Murthy, Preetika Dwivedi, Mukti Chaudhary, Sanskriti Pathak, Senthil Jagadeesan, Satya Mitra, Rakesh Kumar Gupta, Shiv Ram Pandey, A. Subba Rao, Manoj Gorkela, A.T. Rao, Anand Tiwari, Vinod, Ajit Kumar Gupta, Mridula Ray Bharadwaj, Pradeep Misra, Suraj Singh, Prashant Choudhary, Anuvrat Sharma, Vishwajit Singh, Abhinda Maheswari, Kumar Parimal, Sanjeev K. Choudhary, A.P. Mayee, Abhishek Chaudhary, Vishwajit Singh, Abhindra Maheshwari (for Vidhi International), Kamakshi S. Mehwal, Naresh Kaushik, Anirudh Joshi, Lalitha Kaushik, Mukesh Verma, Yash Pal Dhingra, Rajendra Singhvi, K.K.L. Gautam, Brij Bhushan, Sameer Singh, Sneha Kalita, Vibhor Vardhan (for Harsh Surana), Manish Pratap Singh, Ajit Singh, Rajan Roy, Shailendra Tiwary, Prem Prakash, P.K. Manohar, C.D. Singh, P.V. Yoeswaran, A.K. Singh for the appearing parties.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted in Special Leave Petitions.

2. The controversy pertaining to reservation in promotion for the Scheduled Castes and Scheduled Tribes with consequential seniority as engrafted under Articles 16(4A) and 16(4B) and the facet of relaxation grafted by way of a proviso to Article 335 of the Constitution of India being incorporated by the Constitution (Seventy-seventh Amendment) Act, 1995, the Constitution (Eight-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001 at various stages having withstood judicial scrutiny by the dictum in *M. Nagaraj v. Union of India*[1], the issue of implementation of the same through existing statutory enactment by the State Legislature and the subsequent rules framed by the authorities of the State or concerned corporation of the State of Uttar Pradesh, has, as the learned counsel appearing for both sides in their astute and penetrating manner have pyramided the concept in its essentiality, either appeared too simple that simplification may envy or so complex that it could manifest as the reservoir of imbalances or a sanctuary of uncertainties. Thus, the net result commands for an endeavour for a detailed survey of the past and casts an obligation to dwell upon the controversy within the requisite parameters that are absolutely essential for adjudication of the *lis* emanated *in praesenti.*

THE FACTUAL EXPOSE'

3. Extraordinary and, in a way, perplexing though it may seem, yet as the factual scenario pronouncedly reveals, the assail in some of the appeals of this batch of appeals is to the judgment and order passed by the Division Bench of the High Court of Judicature at Allahabad in Writ Petition No. 63217 of 2010 (*Mukund Kumar Srivastava vs. State of U.P. and Another*) upholding the validity of the provisions contained in Rule 8-A of the U.P. Government Servants Seniority Rules, 1991 (for brevity 'the 1991 Rules') that were inserted by the U.P. Government Servants Seniority (3rd Amendment) Rules,

1. (2006) 8 SCC 212 : AIR 2007 SC 71.

2007 by the employees-appellants and in some of the appeals, the challenge by the State Government and the U.P. Power Corporation Ltd. (for short 'the Corporation') is to the judgment and order passed by the Division Bench of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, in Writ Petition No. 1389 (S/B) of 2007 (*Prem Kumar Singh and others v. State of U.P. and others*) and other connected writ petitions holding, inter alia, that the decision rendered by the Division Bench in the case of *Mukund Kumar Srivastava* (supra) at Allahabad is *per incuriam* and not a binding precedent and further Section 3(7) of the Uttar Pradesh Public Servants (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 (for short 'the 1994 Act') and Rule 8A of the 1991 Rules, as brought into force in 2007, are invalid, ultra vires and unconstitutional and, as a necessary corollary, the consequential orders relating to seniority passed by the State Government deserved to be quashed and, accordingly, quashed the same and further clarified that in case the State Government decides to provide reservation in promotion to any class or classes of posts in the services under the State, it is free to do so after undertaking the exercise as required under the constitutional provisions keeping in mind the law laid down by this Court in *M. Nagraj* (supra). It has been directed that till it is done, no reservation in promotion on any post or classes of posts under the services of the State including the Corporation shall be made hence forth. However, the Division Bench observed that the promotions already made as per the provisions/Rules where the benefit of Rule 8A has not been given while making the promotion shall not be disturbed.

4. The cleavage has invited immense criticism by the learned senior counsel appearing for both sides on principles of judicial discipline, decorum, propriety and tradition. Initially the debate centred around the concept of precedent and the duties of the Benches but gradually it was acceded to, absolutely totally being seemly, to decide the controversy on

merits instead of a remit and, accordingly, the learned counsel for the parties addressed the Court at length. As advised, we shall dwell upon the merits of the controversy but we shall not abdicate our responsibility to delve into the first issue, i.e., judicial discipline as we are inclined to think that it is the duty, nay, obligation in the present case to do so because despite repeated concern shown by this Court, the malady subsists, making an abode of almost permanency. Ergo, we proceed to state the facts on the first issue and our opinion thereon and, thereafter, shall deal with the assail and attack on both the judgments on merits.

5. One Rajesh Kumar and two others, the private respondents in the appeal preferred by the Corporation, filed Writ Petition No. *146 (S/B) of 2009* at the Lucknow Bench of the High Court of Judicature at Allahabad seeking declaration to the effect that Rule 8A of the 1991 Rules and the resolution passed by the Corporation are ultra vires. That apart, the assail was to the constitutional validity of Section 3(7) of the 1994 Act on the foundation that the State Government in gross violation of the constitutional provisions enshrined under Articles 16(4A) and 16(4B) and the interpretation placed thereon by the Constitution Bench in *M. Nagraj* (supra) has framed the Rules and the Corporation has adopted the same by amending its Rules and introduced the concept of reservation in promotion with accelerated seniority.

6. It was contended before the Lucknow Bench that neither the State Government nor the Corporation had carried out the exercise as per the decision in *M. Nagraj* (supra) and in the absence of the same, the provisions of the Act and the Rules caused discomfort to the constitutional provisions. The stand and stance put forth by the writ petitioners was combated by the Corporation contending, inter alia, that the Scheduled Castes and Scheduled Tribes were inadequately represented in the service and the chart wise percentage of representation to direct recruitment of reserved categories incumbents would

clearly reflect the inadequacy. We are not referring to the pleadings in detail as that will be adverted to at a later stage. Suffice to say at present, in view of the assertions made by the parties and the records produced the Division Bench framed the question for determination whether Rule 8-A of the Rules is ultra vires and unconstitutional. During the course of hearing of the writ petition, the Corporation brought to the notice of the Division Bench at Lucknow the judgment dated 21.10.2010 passed by the Division Bench at Allahabad in Writ Petition No. 63127 of 2010 (*Mukund Kumar Srivastava* v. *State of U.P. and another)*. It was urged that the same was a binding precedent and, therefore, the Division Bench was bound to follow the same. But, the Bench hearing the writ petition declared the said decision as not binding and *per incuriam* as it had not correctly interpreted, appreciated and applied the ratio laid down in *M. Nagraj* (supra) and, on that base, declared Section 3(7) of the 1994 Act and Rule 8A of the 1991 Rules as unconstitutional and issued the directions as have been stated hereinbefore.

7. It is the admitted position at the Bar that certain writ petitions were filed at Lucknow Bench and they were being heard. They were filed on earlier point of time and were being dealt with on merits by the concerned Division Bench. At that juncture, the Division Bench at Allahabad entertained Writ Petition No. 63127 of 2010. The Bench was of the view that without calling for a counter affidavit from any of the respondents the writ petition could be decided. Be it noted, the petitioner therein was an Executive Engineer in Rural Engineering Service at Sonebhadra Division and had challenged the seniority list of Executive Engineers of Rural Engineering Service published vide Office Memorandum No. 2950/62-3-2010-45-RES/2010 dated 8.9.2010 and further sought declaration of Rule 8A of the 2007 Rules as unconstitutional. A prayer for issue of a writ of mandamus was sought not to proceed with and promote any person on the next higher post on the basis of the impugned seniority list of Executive Engineers of Rural Engineering Service. The Bench, as is

manifest from the order, adverted to the facts and then dwelled upon the validity of the Rules. It scanned Rules 6, 7, 8 and 8A and referred to the decision of this Court in *Indra Sawhney etc. v. Union of India and others*[2], Section 3 of the 1994 Act, Article 335 of the Constitution and quoted in extenso from *M. Nagraj* (supra) and came to hold as follows: -

> "The Constitutional validity of Amending Act 77th Amendment Act 1995 and 85th Amendment Act 2001 whereby clause (4A) has been inserted after clause (4) under the Article 16 of the Constitution has already been upheld by the Constitution Bench of Hon'ble Apex Court in *M. Nagraj* case (supra) holding that neither the catch up rule nor the Constitutional seniority is implicit in Clause (1) and Clause (4) of Article 16 rather the concept of catch up rule and consequential seniority are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom, like secularism, constitutional sovereignty, equality code etc. forming basic structure of the Constitution. It cannot be said that by insertion of concept of consequential seniority the structure of Article 16 stands destroyed or abrogated. It cannot be said that equality code contained under Articles 14, 15, 16 is violated by deletion of catch-up rule.
>
> We are bound by the aforesaid decision of Hon'ble Apex Court in *M. Nagraj* case (supra). Therefore, there can be no scope for doubt to hold that deletion of catch-up rule and conferring the benefits of consequential seniority upon the members of SC and ST on account of reservation in promotion in a particular service or grade or post has any way obliterated the equality code contained under Articles 14, 15 and 16 of the Constitution as concept of catch-up rule of seniority does not directly flow from Article 16(1) and (4) of the Constitution of India. We are of the

2. 1992 Supp. (3) SCC 217 : AIR 1993 SC 477.

considered opinion that Rule 8A of 1991 Rules has merely effectuated the provisions contained under Article 16(4A) of the Constitution of India whereby benefit of consequential seniority has been given to the members of scheduled castes and scheduled tribes due to reservation/ roster in promotion by obliterating the concept of catch-up Rule of seniority. Rule 8A of 1991 Rules specifically stipulates that if any member of scheduled castes or scheduled tribes is promoted on any post or grade in service earlier to other categories of persons, the member of SC/ST shall be treated to be senior to such other categories of persons who are promoted subsequently after promotion of members of SC/ST, despite anything contained in Rules 6, 7 and 8 of 1991 Rules. In our view Rule 8A of 1991 Rules has constitutional sanctity of Article 16(4A) of the Constitution and cannot be found faulty merely on account of violation of judicially evolved concept of catch-up rule of seniority which has been specifically obliterated by Article 16(4A) of the Constitution. Likewise the said rule can also not be held to be unconstitutional or invalid on account of obliteration of any other judicially evolved principle of seniority or any other contrary rules of seniority existing under Rules 6, 7 and 8 of 1991 Rules, as Rule 8A of 1991 Rules opens with non-obstante clause with overriding effect upon Rules 6, 7 and 8 of 1991 Rules, therefore, we do not find any justification to strike down the provisions contained under Rule 8-A of 1991 Rules on the said ground and on any of the grounds mentioned in the writ petition."

After so stating, the Division Bench proceeded to observe as follows: -

"27. In this connection, we make it clear that deletion of the said concept of catch-up Rule of seniority and addition of consequential seniority due to reservation in promotion on any post or grade in service are applicable to the

member of scheduled castes and scheduled tribes only, whereas inter-se seniority of other categories employees shall continue to be determined according to their existing seniority rules as contemplated by the provisions of Rules 6, 7 and 8 of 1991 Rules, subject to aforesaid limitations. Thus the concept of catch-up Rule of Seniority stands obliterated only to the extent of giving benefit of consequential seniority to the members of scheduled castes and scheduled tribes on account of their promotion on any post or grade in service due to reservation, therefore, the scope of obliteration of concept of catch-up rule is limited to that extent. In this view of the matter the petitioner is not entitled to get the relief sought for in the writ petition questioning the validity of said Rule 8A of 1991 Rules. Thus we uphold the validity of said Rules and the question formulated by us is answered accordingly."

It is interesting to note that in paragraph 29 of the said judgment the Division Bench expressed thus: -

"29. However, since the petitioner did not challenge the Constitutional Validity of Law regarding reservation in promotion in favour of scheduled castes and scheduled tribes existing in State of Uttar Pradesh which is applicable to the services and posts in connection of affairs of State of Uttar Pradesh inasmuch as other services and posts covered by said Reservation Act 1994, in our opinion, the petitioner shall not be permitted to raise this question by filing any other writ petition again. In given facts and circumstances of the case, we are not inclined to issue any mandamus, commanding the respondents, not to proceed with impugned seniority list for the purpose of promotion on the next higher post without expressing any opinion on the merit of said seniority list. We are also not inclined to issue any such restraint order, staying any promotion on the next higher post, if the respondents are intending to make such promotion on the basis of impugned seniority list."

8. We have been apprised at the Bar that it was brought to the notice of the Division Bench at Allahabad that certain writ petitions, where there was comprehensive challenge, were part-heard and the hearing was in continuance at Lucknow Bench, but, as is vivid from the first paragraph of the said judgment, the Bench heard the learned counsel for the petitioner and the standing counsel for the State and caveator and proceeded to decide the matter without a counter affidavit.

9. Presently, we shall advert to how the Lucknow Bench dealt with this decision.

10. After stating the basic pleas, the Division Bench at Lucknow proceeded to state as follows:-

> ".....but before we proceed to decide the validity of the challenge made and the defence put, we find it expedient to respond to the foremost plea of the respondents that the aforesaid Rule 8-A of the U.P. Government Servants Seniority Rules, 1991, (hereinafter referred to as 'the Rules, 1991), was challenged before a Division Bench (Hon'ble Sheo Kumar Singh and Hon'ble Sabhajeet Yadav, JJ) at Allahabad in Writ Petition No. 63127 of 2010 in re: Mukund Kumar Srivastava versus State of U.P. and another, which writ petition has been dismissed upholding the validity of the aforesaid Rule 8-A, therefore, this Court is bound by the said judgment passed by a Bench of equal strength and hence all these petitions need be dismissed only on this ground."

Before the said Bench, it was contended that the judgment rendered by the Division Bench at Allahabad is *per incuriam* and is not a binding precedent.

11. Various grounds were urged to substantiate the aforesaid stand. The Division Bench, after analysing the reasoning of the Allahabad Bench in great detail and after

referring to certain decisions and the principles pertaining to binding precedent, opined as follows:-

> "The Division Bench at Allahabad, did not enter into the question of exercise of power by the State Government under the enabling provisions of the Constitution and upheld the validity of Rule 8-A only for the reason, that there did exist such a power to enact the Rule, whereas the Apex Court, very clearly has pronounced, that if the given exercise has not been undertaken by the State Government while making a rule for reservation with or without accelerated seniority, such a rule may not stand the test of judicial review.
>
> In fact, M. Nagraj obliges the High Court that when a challenge is made to the reservation in promotion, it shall scrutinize the same on the given parameters and it also casts a corresponding duty upon the State Government to satisfy the Court about the exercise undertaken in making such a provision for reservation. The Division Bench did not advert upon this issue, nor the State Government fulfilled its duty as enumerated in M. Nagraj.
>
> The effect of the judgment delivered at Allahabad is also to be seen in the light of the fact that though the Division Bench at Allahabad did not adjudicate on the dispute with regard to the seniority for which the petitioner Mukund Kumar Srivastava has been relegated to the remedy of State Public Services Tribunal, but upheld the validity of Rule 8-A, which could not be said to be the main relief, claimed by the petitioner.
>
> For the aforesaid reasons and also for the reason, that the present writ petitions do challenge the very rule of reservation in promotion, which challenge we have upheld for the reasons hereinafter stated, because of which the rule of accelerated seniority itself falls to the ground, we, with deep respect, are unable to subscribe to the view

taken by the Division Bench at Allahabad and hold that the said judgment cannot be considered as binding precedent having been rendered per incuriam."

12. We have reproduced the paragraphs from both the decisions in extenso to highlight that the Allahabad Bench was apprised about the number of matters at Lucknow filed earlier in point of time which were being part heard and the hearing was in continuum. It would have been advisable to wait for the verdict at Lucknow Bench or to bring it to the notice of the learned Chief Justice about the similar matters being instituted at both the places. The judicial courtesy and decorum warranted such discipline which was expected from the learned Judges but for the unfathomable reasons, neither of the courses were taken recourse to. Similarly, the Division Bench at Lucknow erroneously treated the verdict of Allahabad Bench not to be a binding precedent on the foundation that the principles laid down by the Constitution Bench in *M. Nagraj* (supra) are not being appositely appreciated and correctly applied by the Bench when there was reference to the said decision and number of passages were quoted and appreciated *albeit* incorrectly, the same could not have been a ground to treat the decision as *per incuriam* or not a binding precedent. Judicial discipline commands in such a situation when there is disagreement to refer the matter to a larger Bench. Instead of doing that, the Division Bench at Lucknow took the burden on themselves to decide the case.

13. In this context, we may profitably quote a passage from *Lala Shri Bhagwan and another v. Ram Chand and another*[3]:-

"18. .. It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to

3. AIR 1965 SC 1767.

be reconsidered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

14. In *Sundarjas Kanyalal Bhathija and others v. The Collector, Thane, Maharashtra and others*[4] while dealing with judicial discipline, the two-Judge Bench has expressed thus:-

"One must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure."

The aforesaid pronouncements clearly lay down what is expected from the Judges when they are confronted with the decision of a Co-ordinate Bench on the same issue. Any contrary attitude, however adventurous and glorious may be, would lead to uncertainty and inconsistency. It has precisely so happened in the case at hand. There are two decisions by two Division Benches from the same High Court. We express our concern about the deviation from the judicial decorum and discipline by both the Benches and expect that in future, they

4. AIR 1991 SC 1767.

shall be appositely guided by the conceptual eventuality of such discipline as laid down by this Court from time to time. We have said so with the fond hope that judicial enthusiasm should not obliterate the profound responsibility that is expected from the Judges.

15. Having dealt with the judicial dictum and the propriety part, we shall now proceed to deal with the case on merit as a common consensus was arrived at the Bar for the said purpose. The affected employees have filed certain civil appeals against the judgment of the Allahabad High Court and the employees who are affected by the verdict of the Lucknow Bench have also preferred appeals. That apart, the State of U.P. and the Corporation have also challenged the decision as the rules framed have been declared ultra vires. The main controversy relates to the validity of Section 3(7) of the 1994 Act and Rule 8A of the 1991 Rules. Thus, we really have to advert to the constitutional validity of the said provisions.

16. Prior to the advertence in aforesaid regard, it is necessary to have a certain survey pertaining to reservation in promotional matters. The question of reservation and the associated promotion with it has been a matter of debate in various decisions of this Court. After independence, there were various areas in respect of which decisions were pronounced. Eventually, in the case of *Indra Sawhney and another v. Union of India and others* (supra) the nine-Judge Bench, while dealing with the question whether clause (4) of Article 16 of the Constitution provides for reservation only in the matter of initial appointment, direct recruitment or does it contemplate and provide for reservations being made in the matter of promotion as well, recorded the submissions of the petitioners in paragraph 819 which reads as follows: -

> "The petitioners' submission is that the reservation of appointments or posts contemplated by clause (4) is only at the stage of entry into State service, i.e., direct

> recruitment. It is submitted that providing for reservation thereafter in the matter of promotion amounts to a double reservation and if such a provision is made at each successive stage of promotion it would be a case of reservation being provided that many times. It is also submitted that by providing reservation in the matter of promotion, the member of a reserved category is enabled to leap-frog over his compatriots, which is bound to generate acute heartburning and may well lead to inefficiency in administration. The members of the open competition category would come to think that whatever be their record and performance, the members of reserved categories would steal a march over them, irrespective of their performance and competence. Examples are give how two persons (A) and (B), one belonging to O.C. category and the other belonging to reserved category, having been appointed at the same time, the member of the reserved category gets promoted earlier and how even in the promoted category he jumps over the members of the O.C. category already there and gains a further promotion and so on. This would generate, it is submitted, a feeling of disheartening which kills the spirit of competition and develops a sense of disinterestedness among the members of O.C. category. It is pointed out that once persons coming from different sources join a category or class, they must be treated alike thereafter in all matters including promotions and that no distinction is permissible on the basis of their "birth-mark". It is also pointed out that even the Constituent Assembly debates on draft Article 10(3) do not indicate in any manner that it was supported to extend to promotions as well. It is further submitted that if Article 16(4) is construed as warranting reservation even in the matter of promotion it would be contrary to the mandate of Article 335 viz., maintenance of efficiency in administration. It is submitted that such a provision would amount to putting a premium upon inefficiency. The members of the reserved category would

not work hard since they do not have to compete with all their colleagues but only within the reserved category and further because they are assured of promotion whether they work hard and efficiently or not. Such a course would also militate against the goal of excellence referred to in clause (j) of Article 51-A (Fundamental Duties)."

Thereafter, the Bench referred to the decisions in *General Manager, S. Rly. v. Rangachari*[5], *State of Punjab v. Hira Lal*[6], *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*[7] and *Comptroller and Auditor General v. K.S. Jagannathan*[8] and did not agree with the view stated in *Rangachari* (supra), despite noting the fact that *Rangachari* has been a law for more than thirty years and that attempt to reopen the issue was repelled in *Akhil Bharatiya Soshit Karamchari Sangh* (supra). Thereafter, their Lordships addressed to the concept of promotion and, eventuall,y after adverting to certain legal principles, stated thus: -

"**831.** We must also make it clear that it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion *without* compromising the efficiency of the administration. The relaxation concerned in *State of Kerala v. N.M. Thomas* [(1976) 2 SCC 310] and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in *Karamchari Sangh* are instances of such concessions and relaxations. However, it would not be permissible to prescribe lower qualifying marks or a lesser level of evaluation for the members of reserved categories since that would compromise the efficiency of administration. We reiterate that while it may be permissible to prescribe a reasonably

5. AIR 1962 SC 36.
6. (1970) 3 SCC 567.
7. (1981) 1 SCC 246.
8. (1986) 2 SCC 679.

lesser qualifying marks or evaluation for the OBCs, SCs and STs – consistent with the efficiency of administration and the nature of duties attaching to the office concerned – in the matter of direct recruitment, such a course would not be permissible in the matter of promotions for the reasons recorded hereinabove."

In paragraph 859, while summarising the said aspect, it has been ruled thus: -

"**859.** We may summarise our answers to the various questions dealt with and answered hereinabove:

....

(7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion – be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 – such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein,

it shall be open to it to do so (Ahmadi, J expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion *without* compromising the efficiency of the administration."

17. After the said decision, another decision, namely, *Union of India and others v. Virpal Singh Chauhan and others*[9] came to the field. In the said case, the two-Judge Bench was concerned with the nature of rule and reservation in promotions obtaining in the railway service and the rule concerning the determination of seniority between general candidates and candidates belonging to reserved classes in the promotional category. The Bench referred to the decision in *R.K. Sabharwal v. State of Punjab*[10], various paragraphs of the Indian Railways Establishment Manual and paragraphs 692 and 693 of the *Indra Sawhney* (supra) and opined that the roster would only ensure the prescribed percentage of reservation but would not affect the seniority. It has been stated that while the reserved candidates are entitled to accelerated promotion, they would not be entitled to consequential seniority.

18. Thereafter, in *Ajit Singh Januja and others v. State of Punjab and others*[11], the three-Judge Bench posed the question in the following terms: -

"The controversy which has been raised in the present appeals is: whether, after the members of Scheduled Castes/Tribes or Backward Classes for whom specific percentage of posts have been reserved and roster has been provided having been promoted against those posts

9. (1995) 6 SCC 684.

10. (19950 2 SCC 745.

11. (1996) 2 SCC 715.

on the basis of "accelerated promotion" because of reservation of posts and applicability of the roster system, can claim promotion against general category posts in still higher grade on the basis of their seniority which itself is the result of accelerated promotion on the basis of reservation and roster?"

The Bench referred to the decisions in *Virpal Singh Chauhan* (supra), *R.K. Sabharwal* (supra) and *Indra Sawhney* (supra) and ultimately concurred with the view expressed in *Virpal Singh Chauhan* by stating as follows: -

"16. We respectfully concur with the view in *Union of India v. Virpal Singh Chauhan*, that seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position i.e. with reference to their inter se seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated "consequential seniority". If a Scheduled Caste/Scheduled Tribe candidate is promoted earlier because of the rule of reservation/roster and his senior belonging to the general category is promoted later to that higher grade the general category candidate shall regain his seniority over such earlier promoted Scheduled Caste/Tribe candidate. As already pointed out above that when a Scheduled Caste/ Tribe candidate is promoted earlier by applying the rule of reservation/roster against a post reserved for such Scheduled Caste/Tribe candidate, in this process he does not supersede his seniors belonging to the general category. In this process there was no occasion to examine the merit of such Scheduled Caste/Tribe candidate vis-à-vis his seniors belonging to the general category. As such it will be only rational, just and proper to hold that when the general category candidate is promoted later from the lower grade to the higher grade, he will be considered senior to a candidate belonging to

the Scheduled Caste/Tribe who had been given accelerated promotion against the post reserved for him. Whenever a question arises for filling up a post reserved for Scheduled Caste/Tribe candidate in a still higher grade then such candidate belonging to Scheduled Caste/Tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in a still higher grade then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority-cum-merit or merit-cum-seniority. If this rule and procedure is not applied then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered service on the basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or the spirit of Article 16(4) or Article 335 of the Constitution."

19. In *Jagdish Lal and others v. State of Haryana and others*[12], a three-Judge Bench opined that seniority granted to the Scheduled Caste and Scheduled Tribe candidates over a general candidate due to his accelerated promotion does not in all events get wiped out on promotion of general candidate. The Bench explained the decisions in *Vir Pal Singh Chauhan* (supra) and *Ajit Singh Januja* (supra).

20. In *Ajit Singh and others (II) v. State of Punjab and others,*[13] the Constitution Bench was concerned with the issue whether the decisions in *Vir Pal Singh Chauhan* (supra) and *Ajit Singh Januja* (supra) which were earlier decided to the effect that the seniority of general candidates is to be confirmed

12. AIR 1997 SC 2366.

13. (1999) 7 SCC 209.

or whether the later deviation made in *Jagdish Lal* (supra) against the general candidates is to be accepted. The Constitution Bench referred to Articles 16(1), 16(4) and 16(4A) of the Constitution and discussed at length the concept of promotion based on equal opportunity and seniority and treated them to be facets of Fundamental Right under Article 16(1) of the Constitution. The Bench posed a question whether Articles 16(4) and 16(4A) guarantee any Fundamental Right to reservation. Regard being had to the nature of language employed in both the Articles, they were to be treated in the nature of enabling provisions. The Constitution Bench opined that Article 16(1) deals with the Fundamental Right and Articles 16(4) and 16(4A) are the enabling provisions. After so stating, they proceeded to analyse the ratio in *Indra Sawhney* (supra), *Akhil Bharatiya Soshit Karamchari Sangh* (supra) and certain other authorities in the field and, eventually, opined that it is axiomatic in service jurisprudence that any promotions made wrongly in excess of any quota are to be treated as ad hoc. This applies to reservation quota as much as it applies to direct recruits and promotee cases. If a court decides that in order only to remove hardship such roster-point promotees are not to face reversions, - then it would, in our opinion be, necessary to hold – consistent with our interpretation of Articles 14 and 16(1) – that such promotees cannot plead for grant of any additional benefit of seniority flowing from a wrong application of the roster. While courts can relieve immediate hardship arising out of a past illegality, courts cannot grant additional benefits like seniority which have no element of immediate hardship. Ultimately while dealing with the promotions already given before 10.2.1995 the Bench directed as follows: -

"Thus, while promotions in excess of roster made before 10-2-1995 are protected, such promotees cannot claim seniority. Seniority in the promotional cadre of such excess roster-point promotees shall have to be reviewed after 10-2-1995 and will count only from the date on which they would have otherwise got normal promotion in any future

vacancy arising in a post previously occupied by a reserved candidate. That disposes of the "prospectivity" point in relation to *Sabharwal*."

21. At this juncture, it is condign to note that Article 16(4A) and Article 16 (4B) were inserted in the Constitution to confer promotion with consequential seniority and introduced the concept of carrying forward vacancies treating the vacancies meant for reserved category candidates as a separate class of vacancies. The said Articles as amended from time to time read as follows: -

"16(4A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

16(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of that year."

22. The validity of the said Articles were challenged under Article 32 of the Constitution of India before this Court and the Constitution Bench in *M. Nagraj* (supra) upheld the validity of the said Articles with certain qualifiers/riders by taking recourse to the process of interpretation. As the controversy rests mainly on the said decision, we will advert to it in detail at a later stage.

23. Presently, we shall dwell upon the provisions that were under challenge before the High Court. The Legislative

Assembly of Uttar Pradesh brought in a legislation, namely, the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 (UP Act No. 4 of 1994) to provide for reservation in public services and posts in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and other Backward Classes of citizens and for matters connected therewith or incidental thereto. Section 3(7), which is relevant for our present purpose, reads as follows: -

"**Reservation in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes.** –

....

(7) If, on the date of commencement of this Act, reservation was in force under Government Orders for appointment to posts to be filled by promotion, such Government Orders shall continue to be applicable till they are modified or revoked."

Sub-section (7) of Section 3 was the subject-matter of assail before the High Court.

24. As the factual matrix would reveal, the State of Uttar Pradesh brought into existence the Uttar Pradesh Government Servants Seniority (First Amendment) Rules, 2002 on the 18th of October, 2002 in exercise of the power conferred under Article 309 of the Constitution whereby after Rule 8, new Rule 8-A was inserted. The said Rule reads as follows: -

"8-A. Notwithstanding anything contained in Rule s6,7 or 8 of these rules, a person belonging to the Scheduled Castes or Scheduled Tribes shall on his promotion by virtue of rule of reservation/ roster, be entitled to consequential seniority also."

25. It is worth noting that on May 13, 2005, by the Uttar Pradesh Government Servants Seniority (Second Amendment)

Rules, 2005, Rule 8-A was omitted. However, it was provided in the said Rules that the promotions made in accordance with the revised seniority as determined under Rule 8-A prior to the commencement of the 2005 Rules could not be affected. Thereafter, on September 14, 2007, by the Uttar Pradesh Government Servants Seniority (Third Amendment) Rules, 2007, Rule 8-A was inserted in the same language which we have already reproduced hereinabove. It has been mentioned in the said Rule that it shall be deemed to have come into force on June 17, 1995. It is germane to note here that the U.P. Power Corporation Limited adopted the said Rules as there is no dispute about the fact that after the Rules came into existence and have been given effect to at some places and that is why the challenge to the constitutional validity of the Act and the Rules was made before the High Court. We have already indicated how both the Benches have dealt with the said situation.

26. At this stage, we may usefully state that though number of appeals have been preferred, yet some relate to the assail of the interim orders and some to the final orders. We may only state for the sake of clarity and convenience that if Section 3(7) and Rule 8-A as amended in 2007 are held to be constitutionally valid, all the appeals are bound to be dismissed and if they are held to be *ultra vires*, then the judgment passed by the Lucknow Bench shall stand affirmed subject to any clarification/ modification in our order.

27. As has been noticed hereinbefore, the Allahabad Bench had understood the dictum in *M. Nagaraj* (supra) in a different manner and the Division Bench at Lucknow in a different manner. The learned counsel appearing for various parties have advanced their contentions in support of the provisions in the enactment and the Rules. We would like to condense their basic arguments and endeavour to pigeon-hole keeping in view the facts which are requisite to be referred to at the time of analysis of the said decision in the backdrop of the verdict in *M. Nagaraj* (supra).

28. Mr. Andhyarujina and Mr. Raju Ram Chandran, learned senior counsel criticising the decision passed by the Lucknow Bench, have submitted that the High Court has fallen into grave error by not scrutinising the materials produced before it, as a consequence of which a sanctuary of errors have crept into it. If the counter affidavit and other documents are studiedly scanned, it would be luminescent that opinion has been formed as regards inadequate representation in promotional posts and, therefore, it had become an imperative to provide for reservation. The opinion formed by the Government need not be with mathematical precision to broad spectrum and such exercise has already been done by the State of U.P., since reservation in promotional matters was already in vogue by virtue of administrative circulars and statutory provisions for few decades. It is urged that the concept of inadequate representation and backwardness have been accepted by the amending power of the Constitution and, therefore, the High Court has totally flawed by laying unwarranted emphasis on the said concepts. The High Court could not have sat in appeal on the rule of reservation solely on the factual bedrock. The chart brought on record would reflect department wise how the persons from backward classes have not been extended the benefit of promotion and the same forms the foundation for making the enactment and framing the rule and hence, no fault could have been found with the same. Once an incumbent belongs to Scheduled Castes/ Scheduled Tribes category, it is conclusive that he suffers from backwardness and no further enquiry is necessary. It has been clearly held in the case of *Indra Sawhney* (supra) that the test or requirement of social and educational backwardness cannot be applied to Scheduled Castes/ Scheduled Tribes who indubitably fall within the expression 'Backward Classes of Citizen'. It is beyond any shadow of doubt that Scheduled Castes/ Scheduled Tribes are a separate class by themselves and the creamy layer principle is not applicable to them. It has been so held in *Avinash Singh*

Bagri and Ors. v. Registrar IIT Delhi and Another[14]. Article 16 (4A) uses the phrase 'in the opinion of' and the said word carries a different meaning to convey that it is subjective in nature rather than objective. The Report of the "Social Justice Committee" dated 28.06.2001 clearly ascertains the need for implementation of reservation in promotional matters in public service in U. P. and the said Report deserves acceptance. The State Government was possessed of sufficient materials to implement the promotional provisions which are enabling in nature and the same is justified by the "Social Justice Committee Report" which has examined the current status of implementation of Scheduled Castes/ Scheduled Tribes and other backward classes in other public services with respect to their quota, their participation and progress in various services, the substantial backlog in promotional posts in category A, B and C posts and the inadequacy of representation in promotional posts and various departments and State owned corporations. The High Court has completely erred specially when there was sufficient data available with the State Government. Regard being had to the factum that the said promotions were being given for few decades, a fresh exercise regarding adequacy was not necessary. The concept of efficiency as stipulated under Article 335 of the Constitution is in no way affected if the reservation does not exceed 50%. The consequential seniority being vested by the Constitution, it follows as natural corollary and hence, no further exercise was required to be undertaken. The learned counsel for the State has drawn the attention of this Court with respect to the percentage of representation to justify that requisite data was available and no further exercise was needed and, therefore, the decision of the High Court is fundamentally fallacious.

29. Mr. P. S Patwalia, learned senior counsel appearing in some appeals for the corporation, has submitted that the requirement of having quantifiable data is not a new concept propounded in the case of *M. Nagraj* (supra) but is a reiteration

14. (2009) 8 SCC 220

of the earlier view enunciated in *Indra Sawhney case* (supra) and, therefore, the provision could not have been declared as u*ltra vires*. The emphasis on backwardness is absolutely misconceived, for Scheduled Castes/ Scheduled Tribes are duly notified as such in the Presidential list by virtue of Articles 341 and 342 of the Constitution. Their exclusion from the list can alone be done by the amendment of the Presidential Order and hence, any kind of collection of data as regards the backwardness is an exercise in futility. The concept of creamy layer principle cannot be applied to Scheduled Castes/ Scheduled Tribes as has been held in the case of *Ashok Kumar Thakur v. Union of India*[15]. Learned senior counsel has placed reliance on the decision in *E. V. Chinniah v. State of Andhra Pradesh*[16] to highlight that there may be only one list of Scheduled Castes/Scheduled Tribes and this list constitutes one group for the purpose of reservation and the same cannot be interfered with, disturbed, re-grouped or re-classified by the State. In essence, the submission is that there may not be exclusion by engrafting the principle of backwardness for the purpose of reservation in promotion. Commenting on the adequacy of representation, it is urged by Mr. Patwalia that the data was immediately collected after the 1994 Act and thereafter, no fresh data was necessary to be collected after the decision rendered by the Constitution Bench in *M. Nagraj* (supra). It is further submitted by the learned counsel that even if quantifiable data is not collected, the State can be asked to do so in view of the order passed by this Court in *S. B Joshi v. State of Karnatka and Others* in W.P. 259 of 1994 decided on 13.07.2010. The efficiency of service as encapsuled in Article 335 of the Constitution has been duly respected by providing a uniform minimum standard of the matters of promotion as far as the Corporation is concerned and, therefore, no fault can be found in that regard.

30. Mr. P. P. Rao, learned senior counsel appearing for

15. (2008) 6 SCC 1.

16. (2005) 1 SCC 394.

some of the private respondents assailing the decision of the Lucknow Bench, has urged that when there was no challenge to the orders issued prior the amendment for reservation in promotion, no quantifiable data is necessary. Section 3 (7) of the 1994 Act does not make any change except recognising the earlier orders which lay down that they shall continue to be applicable till it is modified or revoked and, therefore, it has only been conferred statutory recognition. The High Court has misunderstood the decision in *M. Nagraj* (supra) while stating that the collection of quantifiable data was not undertaken though the said decision clearly lays down that a collection of quantifiable data showing backwardness for the class would be required while demonstrating the same in Court to the extent of promotion when it is under challenge. In the case at hand, the issue is not the extent of reservation or excessive reservation but reservation in promotion. That apart, the principles laid down in *M. Nagraj* (supra) do not get attracted if reservation in promotion is sought to be made for the first time but not for continuing the reservation on the basis of assessment made by the Parliament in exercise of its constituent powers. The Constitutional Amendment removed the base of the decision in *Indra Sawhney* (supra) that reservation in promotion is not permissible and the Government in its wisdom has carried out the assessment earlier and decided to continue the policy and, therefore, to lay down the principle that in view of the decision in *M Nagraj* (supra), a fresh exercise is necessary would tantamount to putting the concept in the realm of inherent fallacy. The decision in *Suraj Bhan Meena and Another v. State of Rajasthan & Ors.*[17] is not a binding precedent inasmuch as it takes note of the contention (at paragraph 24 at page no. 474-475 of the Report) but does not deal with it. The 85th Amendment which provides for consequential seniority wipes out the 'catch up' rule 'from its inception and the general principle of seniority from the date of promotion operates without any break and for the same

17. (2011) 1 SCC 467.

reason the said amendment had been given retrospective effect'. The intention of the Parliament at the time of exercise of its constitutional power clearly states that the representation of Scheduled Castes/ Scheduled Tribes in the services in the States had not reached the required level and it is necessary to continue the existing position of providing reservation in promotion in the case of Scheduled Castes/ Scheduled Tribes. The learned senior counsel has laid immense emphasis on the intention of the Parliament and the Legislature to continue the policy and, pyramiding the said submission, he has contended that no fresh exercise is required. It is propounded by Mr. Rao that Article 16 basically relates to classes and not backward individuals and therefore, no stress should be given on the backwardness. Alternatively, the learned senior counsel has submitted that the matter should be referred to a larger Bench, regard being had to the important issue involved in the case.

31. Mr. Rakesh Dwivedi, learned senior counsel who represents some of the petitioners aggrieved by the Lucknow Bench decision, has urged that backwardness is presumed in view of the nine-Judge Bench decision in *Indra Sawhney* (supra) and the same has to be regarded beyond any cavil. The dictum in *M. Nagraj* (supra) cannot be understood to mandate collection of quantifiable data for judging the backwardness of the Scheduled Castes/ Scheduled Tribes while making reservation in promotion. But, unfortunately, the High Court has understood the Judgment in the aforesaid manner. There is no material produced on record to establish that Scheduled Castes/ Scheduled Tribes candidates having been conferred the benefit of promotion under reservation have ceased to be backward. Though the decision in *Indra Sawhney* (supra) held that the promotion in reservation is impermissible, yet it continued the reservation in promotion for a period of five years and, therefore, the Constitution Amendment came into force in this backdrop Section 3 (7) of the 1994 Act could not have been treated to be invalid. But the stand that the refixation of seniority

after coming into existence of Rule 8-A of the Rules or the rule by the corporation is basically fallacious, for persons who were promoted earlier to the higher post are entitled to seniority from the date of promotion. The learned senior counsel has contended that after coming into force of the amendment of the Constitution by inserting Article 16 (4A), the decisions in *Rangachary* (supra) and *Akhil Bhartiya Karmachari Sangh* (supra) have been restored and the concept of 'catch up' rule as propounded in *Ajit Singh II* (supra) has also been nullified. Article 16 (4A) only makes it explicit what is implicit under service jurisprudence in matters of promotion and the said benefit was always enjoyed by the Scheduled Castes/ Scheduled Tribes people and *M. Nagraj* (supra) does not intend to affect the said aspect. The learned counsel has referred to paragraph 798 of *Indra Sawhney* (supra) to highlight the scope of judicial scrutiny in matters which are within the subjective satisfaction of the executive and are to be tested as per the law laid down in *Barium Chemicals v. Company Law Board*[18]. In essence, the submission is that in adequacy of representation is in the domain of subjective satisfaction of the State Government and is to be regarded as a policy decision of the State. The learned senior counsel has distinguished the principle enunciated in *Suraj Bhan Meena* (supra). In that case, the court was not dealing with an issue where the reservation had already been made and was in continuance. It is highlighted by Mr Dwivedi that in the present case the issue is not one where there is no material on record to justify the subjective satisfaction, but, on the contrary, there is adequate material to show that the State Government was justified in introducing the provision in the Act and the Rule. As regards the efficiency in administration has mandate under Article 335 of the Constitution, the submission of Mr. Dwivedi is that the constitutional amendment has been made keeping in mind the decision in *Indra Sawhney* (supra) and the amendment of Article 335 facilitates the reservations in promotion. The learned

18. (1970) 3 SCC 567.

senior counsel would contend that maintenance of efficiency basically would convey laying a prescription by maintaining the minimum standard and in the case of the Corporation it has been so done. It has been propounded by him that if backwardness becomes the criterion, it would bring out the internal conflict in the dictum of *M. Nagraj* (supra) and then in that case it has to be reconciled keeping in view the common thread of judgment or the matter should be referred to a larger Bench. In any case, *M. Nagraj* (supra) does not lay down that the quantifiable data of backwardness should be collected with respect to eligible Scheduled Castes/ Scheduled Tribes employees seeking promotion. Mr. Dwivedi has commended to the decision in *Union of India v. Rakesh Kumar*[19] to highlight that the proportion of population is the thumb rule as far as the Scheduled Castes/ Scheduled Tribes are concerned and that should be the laser beam to adjudge the concept of inadequacy of reservation. Reservation in promotion involves a balancing act between the national need to equalise by affirmative action and to do social justice on one hand and to ensure that equality of opportunity as envisaged under Article 14 is not unduly affected by the benefit of promotion which has been conferred by the Act and Rules on the Scheduled Castes/ Scheduled Tribes as a balancing act and same has always been upheld by this Court.

32. Mr. Shanti Bhushan, learned senior counsel, has submitted that the Constitution Bench in *M. Nagaraj* (supra) has clearly laid down certain conditions, namely, that there must be compelling reasons for making reservation in promotion; that the State is not bound to make reservation for Scheduled Castes/ Scheduled Tribes in matters of promotion; that if the State thinks that there are compelling reasons to make such reservation in promotion, it is obligatory on the part of the State to collect quantifiable data showing the backwardness of the class and inadequacy of representation of that class in public employment and also by making such reservation in promotion,

19. 2010 4 SCC 50.

the efficiency in administration is not affected; that the exercise is required to be made before making any reservation for promotion; that the State has not applied its mind to the question as to what could be regarded as an adequate representation for Scheduled Castes/Scheduled Tribes in respect of promotion; that the provision for reservation in matters of promotion has to be considered in any class or classes of posts not adequately represented in the services under the State but unfortunately, the exercise in that regard has not at all been taken up but amendments have been incorporated; that the concept of backwardness and inadequacy of representation as understood in the case of *M. Nagaraj* (supra) has been absolutely misunderstood and misconstrued by the State Government as a consequence of which the Rules of the present nature have come into existence; that the overall efficiency as enshrined under Article 335 of the Constitution has been given a total go-bye which makes Section 3(7) of the 1994 Act and Rule 8-A absolutely vulnerable and thereby invites the frown of the enabling provision and the dictum in *M. Nagaraj* (supra); that Rule 8-A which confers accelerated seniority would leave no room for the efficient general category officers which is not the intention of the framers of the Constitution and also as it is understood by various decisions of this Court.

33. Dr. Rajeev Dhavan, learned senior counsel, supporting the decision of the Division Bench which has declared the Rule as *ultra vires*, has submitted that if *M. Nagaraj* (supra) is properly read, it does clearly convey that social justice is an over reaching principle of the Constitution like secularism, democracy, reasonableness, social justice, etc. and it emphasises on the equality code and the parameters fixed by the Constitution Bench as the basic purpose is to bring in a state of balance but the said balance is destroyed by Section 3(7) of the 1994 Act and Rule 8-A inasmuch as no exercise has been undertaken during the post *M. Nagaraj* (supra) period. In *M. Nagraj* (supra), there has been emphasis on

interpretation and implementation, width and identity, essence of a right, the equality code and avoidance of reverse discrimination, the nuanced distinction between the adequacy and proportionality, backward class and backwardness, the concept of contest specificity as regards equal justice and efficiency, permissive nature of the provisions and conceptual essence of guided power, the implementation in concrete terms which would not cause violence to the constitutional mandate; and the effect of accelerated seniority and the conditions prevalent for satisfaction of the conditions precedent to invoke the settled principles. The learned senior counsel further submitted that *M. Nagaraj* (supra) deals with cadre and the posts but the State has applied it across the board without any kind of real quantifiable data after pronouncement of the *M. Nagaraj* (supra). It is his further submission that after Section 3(7) of the 1994 Act and Rule 8-A are allowed to stand, the balancing factor which has so far been sustained by this Court especially pertaining to reservation would stand crucified. It is urged by him that the chart supplied by the State only refers to the number and, seniority of officers but it does not throw any light on the core issue and further, a mere submission of a chart would not meet the requisite criteria as specified in *M. Nagaraj* (supra).

34. Mr. Vinod Bobde, learned senior counsel, has submitted that if accelerated seniority is confirmed on the roster by the promotees, the consequences would be disastrous inasmuch as the said employee can reach the fourth level by the time he attains the age of 45 years and at the age of 49, he would reach the highest level and stay there for nine years whereas a general merit promotee would reach the third level out of the six levels at the age of 56 and by the time he gets eligibility to get into the fourth level, he would reach the age of superannuation. It is urged by him that if reservation in promotion is to be made, there has to be collection of quantifiable data, regard being had to the backwardness and inadequacy of representation in respect of the posts in a

particular cadre and while doing so, the other condition as engrafted under Article 335 of the Constitution relating to the efficiency of administration has to be maintained. It is his further submission that in *M. Nagaraj* (supra), Articles 16(4A) and 16(4B) have been treated to be enabling provisions and an enabling provision does not create a fundamental right. If the State thinks to exercise the power, it has to exercise the power strictly in accordance with the conditions postulated in the case of *M. Nagaraj* (supra). The State of U.P. has totally misguided itself by harbouring the notion that merely because there has to be representation of Scheduled Castes and Scheduled Tribes in the services, the State is obliged to provide for reservation in promotion under Article 16(4A). The learned senior counsel would vehemently contend that nothing has been brought on record to show that after pronouncement of *M. Nagaraj* (supra), the State had carried out an exercise but has built a castle in Spain by stating that the provision being always there, the data was available. It is canvassed that the stand of the State runs counter to the principles laid down in *M. Nagaraj* (supra) which makes Section 3(7) and Rule 8-A sensitively susceptible. The consequential seniority was introduced on 18.10.2002 but was obliterated on 13.5.2005 and thereafter, it was revived on 14.9.2007 with retrospective effect and the reason is demonstrable from the order/circular dated 17.10.2007 which is based on total erroneous understanding and appreciation of the law laid down by this Court. It is argued by him that the Act and the Rules were amended solely keeping in view the constitutional provision totally ignoring how the said Articles were interpreted by this Court. It is propounded by Mr. Bobde that the State has referred to certain data and the "Social Justice Committee Report" of 2001 but the same cannot save the edifice of the impugned statutory provision and the Rules as the State could not have anticipated what this Court was going to say while upholding the constitutional validity.

35. Mr. Ranjit Kumar, learned senior counsel, has laid

immense emphasis on paragraphs 121 to 123 of M*. Nagaraj* (supra) to buttress the stand that reservation in promotional matters is subject to the conditions enumerated in the said paragraphs. The learned senior counsel has drawn inspiration from an order dated 11.3.2010 passed by a two-Judge Bench in Writ Petition (civil) 81 of 2002 wherein the direction was given that the validity may be challenged and on such challenge, the same shall be decided in view of the final decision in *M. Nagaraj* (supra). The learned senior counsel has placed reliance on *Ashok Kumar Thakur v. Union of India and others*[20] to highlight that any privilege given to a class should not lead to inefficiency. Emphasis has also been laid on the term backwardness having nexus with the reservation in promotion and collection of quantifiable data in a proper perspective. He has drawn inspiration from various paragraphs in *M. Nagaraj* (supra) to show that when an enabling provision is held valid, its exercise can be arbitrary and in the case at hand, the provisions are absolutely arbitrary, unreasonable and irrational.

36. To appreciate the rival submissions raised at the bar and the core controversy, it is absolutely seemly to understand what has been held in *M. Nagraj* (supra) by the Constitution Bench. While assailing the validity of Article 16(4A) of the Constitution which provides for reservation in promotion with a consequential seniority, it was contended that equity in the context of Article 16(1) connotes accelerated promotion so as not to include consequential seniority and as consequential seniority has been attached to the accelerated promotion, the constitutional amendment is violative of Article 14 read with Article 16(1) of the Constitution. Various examples were cited about the disastrous affects that would be ushered in, in view of the amendment. After noting all the contentions, the Constitution Bench addressed to the concept of reservation in the context of Article 16(4) and further proceeded to deal with equity, justice and merit. In that context, the Bench stated thus:-

20. (2008) 6 SCC 1.

"This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of Scheduled Caste and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4A) come in the form of Article 335 of the Constitution."

While dealing with reservation and affirmative action, the Constitution Bench opined thus: -

"48. It is the equality "in fact" which has to be decided looking at the ground reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti-discrimination legislation has a tendency of pushing towards *de facto* reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination.

49. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is under-written by a special justification. Equality in Article 16(1) is individual- specific whereas reservation in Article 16(4) and Article 16 (4-A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are

maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise."

37. The Bench referred to the cases of *Indra Sawhney* (supra), *R.K. Sabharwal* (supra), *Vir Pal Singh Chauhan* (supra), *Ajit Singh (I)* (supra) and *Ajit Singh (II)* (supra) and opined that the concept of catch-up rule and consequential seniority are judicially evolved concepts to control the extent in reservation and the creation of this concept is relatable to service jurisprudence. Thereafter, the Constitution Bench referred to the scope of the impugned amendment and the Objects and Reasons and, in paragraph 86, observed thus: -

"Clause (4-A) follows the pattern specified in Clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasizes the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, Clause (4-A) will be governed by the two compelling reasons - "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further in *Ajit Singh (II)*, this Court has held that apart from "backwardness" and "inadequacy of representation" the State shall also keep

in mind "overall efficiency" (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs."

Thereafter, the Bench referred to the 2000 Amendment Act, the Objects and Reasons and the proviso inserted to Article 335 of the Constitution and held thus: -

"98. By the Constitution (Eighty-Second Amendment) Act, 2000, a proviso was inserted at the end of Article 335 of the Constitution which reads as under:

> "Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

99. This proviso was added following the benefit of reservation in promotion conferred upon SCs and STs alone. This proviso was inserted keeping in mind the judgment of this Court in *Vinod Kumar* which took the view that relaxation in matters of reservation in promotion was not permissible under Article 16(4) in view of the command contained in Article 335. Once a separate category is carved out of Clause (4) of Article 16 then that category is being given relaxation in matters of reservation in promotion. The proviso is confined to SCs and STs alone. The said proviso is compatible with the scheme of Article 16(4-A)."

In paragraph 102, their Lordships have ruled thus: -

"Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that backward class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation'. As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the concerned State fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from Clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution."

After so stating, it was observed that there is no violation of the basic structure of the Constitution and the provisions are enabling provisions. At that juncture, it has been observed as follows: -

"Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions

keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between "equality in law" and "equality in fact" (See *Affirmative Action* by William Darity). If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred."

In paragraph 108, the Bench analyzed the concept of application of the doctrine of guided power under Article 335 of the Constitution and, in that context, opined thus: -

"Therefore, the question before us is - whether the State could be empowered to relax qualifying marks or standards for reservation in matters of promotion. In our view, even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. Reason is that "efficiency" is a variable factor. It is for State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the scheduled castes and scheduled tribes, and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests however have to be identified by weighty and comparable data."

Thereafter, the Constitution Bench proceeded to deal with the test to judge the validity of the impugned State Acts and opined as follows: -

"110. As stated above, the boundaries of the width of the power, namely, the ceiling-limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the

exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside."

In paragraph 117, the Bench laid down as follows: -

"The extent of reservation has to be decided on facts of each case. The judgment in *Indra Sawhney* does not deal with constitutional amendments. In our present judgment, we are upholding the validity of the constitutional amendments subject to the limitations. Therefore, in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/ STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution."

In the conclusion portions, in paragraphs 123 and 124, it has been ruled thus: -

"123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is

an enabling provision. The State is not bound to make reservation for SCs/STs in matter of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995; the Constitution (Eighty-First Amendment) Act, 2000; the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act, 2001."

38. From the aforesaid decision and the paragraphs we have quoted hereinabove, the following principles can be carved out: -

(i) Vesting of the power by an enabling provision may be constitutionally valid and yet 'exercise of power' by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

(ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality under Article 14.

(iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

(iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling-limit of 50% is not violated. Further roster has to be post-specific and not vacancy based.

(v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4A). Therefore, Clause (4A) will be governed by the two compelling reasons – "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

(vi) If the ceiling-limit on the carry-over of unfilled vacancies is removed, the other alternative time-factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact-situation.

(vii) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335, then this Court will certainly set aside and strike down such legislation.

(viii) The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

(x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.

39. At this stage, we think it appropriate to refer to the case of *Suraj Bhan Meena and another* (supra). In the said case, while interpreting the case in *M. Nagaraj* (supra), the two-Judge Bench has observed: -

"10. In *M. Nagaraj case*, this Court while upholding the constitutional validity of the Constitution (77thAmendment) Act, 1995 and the Constitution (85th Amendment) Act, 2001, clarified the position that it would not be necessary for the State Government to frame rules in respect of reservation in promotion with consequential seniority, but in case the State Government wanted to frame such rules in this regard, then it would have to satisfy itself by quantifiable data, that there was backwardness, inadequacy of representation in public employment and overall administrative inefficiency and unless such an exercise was undertaken by the State Government, the rule relating to reservation in promotion with consequential seniority could not be introduced."

40. In the said case, the State Government had not undertaken any exercise as indicated in *M. Nagaraj* (supra). The two-Judge Bench has noted three conditions in the said judgment. It was canvassed before the Bench that exercise to be undertaken as per the direction in *M. Nagaraj* (supra) was mandatory and the State cannot, either directly or indirectly, circumvent or ignore or refuse to undertake the exercise by taking recourse to the Constitution (Eighty-Fifth Amendment) Act providing for reservation for promotion with consequential seniority. While dealing with the contentions, the two-Judge Bench opined that the State is required to place before the Court the requisite quantifiable data in each case and to satisfy the court that the said reservation became necessary on account of inadequacy of representation of Scheduled Castes and Scheduled Tribes candidates in a particular class or classes of posts, without affecting the general efficiency of service. Eventually, the Bench opined as follows: -

"66. The position after the decision in *M. Nagaraj case* is that reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward

Classes and subject to the condition of ascertaining as to whether such reservation was at all required.

67. The view of the High Court is based on the decision in *M. Nagaraj case* as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Schedule Caste and Scheduled Tribe communities in public services. The Rajasthan High Court has rightly quashed the notifications dated 28.12.2002 and 25.4.2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Caste and Scheduled Tribe communities and the same does not call for any interference."

After so stating, the two-Judge Bench affirmed the view taken by the High Court of Rajasthan.

41. As has been indicated hereinbefore, it has been vehemently argued by the learned senior counsel for the State and the learned senior counsel for the Corporation that once the principle of reservation was made applicable to the spectrum of promotion, no fresh exercise is necessary. It is also urged that the efficiency in service is not jeopardized. Reference has been made to the Social Justice Committee Report and the chart. We need not produce the same as the said exercise was done regard being had to the population and vacancies and not to the concepts that have been evolved in *M. Nagaraj* (supra). It is one thing to think that there are statutory rules or executive instructions to grant promotion but it cannot be forgotten that they were all subject to the pronouncement by this Court in *Vir Pal Singh Chauhan* (supra) and *Ajit Singh (II)* (supra). We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in *M. Nagaraj* (supra) is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval

to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4A) and 16(4B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein.

42. In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8A of the 2007 Rules are ultra vires as they run counter to the dictum in *M. Nagaraj* (supra). Any promotion that has been given on the dictum of *Indra Sawhney* (supra) and without the aid or assistance of Section 3(7) and Rule 8A shall remain undisturbed.

43. The appeals arising out of the final judgment of Division Bench at Allahabad are allowed and the impugned order is set aside. The appeals arising out of the judgment from the Division Bench at Lucknow is affirmed subject to the modification as stated hereinabove. In view of the aforesaid, all other appeals are disposed of. The parties shall bear their respective costs.

R.P. Appeals disposed of.

M.T. ENRICA LEXIE & ANR.
v.
DORAMMA & ORS
(Civil Appeal No. 4167 of 2012)

MAY 2, 2012

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

Search and Seizure:

Power of police officer to seize certain property – Two Indian fishermen killed as a result of firing from an Italian ship – Letter issued by Kerala Police to Master of the vessel not to continue her voyage without prior permission – Held: Admittedly, the vessel was not object of the crime nor have any circumstances come up in the course of investigation that create suspicion of commission of any offence by the vessel – It has been further stated that the detention of the vessel was no longer required in the matter – Most of the safeguards sought for have been taken care of by the vessel and her owner – The assurance given by the Republic of Italy to secure the presence of the four Marines, if required by any court or lawful authority, fully meets the ends of justice and protects wholly the interest of the State Government – In no way it affects the State Government's right to proceed with the investigation and prosecute the offenders – The State Government and its authorities shall allow the vessel to commence her voyage subject to the directions given in the judgment – Code of Criminal Procedure, 1973 – s.102.

On 15.2.2012, an FIR was lodged by the owner of an Indian fishing boat that as a result of indiscriminate firing from an Italian ship i.e. appellant no. 1, two of its fisherman died. During the course of investigation the Circle Inspector of the Kerala Police issued a letter to the Master of appellant no. 1 vessel not to continue her

voyage without his prior permission. The vessel and its owner filed a writ petition before the High Court. Their stand was that the Master of the ship was in no way responsible and could not interfere with the military activities undertaken by the NMP Squad which was directly under the command of the military of Republic of Italy. The writ petition was allowed by the Single Judge of the High Court permitting the vessel to commence her voyage subject to certain conditions. On the appeal filed by the wife of the one of the deceased fisherman, the Division Bench of the High Court set aside the orders of the single Judge and permitted the vessel and its owner to approach the jurisdictional Magistrate with an application u/s 457 CrPC. Aggrieved, the vessel and its owner filed the appeal.

Meanwhile three admiralty suits were filed by the owner of the fishing boat and the heirs of the deceased fishermen. Three settlements took place before Lok Adalat. The State Government contended that the said settlements were against public policy as also the Indian laws and would be challenged in appropriate proceedings. The Republic of Italy was also permitted to intervene.

Disposing of the appeal, the Court

HELD: 1. The police officer in the course of investigation can seize any property u/s 102 CrPC if such property is alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has direct link with the commission of offence for which the police officer is investigating into. A property not suspected of commission of the offence which is being investigated into by the police officer cannot be seized. Under s. 102 of the Code, the police officer can seize such property which is covered by s.102(1) and no other. [para 13] [181-G-H; 182-A]

1.2. It is the admitted case that the vessel was not object of the crime nor have any circumstances come up in the course of investigation that create suspicion of commission of any offence by the vessel. It has been further stated that the detention of the vessel was no longer required in the matter. In view thereof, the order of the Division Bench of the High Court in upsetting the order of the Single Judge is set aside. [para 14] [182-C-D]

1.3. Two things are required to be made clear - (i) In the instant appeal, the Court is not directly concerned with the correctness, legality or validity of the settlements arrived at between the Republic of Italy and claimants-plaintiffs. Having regard to certain clauses in the settlements, insofar as the instant appeal is concerned, these settlements deserve to be ignored; and (ii) the limited question for consideration in this appeal is with regard to the voyage of the vessel and, therefore, it is not necessary for this Court to dwell on the position taken up by the Republic of Italy with regard to the jurisdiction of Indian authorities and courts. [para 23] [186-E-H; 187-A]

1.4. Most of the safeguards sought for have been taken care of by the vessel and her owner. However, for securing the presence of four named Marines, it is expressly stated that the Republic of Italy is agreeable to give assurance to this Court that if the presence of these 4 Marines is required by any court or in response to any summons issued by any court or lawful authority, the Republic of Italy shall ensure their presence before the appropriate court or such authority. This assurance is subject to the right of the persons summoned to challenge the same before a competent court in India. The assurance given by the Republic of Italy fully meets the ends of justice and protects wholly the interest of the State Government and in no way it affects its right to

proceed with the investigation and prosecute the offenders. [para 24, 25] [187-B-F]

1.5. The State Government and its authorities shall allow the vessel to commence her voyage subject to the directions given in the judgment. [para 26] [187-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4167 of 2012.

From the Judgment & Order dated 03.04.2012 of the High Court of Kerala at Ernakulam in W. A. No. 679 of 2012.

Goolam E. Vahanvati, Attorney General, Indira Jaising, ASG, K.K. Venugopal, V.J. Mathew, Gopal Subramaniam, Harish N. Salve, Suhail Dutt, Raghenth Basant, Vipin Varghese, Ankur Talwar, Arjun Singh Bhati (for Senthil Jagadeesan), Harris Beeran, Nishanth Patil, Prashant Patil, Supriya Jain, Rekha Pandey, D.S. Mahra, M.T. George, K.T. Kavitha, P.V. Dinesh, P.V. Vinod, Jaimon Andrews, P.P. Sandhu, Robin V.S. Parameswaran Nair, Diljeet Titus, Abhixit Singh, Achint Singh Gyani, Jagjit Singh Chhabra, Jaswant Perraya, Ankur Manchanda for the apprearing parties.

The Judgment of the Court was delivered by

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

2. We have heard Mr. K.K. Venugopal, learned senior counsel for the appellants, Mr. Goolam E. Vahanvati, learned Attorney General of India for respondent No. 6, and Mr. Gopal Subramaniam, learned senior counsel for respondent Nos. 2 and 3. Despite service, respondent No. 1 has not chosen to appear.

3. The vessel - M.T. Enrica Lexie - and M/s Dolphin Tanker SRL (owner of the vessel) are in appeal aggrieved by the order passed by the Division Bench of the Kerala High Court on April 3, 2012 whereby the Division Bench set aside the judgment and order of the Single Judge dated March 29, 2012.

4. The controversy arises in this way. On February 15, 2012

an First Information Report (FIR) was lodged at Neendakara Coastal Police Station by one Fredy, owner of the Indian registered fishing boat St. Antony. It was alleged in the FIR that at 4.30 p.m. (IST) on that day while the fishing boat St. Antony was sailing through the Arabian Sea, incriminate firing was opened by an Italian Ship - M.T. Enrica Lexie (first appellant). As a result of firing from the first appellant vessel, two innocent fishermen who were on board the fishing boat St. Antony died and the other occupants of the boat saved their lives as they were lying in reclining position on the deck of the boat. On the basis of FIR, Crime No. 2/2012 under Section 302 of the Indian Penal Code, (IPC) was registered. Neendakara Coastal Police Station also informed the matter to the Coast Guards and, accordingly, the first appellant vessel was intercepted and brought to the Port of Cochin on February 16, 2012. Two Marines who allegedly committed the offence were arrested on February 19, 2012.

5. It is not necessary to go into details of the investigation into the above crime. Suffice it to say that on February 26, 2012, the concerned Circle Inspector of Police issued a letter to the Master of the first appellant vessel directing that the vessel shall not continue her voyage without his prior sanction.

6. The stand of the first appellant is that she was on way from Singapore to Egypt having 24 crew members on board. The vessel also had on board six Marines personnel, i.e., Naval Military Protection Squad (NMP Squad). The NMP Squad was deployed on board the first appellant vessel by the Government of Republic of Italy due to severe threat of Somalian pirates in the Arabian Sea. The second appellant - owner of the vessel - is a member of the Italian Ship Owner's Confederation. The NMP Squad was on board to ensure efficient protection to the vessel because of piracy and armed plundering as per the agreement between the Ministry of Defence - Naval Staff and the Italian Ship Owner's Confederation. The Master of the ship is in no way responsible for choices relating to operations

involved in countering piracy attacks, if any; the Master of the ship cannot interfere with the military activities undertaken by the NMP Squad for the defence of the vessel, its crew and cargo in the face of pirate attacks and the NMP Squad on board the vessel is always under the direct command of the military of Republic of Italy.

7. According to the appellants, although all the agencies had completed their respective investigations, none of them were giving official clearance for the vessel to sail and that necessitated them to file a Writ Petition before the High Court of Kerala for appropriate directions and permission to the first appellant vessel for sailing and proceeding with her voyage.

8. In response to the Writ Petition, counter affidavit was filed by the Circle Inspector. The Single Judge, after hearing the parties, allowed the Writ Petition filed by the appellants, issued a writ of mandamus directing the present respondent Nos. 1 and 2 to allow the first appellant vessel to commence her voyage on certain conditions.

9. Being not satisfied with the judgment and order of the Single Judge dated March 29, 2012, Doramma (wife of one of the deceased fishermen), inter alia, filed Writ Appeal No. 679 of 2012. The Division Bench of the Kerala High Court noted that investigation in the matter was not yet complete and no charge-sheet had been filed and now since proceedings had been initiated by the Investigating Officer under Section 102(3) of the Code of Criminal Procedure, 1973 (for short, 'Code'), the matter needed to be considered by the concerned Judicial Magistrate exercising the powers under Section 457 of the Code and the Single Judge was not justified in allowing the Writ Petition and issuing the directions. The Division Bench, accordingly, set aside the order of the Single Judge and permitted the appellants to approach the jurisdictional Magistrate with an application under Section 457 of the Code and observed that the concerned Magistrate should dispose of the application in accordance with the procedure after

applying its judicious mind to the facts of the case.

10. During the pendency of the matter before this Court, certain events have intervened. In three Admiralty Suits - one filed by the present respondent No. 1 - Doramma, the other by the first informant Fredy, and the third by Abhinaya Xavier and Aguna Xavier, settlements have taken place after impleadment of the Republic of Italy as one of the parties to the proceedings. The settlement with the present respondent No. 1 - Doramma and the settlement with Abhinaya Xavier and Aguna Xavier took place on April 24, 2012, whereas the settlement with Fredy took place on April 27, 2012. All three settlements took place before Lok Adalat. The Government of Kerala is seriously aggrieved by various clauses of these three settlements. Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, vehemently contended that these settlements were against public policy and the Indian laws. He submitted that the Government of Kerala intends to challenge these settlements in appropriate proceedings before appropriate forum.

11. In the course of the hearing of this Appeal, an oral application was made on behalf of the Republic of Italy for intervention. We permitted the intervention of the Republic of Italy, particularly in view of the statements made in the Appeal that the NMP Squad comprising of six Italian Naval personnel on board were always under the direct command of the Republic of Italy and the Master of the vessel could not interfere with the military activities undertaken by the Naval personnel on board the vessel. The intervention by the Republic of Italy was also found by us proper because of serious challenge by the Government of Kerala to the three settlements entered into between the Republic of Italy and the claimants-plaintiffs in the three Admiralty Suits.

12. Before we deal with the matter further, we may refer to Section 102 of the Code which reads as follows :

"102. Power of police officer to seize certain property.-

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the Commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:

Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale."

13. The police officer in course of investigation can seize any property under Section 102 if such property is alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has direct link with the commission of offence for which the police officer is investigating into. A property not suspected of commission of the offence which is being investigated into by the police officer cannot be seized. Under Section 102 of the Code, the police officer can seize such property which is covered by Section 102(1) and no other.

14. After the Writ Petition was filed by the present appellants before the Kerala High Court, during pendency thereof on March 26, 2012 a report under sub-section (3) of Section 102 of the Code was filed by the Circle Inspector before the Chief Judicial Magistrate, Kollam reporting to that court that the first appellant vessel has been seized. To our specific question to Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, whether the first appellant vessel was object of the crime or the circumstances have come up in the course of investigation that create suspicion of commission of any offence by the first appellant vessel, Mr. Gopal Subramaniam answered in the negative. Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, further stated that the detention of the first appellant vessel was no longer required in the matter. In view thereof, the order of the Division Bench in upsetting the order of the Single Judge has to go and we order accordingly.

15. The question now remains, whether the order passed by the Single Judge on March 29, 2012 can be allowed to stand as it is or deserves to be modified.

16. Mr. Goolam E. Vahanvati, learned Attorney General, at the outset, submitted that Union of India has the same position as has been taken up by the Government of Kerala. He referred to the short counter affidavit filed on behalf of the Union of India by P. Sasi Kumar, Under Secretary to Government of India, Ministry of Shipping. In para 6 of the said counter affidavit, it is stated that the material evidence in relation to the first appellant vessel itself has been collected during the preliminary inquiry for the purposes of Sections 358 and 359 of the Merchant Shipping Act, 1958. The FIR lodged against the accused persons is being investigated by the competent

authorities of the State of Kerala because law and order is a State subject.

17. Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, had already indicated that detention of the first appellant vessel was no longer required. He did not have any serious objection if the first appellant vessel was allowed to commence her voyage. He, however, sought for the following safeguards, viz., (i) the appellants must submit to the jurisdiction of the Indian court/s and they must also clarify their position about settlements in the Admiralty Suits arrived at between the Republic of Italy and the claimants-plaintiffs; (ii) for securing the presence of the six crew members, namely, Vitelli Umberto (Master), Noviello Carlo (Master SN), James Mandley Samson (Chief Officer), Sahil Gupta (2nd Officer), Fulbaria (Seaman) and Tirumala Rao (Ordinary Sea Man) and four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), an undertaking must be given by the Master of the first appellant vessel, the Managing Director of the owner of the first appellant vessel and the Managing Director of the shipping agent, namely, James Mackintosh & Co. Pvt. Ltd.; and (iii) it be clarified that the interest of the Government of Kerala shall remain unaffected by the settlements arrived at between the Republic of Italy and the claimants-plaintiffs and the Government of Kerala should be free to take appropriate legal recourse in challenging these settlements.

18. Mr. K.K. Venugopal, learned senior counsel for the appellants, in response to the submissions made by Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, submitted that the appellants were not associated with the settlements arrived at between the Republic of Italy and the claimants-plaintiffs in the Admiralty Suits. He also submitted that for securing the presence of the six crew members on board the first appellant vessel, an undertaking shall be

furnished by the Master of the first appellant vessel, the Managing Director of the owner of the first appellant vessel and Managing Director of the shipping agent, namely, James Mackintosh & Co. Pvt. Ltd. He also submitted that the appellants, in fact, have submitted to the jurisdiction of the Indian courts and they maintain that position. As regards, four Marines on board, Mr. K.K. Venugopal submitted that the Marines being under the direct command of the military of the Republic of Italy, the owner or the Master of the first appellant vessel were not in a position to give any undertaking or make any statement.

19. Since we have permitted Republic of Italy to intervene in the matter, we wanted to know from Mr. Harish Salve, learned senior counsel for the Republic of Italy, whether the Republic of Italy was in a position to give any assurance to this Court to secure the presence of four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), as and when required by the Investigating Officer or any Court or lawful authority, Mr. Harish Salve handed over to us a written note indicating the position of the Republic of Italy which reads as follows :-

> "1. The position of the Republic of Italy is that the alleged incident took place outside Indian territorial waters and the Union of India and the State of Kerala have no jurisdiction to deal with the matter under Indian municipal laws, including criminal laws, as well as under international law; that the incident is between two sovereign states, i.e., Republic of India and the Republic of Italy and that dispute settlement that are provided by international law and conventions.
>
> 2. The Republic of Italy filed a petition under Article 32 and has also challenged the legal proceedings initiated in Kerala by an appropriate proceeding in the Kerala High Court. Without prejudice to its rights [and obligations] under international law, and its contentions of sovereign immunity

including those raised in these two petitions, and without accepting that the actions of the Union of India or the State of Kerala are authorized by law, the Republic of Italy is agreeable to give an assurance to the Supreme Court of India that if the presence of these marines is required by any Court or in response to any summons issued by any Court or lawful authority, the Republic of Italy shall ensure their presence before an appropriate court or authority. This would be subject to the right of the persons summoned to challenge such summons/order before a competent court in India.

3. On this assurance this Hon'ble Court may, if it considers it appropriate, issue directions in respect of the following:-

(a) The vessel shall be permitted to sail out of India, and the marines shall sail on the vessel [together with all equipments, arms and ammunitions on board] and cross Indian territorial waters.

4. This assurance should not be considered as in any manner detracting from the stand of the Republic of Italy that its officers are entitled to sovereign immunity and that proceedings in India under the Indian municipal laws are illegal.

5. If in appropriate legal proceedings [including the petition filed by the Republic of Italy in this Hon'ble Court] it is declared that the proceedings in India are illegal, then these assurances shall come to an end."

20. In response to the above statement made by the Republic of Italy, Mr. Goolam E. Vahanvati, learned Attorney General, submitted that the Union of India did not accept the correctness of the assurances made in the above statement and, in any case, it must be clarified that the position taken by the Republic of Italy would in no way prejudice the proceedings

in this Court or in any other Court or forum.

21. Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, vehemently opposed the above statement of the Republic of Italy and submitted that the above statement was not acceptable to the Government of Kerala. He further asserted the right of the Government of Kerala to investigate into the crime and prosecute the offenders for the death of two fishermen.

22. Pertinently, Mr. Harish Salve, learned senior counsel for the Republic of Italy, also submitted that the settlements arrived at between the Republic of Italy and claimants-plaintiffs could be set aside by this Court in exercise of its powers under Article 142 of the Constitution of India. Mr. Harish Salve further submitted that the payments under the settlements have been made by the Republic of Italy to the claimants-plaintiffs not by way of compensation in the proceedings initiated by them but by way of goodwill and gesture.

23. We may make two things clear - (i) In the present Appeal, we are not directly concerned with the correctness, legality or validity of the settlements arrived at between the Republic of Italy and claimants-plaintiffs. Having regard to certain clauses in the settlements, we are of the view that insofar as the present Appeal is concerned, these settlements deserve to be ignored and we do so, and (ii) The limited question for consideration in this Appeal is with regard to the voyage of the first appellant vessel and, therefore, it is not necessary for us to dwell on the position taken up by the Republic of Italy that the alleged incident took place outside territorial waters and the Union of India and the State of Kerala have no jurisdiction to deal with the matter under municipal laws and the stout refutation to that position by the Union of India and the State of Kerala and the strong assertion by the Union of India and the State of Kerala that the offence of murder of two

Indian citizens was committed within the territorial jurisdiction of India.

24. Most of the safeguards sought for by Mr. Gopal Subramaniam, learned senior counsel for the Government of Kerala, have been taken care of by the first appellant vessel and her owner. However, for securing the presence of four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), some difficulty remains.

25. While taking up its position as set out in the statement handed over to us on behalf of the Republic of Italy, it is expressly stated that the Republic of Italy is agreeable to give assurance to this Court that if the presence of these 4 Marines is required by any Court or in response to any summons issued by any Court or lawful authority, the Republic of Italy shall ensure their presence before the appropriate Court or such authority. This assurance is subject to the right of the persons summoned to challenge the same before a competent court in India. In our view, the assurance given by the Republic of Italy to secure the presence of these four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), if required by any court or lawful authority, fully meets the ends of justice and protects wholly the interest of the Government of Kerala. In no way it affects the Government of Kerala's right to proceed with the investigation and prosecute the offenders.

26. Having regard to the above, we dispose of the present Appeal by the following order :-

(1) Subject to the compliances by the appellants as noted below, the Government of Kerala and its authorities shall allow the first appellant vessel to commence her voyage:-

(a) The Master of the first appellant vessel, the Managing Director of the owner of the first appellant

vessel and the Managing Director of the shipping agent, namely, James Mackintosh & Co. Pvt. Ltd shall furnish their undertakings to the satisfaction of the Registrar General of the Kerala High Court that six crew members, namely, Vitelli Umberto (Master), Noviello Carlo (Master SN), James Mandley Samson (Chief Officer), Sahil Gupta (2nd Officer), Fulbaria (Seaman) and Tirumala Rao (Ordinary Sea Man), on receipt of summons/notice from any court or by Investigating Officer or lawful authority shall present themselves within five weeks from the date of the receipt of such summons/notice and shall produce the first appellant vessel, if required by any court or the Investigating Officer or any other lawful authority, within seven weeks from the receipt of such summons/notice.

(b) The second appellant shall execute a bond in the sum of Rupees Three Crores before the Registrar General of the Kerala High Court for production of the first appellant vessel and securing the presence of the above six crew members as and when called upon by any court or the Investigating Officer or any other lawful authority.

(2) The assurance given by the Republic of Italy that if the presence of the four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), is required by any court or lawful authority or Investigating Officer, the Republic of Italy shall ensure their presence before such court or lawful authority or Investigating Officer is accepted. Such assurance shall, however, not affect the right of the above four Marines to challenge such summons/ notice issued by any court or Investigating Officer or any other lawful authority before a competent court in India.

27. It is clarified that the investigation into Crime No. 2/

2012 registered at Neendakara Coastal Police Station shall not be an impediment for commencement of the voyage by the first appellant vessel subject to port and customs clearances in accordance with law and upon furnishing the undertakings and bond as noted above.

28. The four Marines, namely, Voglino Renato (Seargeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), may sail on the vessel together with all equipments, arms and ammunitions on board the first appellant vessel other than those already seized by the Investigating Officer.

29. No costs.

R.P. Appeal disposed of.

TEJAS CONSTRUCTIONS & INFRASTRUCTURE PVT. LTD.

v.

MUNICIPAL COUNCIL, SENDHWA & ANR.

(Civil Appeal No. 4195 of 2012)

MAY 4, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Administrative Law:

Judicial review of award of contract by municipality – Scope of – Acceptance of bid of a contractor for construction of Integrated water supply scheme by Municipal Council challenged by the unsuccessful bidder – Held: The findings recorded by the High Court with regard to the requirements as per the notice inviting tenders and the eligibility and experience of the successful bidder, are in no way irrational or absurd – Besides, the Municipal Council had the advantage of aid and advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken by them – Therefore, there is no reason to interfere with the view taken by the High Court of the allotment of work made in favour of the successfully bidder – In the light of the settled legal position and in the absence of any mala fide or arbitrariness in the process of evaluation of bids and the determination of the eligibility of the bidders, the Court does not consider it to be a fit case for interference – Tenders – Award of construction contract.

The respondent-Municipal Council invited tenders for construction of an Integrated Water Supply Scheme, in terms of the conditions stipulated in the notice inviting

tenders (NIT). Out of the four bidders, including the appellant and respondent no. 2, found eligible, respondent no. 1 accepted the bid offered by respondent no. 2. The appellant filed a writ petition challenging the eligibility of respondent no. 2 on the grounds: (1) that respondent no. 2 had not filed the requisite certified balance-sheets for five years immediately preceding the issue of NIT; and (2) that respondent no. 2 did not have the requisite experience of executing a single integrated water supply scheme of the required value. The High Court dismissed the writ petition.

Dismissing the appeal, the Court

HELD: 1. A challenge to the award of the project work in favour of respondent No.2 involved judicial review of administrative action. The scope and approach to be adopted in the process of any such review is well settled. [para 8] [198-D]

Tata Cellular v. Union of India **1994 (2) Suppl. SCR 122 = (1994) 6 SCC 651;** *Raunaq International Limited v. I.V.R. Construction Ltd. & Ors.* **(1999) 1 SCC 49;** *Reliance Airport Developers (P) Ltd. v. Airports Authority of India & Ors.* **2006 (8) Suppl. SCR 398 = (2006) 10 SCC 1;** *Sterling Computers Ltd. v. M & N Publication Ltd.* **1993 (1) SCR 81 = (1993) 1 SCC 445;** *Air India Ltd. v. Cochin International Airport Ltd. & Ors.* **2000 (1) SCR 505 = (2000) 2 SCC 617;** *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. & Ors.* **2005 (3) SCR 666 = (2005) 6 SCC 138 and** *Jagdish Mandal v. State of Orissa* **2006 (10) Suppl. SCR 606 = (2007) 14 SCC 517 – referred to.**

1.2. As regards the plea that respondent No.2 had not satisfied the requirement of filing audited balance sheets for the five years preceding award of the contract, it is significant to note that the date of submission of tender was initially fixed upto 25.3.2011 but the same was

extended upto 7.4.2011. That being so, 5 years immediately preceding the issue of the tender notice would have included the year 2010-2011 also for which financial year, audit of the company's books, accounts and documents had not been completed. Such being the case, respondent No.2 could not possibly comply with the requirement of the tender notice or produce certified copy of the audited balance-sheet for the said year. All that it could possibly do was to obtain a certificate based on the relevant books, registers, records accounts etc. of the company, which certificate was indeed produced by the said respondent. The High Court has rightly observed that the appellant had not disputed the correctness of the turnover certified by the Chartered Accountant for the year 2010-2011 nor was it disputed that the same satisfied the requirement of the tender notice. In that view, therefore, there was no question of respondent No.2 being ineligible or committing a deliberate default in producing the requisite documents to establish its eligibility to offer a bid. [para14-15] [204-F-H; 205-A-B; 203-A]

1.3. The High Court has, while examining the question of eligibility of respondent No.2 by reference to the execution of the single integrated water supply scheme, recorded a finding that the nature of the work executed by respondent No.2 for Upleta satisfied the requirement of the tender notice. That finding is in no way irrational or absurd. The certificate sufficiently demonstrates that respondent No.2 had designed, and executed an integrated water supply scheme for Upleta which included raw water transmission from intake wells and transmission of treated clear water from WTP including providing, supplying and laying of pipelines, construction of E.S.Rs, Sumps, Pump houses and providing erecting pumping machinery. [para 18] [207-E-G]

1.4. It is also noteworthy that in the matter of evaluation of bids and determination of eligibility of the bidders, Municipal Council had the advantage of the aid and advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken by them. Therefore, there is no reason to interfere with the view taken by the High Court of the allotment of work made in favour of respondent No.2. [para 19] [207-H; 208-A-B]

1.5. It is pertinent to note that out of a total of Rs.19.5 crores representing the estimated value of the contract, respondent No.2 is certified to have already executed work worth Rs.11.50 crores and received a sum of Rs.8.79 crores towards the said work. More importantly the work in question relates to a drinking water supply scheme for the residents of a scarcity stricken municipality. The project is sponsored with the Central Government assistance under its urban infrastructure scheme for small and middle towns. The completion target of the scheme is September 2012. Any interference with the award of the contract at this stage is bound to delay the execution of the work and put the inhabitants of the municipal area to further hardship. Interference with the on-going work is, therefore, not conducive to public interest which can be served only if the scheme is completed as expeditiously as possible giving relief to the thirsting residents of the area concerned. This is particularly so when the allotment of work in favour of respondent No.2 does not involve any extra cost in comparison to the cost that may be incurred if the contract was allotted to the appellant-company. [para 20] [208-C-F]

1.6. In the light of the settled legal position and in the absence of any mala fide or arbitrariness in the process of evaluation of bids and the determination of the eligibility of the bidders, this Court does not consider it to be a fit case for interference. [para 21] [208-G-H]

Case Law Reference:

1994 (2) Suppl. SCR 122	**referred to**	**para 9**
(1999) 1 SCC 49	**referred to**	**para 10**
2006 (8) Suppl. SCR 398	**referred to**	**para 11**
1993 (1) SCR 81	**referred to**	**para 12**
2000 (1) SCR 505	**referred to**	**para 12**
2005 (3) SCR 666	**referred to**	**para 13**
2006 (10) Suppl. SCR 606	**referred to**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4195 of 2012.

From the Judgment & Order dated 20.05.2011 of the High Court of Madhya Pradesh bench at Indore in W.P. No. 3427 of 2011.

Vikas Singh, Samit Malik, Lakshmi Raman Singh for the Appellant.

Jayant Bhushan, K.V. Vishwanathan, Pragati Neekhra, Suryanarayanm Singh, Ajay, Dharmendra Kumar Sinha, Adeeba Mujahid for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. This appeal arises out of an order passed by the High Court of Madhya Pradesh at Indore whereby Writ Petition No.3427 of 2011 filed by the appellant was dismissed and the

allotment of the project work involving design, construction and commissioning of a single integrated water supply at Sendhwa (Madhya Pradesh) in favour of M/s P.C. Snehal Construction Company-respondent No.2 upheld.

3. In terms of notice inviting tenders (NIT for short) Municipal Council Sendhwa, in the State of M.P., invited tenders from eligible contractors for the construction of an Integrated Water Supply Scheme at an estimated cost of nearly rupees twenty crores. Clause (1) of the said NIT as amended by addendum dated 23rd March, 2011, stipulated the following essential conditions of eligibility for the intending bidders:

> "1. Registered Contractors have to produce valid Registration certificate in the category of S-V or equivalent in any State/Central Government Department or Government undertaking.
>
> (a) Registered Contractors/Firms of Repute/Joint Venture firms have to produce certificate for executing single work of integrated water supply scheme comprising of intake well, raw/clear water pumping main, pumps, OHTS, Distribution system completed and running successfully at present, having value equal to 60% of the cost of the proposed works in last 5 years. This certificate should clearly mention amount of contract, completion period as per Tender and actual completion period. (In case of WPI adjustment for cost of works the same may be furnished along with a certificate of Chartered Accountant). The certificate shall be issued from the officer not below the rank of Executive Engineer or equivalent.
>
> (b) Certified copy of audited balance sheet of last 5 years showing annual turnover equal to estimated cost of the work and average net worth equal to 40% of the cost of works."

4. In response to the above NIT several applications were received by respondent No.1 for purchase of the tender forms. It is common ground that only six out of the said applicants eventually participated in the pre-bid meeting arranged by respondent No.1. It is also not in dispute that out of the said six bidders only four were eventually found to be eligible. These four included the appellant-Tejas Construction & Infrastructure Pvt. Ltd. and respondent No.2-M/s P.C. Snehal Construction Company, Ahmedabad.

5. The tender conditions, *inter alia*, provided that the bid documents shall comprise three envelopes to be submitted by each of the bidders. Envelope A was to contain the earnest money deposited, Envelope B was to contain the technical bid including qualification documents while Envelope C was to contain the price bid of the bidders. The process of evaluation of the bids started on 7th April, 2011 with the opening of envelopes in the above order. Opening of envelope A was uneventful as all the bidders had furnished the earnest money stipulated under the terms of NIT. The appellant's case, however, is that when envelope B was opened a request was made to respondent No.1 to show the technical bid received from respondent No.2 which request was granted. The appellant's further case is that upon perusal of the technical bid of respondent No.2, the appellant had raised an objection as to the eligibility of the said to participate in the bid process on the ground that it did not have the requisite experience of executing a single integrated water supply scheme of the requisite value. Respondent No.2 is said to have claimed eligibility to offer a bid on the basis of clubbing of different water supply scheme projects at Vyara and Songadh which was impermissible according to the appellant. The appellant also raised an objection to the effect that respondent No.2 had not submitted certified copies of audited balance-sheets for the last five years and that the net-worth certificate produced from a Chartered Accountant for the financial year 2010-2011, did not according to the appellant, satisfy the said requirement.

Despite the objection raised by the appellant, respondent No.1 considered all the bids and accepted the bid offered by respondent No.2. The appellant appears to have approached the concerned authorities in Gujarat and obtained a certificate to the effect that Vyara and Songadh projects were two different projects and not a single integrated water supply scheme and based thereon dispatched a telegram to respondent No.1 asking for rejection of the bid offered by respondent No.2, but to no avail.

6. Aggrieved by the allotment of work in favour of respondent No.2, the appellant filed Writ Petition No.3427 of 2011 before the Indore Bench of the High Court of Madhya Pradesh. The challenge to the eligibility of respondent No.2 and eventually to the allotment of the project work to the said respondent in the Writ Petition was confined to two distinct grounds, namely (1) that respondent No.2 had not filed the requisite certified balance-sheets for five years immediately preceding the issue of tender notice and (2) that respondent No.2 did not have the requisite experience of executing a single integrated water supply scheme of the required value.

7. The Writ Petition was opposed by the respondents who asserted in their respective affidavits that requirement of submission of requisite balance-sheets was substantially complied with inasmuch as certified copies of the balance-sheets for four years had been filed but since the audit for the fifth year i.e. 2010-2011 had not been completed, the certificate issued by the Chartered Accountant for the said year sufficiently complied with the said requirement. It is also asserted that respondent No.2 satisfied the requirement of having executed single integrated water supply scheme for Upleta which included raw water transmission from intake well and transmission of treated clear water from WTP including providing, supplying and laying of pipelines, construction of E.S.R.s, Sumps, Pump houses and providing and erecting pumping machinery. The certificate issued by the Upleta Municipal Council and by the Gujarat Urban Development

Mission (GUDM) was relied upon in support of that claim. The High Court has, by the judgment and order under challenge before us, examined both the grounds urged in support of the writ petition and clearly come to the conclusion that respondent No.2 was eligible to offer a bid in as much as it had substantially complied with the requirement of filing the certified copies of audited balance-sheets for the previous period of five years immediately preceding the issue of tender notice and that it had the requisite experience of executing a single integrated water supply project of the requisite value.

8. We have heard learned counsel for the parties at considerable length. A challenge to the award of the project work in favour of respondent No.2 involved judicial review of administrative action. The scope and the approach to be adopted in the process of any such review, has been settled by a long line of decisions of this Court. Reference of all such decisions is in our opinion is unnecessary as the principle of law settled thereof are fairly well recognised by now. We may, therefore, refer to some of the said decisions only to recapitulate and refresh the tests applicable to such cases and the approach which a Writ Court has to adopt while examining the validity of an action questioned before it.

9. In *Tata Cellular v. Union of India* (1994) 6 SCC 651, this Court emphasized the need to find the right balance between administrative discretion to decide matters on the one hand and the need to remedy any unfairness on the other and observed:

> "(1) The modern trend points to judicial restraint in administrative action.
>
> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The court does not have the expertise to correct the administrative, decision. If a review of the administrative

decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative or quasi-administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should be free from arbitrariness, not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

10. In *Raunaq International Limited v. I.V.R. Construction Ltd. & Ors.* (1999) 1 SCC 492, this Court reiterated the principle governing the process of judicial review and held that the Writ Court would not be justified in interfering with commercial transactions in which the State is one of the parties to the same except where there is substantial public interest involved and in cases where the transaction is mala fide. The court observed:

"10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

11. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India & Ors.* (2006) 10 SCC 1, this Court held that while judicial review cannot be denied in contractual matters or matters in which the Government exercises its contractual powers, such review is intended to prevent arbitrariness and must be exercised in larger public interest.

12. Reference may also be made to *Sterling Computers Ltd. v. M & N Publication Ltd.* (1993) 1 SCC 445 where this Court held that power of judicial review in respect of contracts entered into on behalf of the State primarily involves examination of the question whether there was any infirmity in the decision-making process if such process was reasonable, rational and non-arbitrary, the Court would not interfere with the decision. In *Air India Ltd. v. Cochin International Airport Ltd. & Ors.* (2000) 2 SCC 617, this Court held that award of contract was essential in commercial transactions which involves commercial consideration and results in commercial decision. While taking such decision the State can choose its own method on terms of invitation to tender and enter into negotiations. The following passage from the decision is apposite:

> "The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.
>
> Even when some defect is found in the decision-making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

13. To the same effect is the decision of this Court in *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. & Ors.* (2005) 6 SCC 138 and *Jagdish Mandal v. State of Orissa* (2007) 14 SCC 517 where this Court laid down the following tests for judicial interference in exercise of power of judicial review of administrative action:

> "Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :
>
> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.
>
> OR
>
> Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'
>
> (ii) Whether public interest is affected.
>
> If the answers are in the negative, there should be no interference under Article 226."

14. Let us examine the challenge to the award of the contract in favour of respondent No.2 in the light of the above legal position. In the earlier part of this judgment the challenge to the allotment of the work in question was primarily based on

a two-fold contention. Firstly, it was argued that respondent No.2, successful bidder, had not satisfied the requirement of filing audited balance sheets for the five years preceding award of the contract. That the said respondent had filed certified copies of the audited balance sheets for the years 2006-07, 2007-08, 2008-09 and 2009-10, was not in dispute. What was disputed was that the balance sheet for the year 2010-11 had not been filed, instead a certificate from the Chartered Accountant concerned, relating to the period 1.4.2010 to 22.3.2011, had been produced which did not, according to the writ-petitioner before us, satisfy the requirement of the NIT. Rejecting that contention the High Court held that since the balance sheet for the year 2010-11 had not been audited the production of relevant record of the company was a substantial compliance with the stipulation contained in the NIT. The High Court observed:

> "As regards audited balance sheet, it has not been disputed that respondent No.2 submitted audited balance sheets for years 2006-07, 2007-08, 2008-09 and 2009-2010. Respondent No.2 has further submitted certificate issued by its Chartered Accountant in respect of period from 1.4.2010 to 22.3.2011. Certificate is at page 66, which has been issued on the basis of audited books, documents, registers, records, bills and evidences produced before it for verification. Certificate is dated 23.3.2011. It has been pointed out by Shri Vijay Assudani, learned advocate appearing for respondent No.2 that by that time, the financial year 2010-11 was not complete and it was not possible to obtain certified copy of the audited balance sheet. It could not be disputed on behalf of the petitioner that the turnover as shown in the certificate of Chartered Accountant and other documents for last five years, was meeting the requirement as per the NIT. Further, it is not the case of the petitioner that the particulars and the figures mentioned in the certificate are incorrect. Petitioner, by virtue of Sections 159 and 163 of

> the Companies Act, could have obtained certified copy of balance sheets of respondent No.2 to demonstrate incorrectness, if any. The petitioner, having not chosen to place any such documents on record, cannot successfully raise any objection, when there is substantial compliance of the NIT in relation to turnover.
>
> xxx xxx xxx
>
> Audit for the year 2010-11 was not completed by that time. However, certificate was issued on the basis of the audit books, documents, register, records, bills and evidences produced before the Chartered Accountant for verification. This amounts to substantial compliance of the requirement with regard to submission of certified copy of balance sheet, more so, the petitioner himself could have obtained copies of audited balance sheet of respondent No.2 and could have demonstrated incorrectness. It is not the case of the petitioner that the said certificate depicts incorrect turnover or net worth. This being so, the process adopted by respondent No.1 cannot be said to be arbitrary or irrational."

15. There is, in our opinion, no legal flaw in the above finding or the line of reasoning adopted by the High Court. It is true that the date of submission of tender was initially fixed upto 25th March, 2011 but the same was extended upto 7th April, 2011. That being so, 5 years immediately preceding the issue of the tender notice would have included the year 2010-2011 also for which financial year, audit of the company's books, accounts and documents had not been completed. Such being the case, respondent No.2 could not possibly comply with the requirement of the tender notice or produce certified copy of the audited balance-sheet for the said year. All that it could possibly do was to obtain a certificate based on the relevant books, registers, records accounts etc., of the company, which certificate was indeed produced by the said respondent. The High Court has rightly observed that the appellant had not

disputed the correctness of the turnover certified by the Chartered Accountant for the year 2010-2011 nor was it disputed that the same satisfied the requirement of the tender notice. In that view, therefore, there was no question of respondent No.2 being ineligible or committing a deliberate default in producing the requisite documents to establish its eligibility to offer a bid. The first limb of the challenge to the finding of the High Court on the above aspect must, therefore, fail and is accordingly rejected.

16. That leaves us with the second ground on which the appellant questioned the eligibility of respondent No.2 to offer a bid, namely, the non-execution by respondent No.2 of a single integrated water supply scheme for the requisite value. The appellant's case, in this connection, is two-fold. Firstly, it is contended that the works executed by respondent No.2 for Vyare and Songadh were distinct and different works which did not constitute a single integrated water supply scheme hence could not be pressed into service to show satisfaction of the condition of eligibility stipulated under the tender notice. The alternative submission made by learned counsel appearing for the appellant in connection with this ground is that the work executed by respondent No.2 for Upleta also did not satisfy the requirement of the tender notice inasmuch as the said work did not involve the construction of intake wells, which was an essential item of work for any integrated water supply scheme. In the Counter Affidavits filed by the Municipal Council and respondent No.2, the contention that the latter was not eligible on the ground stated by the appellant has been stoutly denied. Respondent-Council has, *inter alia,* stated:

> "To satisfy this condition, respondent no.2 has placed on record the certificate issued by Municipal Council Upleta, whereby respondent No.2 was awarded construction of similar work and has completed the work on 15.8.2010 for a sum of Rs.14,96,78,721/-. Not merely this, to show his experience, respondent No.2 has filed various certificates relating to work at Bardoli, as well as certificate issued by

> Gujarat Urban Development Mission, demonstrating that he has undertaken the work of 87,21,36,172/- of the similar/somewhat similar nature.
>
> In this regard it is worth noticing that the only requirement under this clause was to have executed single work of integrated water supply scheme having above referred components in it and it was not at all necessary for a bidder to have constructed all the components himself but he could have used the existing components, as such it is inconsequential as to whether respondent No.2 has infact constructed intake well and water treatment plant in Upleta, but it is of utmost importance that Respondent No.2 should have experience of having executed integrated water supply scheme."

17. To the same effect is the case set up by respondent No.2 who has stated as under:

> "I say and submit that the only requirement as per the said eligibility condition was to have executed a single work of integrated water supply scheme comprising of all the components, such as intake well, raw/clean water, pumping main, pumps, water treatment plants, over head tanks, distribution system etc., but it was not necessary for the bidder to have himself constructed all the components of integrated water supply scheme. As such to show his experience in the said matter, respondent No.2 also has placed on record certificate issued by Bardoli Nagar Seva Sadan, (Annexure P/10 Page 78 of SLP), wherein respondent No.2 has constructed water treatment plant of 13.5 MLD capacity……."
>
> They have carried out the work of integrated water supply for Upleta Municipal Council for a sum of Rs.14.97 crores, similarly respondent No.2 have also carried augmentation water supply scheme for Bardoli Incorporation Seva Sadan of Rs.4.35 crores, integrated drinking water supply scheme for Vyara project of Rs.6.84 crores, Unjha Water Supply Project of Rs.13.19 crores, Jaitpur Water Project Rs.

16.25 crores, Songarh Integrated Drinking Water Supply Scheme Rs.5.21 crores, Vapi Water Works of Rs.4.00 crores, Jasadan Water Suppply Scheme of Rs.3.05 crores, Rajula Water Supply Scheme of Rs.3.83 crores, Idar Water Supply Scheme of Rs.4.74 crores, Viramgam Water Supply Project Rs.6.92 crores, Amreli City Pipeline Distribution Work Rs.6.49 crores, thus the respondent No.2 have executed works of similar nature of Rs.87.21 crores, whereas the present work was for only Rs.20.80 crores, additionally respondent No.2 is executing similar work of about Rs.40.50 crores at Dholka, Dhandhuka, Ankleshwar, Gondal, Jasdan and Dhorangdhra. Thus respondent No.2 is competent to execute the present work, a copy of list of works executed by respondent No.2 under Gujarat Urban Development Mission duly certified by the G.M. (Technical) of said organization are already annexed as Annexure P/8 (Page 69 of SLP). It is worth mentioning here that average turnover of respondent No.2 during last 5 years ignoring figures of 2010-11 is Rs.45.14 crores and average net worth of respondent No.2 for last 5 years ignoring figures of 2010-11 is Rs. 9.018 crores."

18. The High Court has, while examining the question of eligibility of respondent No.2 by reference to the execution of the single integrated water supply scheme, recorded a finding that the nature of the work executed by respondent No.2 for Upleta satisfied the requirement of the tender notice. That finding, in our view, is in no way irrational or absurd. We say so because the certificate relied upon by respondent No.2 sufficiently demonstrates that respondent No.2 had designed, and executed an integrated water supply scheme for Upleta which included raw water transmission from intake wells and transmission of treated clear water from WTP including providing, supplying and laying of pipelines, construction of E.S.R.s, Sumps, Pump houses and providing erecting pumping machinery.

19. It is also noteworthy that in the matter of evaluation of

the bids and determination of the eligibility of the bidders Municipal Council had the advantage of the aid & advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken by them. We, therefore, see no reason to interfere with the view taken by the High Court of the allotment of work made in favour of respondent No.2.

20. We may while parting point out that out of a total of Rs.19.5 crores representing the estimated value of the contract, respondent No.2 is certified to have already executed work worth Rs.11.50 crores and received a sum of Rs.8.79 crores towards the said work. More importantly the work in question relates to a drinking water supply scheme for the residents of a scarcity stricken municipality. The project is sponsored with the Central Government assistance under its urban infrastructure scheme for small and middle towns. The completion target of the scheme is September 2012. Any interference with the award of the contract at this stage is bound to delay the execution of the work and put the inhabitants of the municipal area to further hardship. Interference with the on-going work is, therefore, not conducive to public interest which can be served only if the scheme is completed as expeditiously as possible giving relief to the thirsting residents of Sendhwa. This is particularly so when the allotment of work in favour of respondent No.2 does not involve any extra cost in comparison to the cost that may be incurred if the contract was allotted to the appellant-company.

21. In the light of the above settled legal position and in the absence of any mala fide or arbitrariness in the process of evaluation of bids and the determination of the eligibility of the bidders, we do not consider the present to be a fit case for interference of this Court. This appeal accordingly fails and is hereby dismissed with cost assessed at Rs.25,000/-.

R.P. Appeal dismissed.

SUPER CASSETTES INDUSTRIES LTD.
v.
MUSIC BROADCAST PVT. LTD.
(Civil Appeal Nos. 4196-4197 of 2012)

MAY 4, 2012

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

Copyright Act, 1957 – s. 31(1)(b) – Powers under – Scope of – Power of Copyright Board – To pass ad interim order – In a pending complaint u/s. 31 – Held: Section 31 contemplates final relief – The statute does not vest the Copyright Board power to grant interim order – To grant interim compulsory licence during the pendency of the complaint would amount to final relief at the interim stage.

The question for consideration in the present appeals was whether on a complaint made to the Copyright Board u/s. 31 of the Copyright Act, 1957, the said Board under Clause (b) of Sub-Section (1) can pass an interim order in the pending complaints.

Allowing the appeals, the Court

HELD: 1. The language used in Section 31of Copyright Act, 1957 clearly contemplates a final order after a hearing and after holding an inquiry to see whether the ground for withholding of the work from the public was justified or not. There is no hint of any power having been given to the

Board to make interim arrangements, such as, grant of interim compulsory licences, during the pendency of a final decision of an application. [Para 38] [232-B-C]

* Judgment Pronounced by J. Chelameswar, J. made non-reportable.

2. The power being sought to be attributed to the Copyright Board involves the grant of the final relief, which is the only relief contemplated u/s. 31 of the Copyright Act. Even in matters under Order XXXIX Rules 1 and 2 and Section 151 of CPC an interim relief granting the final relief should be given after exercise of great caution and in rare and exceptional cases. In the instant case, such a power is not even vested in the Copyright Board and hence the question of granting interim relief by grant of an interim compulsory licence cannot arise. To grant an interim compulsory licence during the stay of the proceedings would amount to granting the final relief at the interim stage, although the power to grant such relief has not been vested in the Board. [Para 42] [233-D-H]

3. A Tribunal is a creature of statute and can exercise only such powers as are vested in it by the statute. Tribunals discharging quasi-judicial functions and having the trappings of a Court, are generally considered to be vested with incidental and ancillary powers to discharge their functions, but that cannot surely mean that in the absence of any provision to the contrary, such Tribunal would have the power to grant at the interim stage, the final relief which it could grant. Such incidental powers could at best be said to exist in order to preserve the status-quo, but not to alter the same, as will happen, if an interim compulsory licence is granted. If the legislature had intended that the Copyright Board should have powers to grant mandatory injunction at the interim stage, it would have vested the Board with such authority. [Paras 39, 43 and 44] [232-D; 234-A-D]

Morgan Stanley Mutual Fund vs. Kartick Das **(1994) 4 SCC 225: 1994 (1) Suppl. SCR 136;** *Rajeev Hitendra Pathak and Ors. vs. Achyut Kashinath Karekar and Anr.* **2011 (9) SCALE 287;** *Bindeshwari Prasad Singh vs. Kali Singh* **(1977) 1 SCC 57: 1977 (1) SCR 125 – relied on.**

Income Tax Officer vs. M.K. Mohammed Kunhi **(1969) 2 SCR 65;***Allahabad Bank, Calcutta vs. Radha Krishna Maity and Ors.* **(1999) 6 SCC 755: 1999 (2) Suppl. SCR 290;** *Industrial Credit and Investment Corporation of India Ltd. vs. Grapco Industries Ltd. and Ors.* **(1999) 4 SCC 710: 1999 (3) SCR 759 – distinguished.**

Music Choice India Pvt. Ltd. vs. Phonographic Performance Ltd. **(2009) 39 PTC 597;** *Sham Lal vs. State Election Commission* AIR 1997 P&H 164; *Lingamma vs. State of Karnataka* **AIR 1982 Karnataka 18;** *Transcore vs. Union of India* **(2008) 1 SCC125: 2006 (9) Suppl. SCR 785;** *Entertainment Network (India) Limited vs. Super Cassette Industries Limited* **(2008) 13SCC 30: 2008 (9) SCR 165 – referred to.**

Case Law Reference:

(2009) 39 PTC 597	**Referred to.**	**Para 11**
AIR 1997 P&H 164	**Referred to.**	**Para 15**
AIR 1982 Karnataka 18	**Referred to.**	**Para 16**
2006 (9) Suppl. SCR 785	**Referred to.**	**Para 20**
2008 (9) SCR 165	**Referred to.**	**Para 36**
1994 (1) Suppl. SCR 136	**Relied on.**	**Para 39**
2011 (9) SCALE 287	**Relied on.**	**Para 39**
1977 (1) SCR 125	**Relied on.**	**Para 39**
(1969) 2 SCR 65	**Distinguished.**	**Para 41**
1999 (2) Suppl. SCR 290	**Distinguished.**	**Para 41**
1999 (3) SCR 759	**Distinguished.**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4196-4197 of 2012.

From the Judgment & Order dated 01.09.2011 of the High Court of Delhi at New Delhi in RFA No. 250 of 2011 and CM No. 8977 of 2011.

Dhruv Mehta, Harish Salve, Bhaskar P. Gupta, Amit Sibal, Neel Mason, Harsh Kaushik Sankalp Dalal, Ankit Relhan, Abhay Chattopadhyay, Giri Subramanium, Senthil Jagadeesan, K.K. Khetan, Meghna Mishra, Sagar Chandra, Rupesh Gupta, Akhid, Mishra Saurabh, Prathiba M. Singh, Kapil Wadhwa, Archana Sahadeva, Chandrika Gupta, Gaurav Sharma, Balaji Srinivasan, K. Datta Diggaj Pathak, Abhay Kumar, Liz Mathew, Karanjawala & Co. for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The sole question for consideration in these appeals is whether on a complaint made to the Copyright Board under Section 31 of the Copyright Act, 1957, the said Board under Clause (b) of Sub-Section (1) can pass an interim order in the pending complaint. Since, we shall be dealing with the said section throughout this judgment, the same is extracted hereinbelow :

"31. Compulsory licence in works withheld from public.-(1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work-

(a) has refused to republish or allow the re-publication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or

(b) has refused to allow communication to the public by [broadcast], of such work or in the case of a

> [sound recording] the work recorded in such [sound recording], on terms which the complainant considers reasonable,
>
> the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a licence to re-publish the work, perform the work in public or communicate the work to the public by [broadcast], as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine; and thereupon the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of Copyright Board, on payment of such fee as may be prescribed.
>
> Explanation.-In this sub-section, the expression "Indian work" includes-
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> (i) an artistic work, the author of which is a citizen of India; and
>
> (ii) a cinematograph film or a [sound recording] made or manufactured in India.
>
> (2) Where two or more persons have made a complaint under sub-section (1), the licence shall be granted to the complainant who in the opinion of the Copyright Board would best serve the interests of the general public."

3. However, in order to consider the said question, it is necessary to set out some of the facts giving rise to the said question.

4. These appeals preferred by Super Cassettes Industries Ltd., hereinafter referred to as "Super Cassettes", are directed against the order dated 1st September, 2011, passed by the Delhi High Court whereby it reversed the order passed by the Copyright Board on 28th March, 2011, in which the Board held that it did not have the power to grant an interim compulsory licence. By its judgment and order dated 1st September, 2011 in R.F.A.No.250 of 2011 and C.M.No.8977 of 2011, the High Court reversed the finding of the Copyright Board upon holding that even while the grant of compulsory licence under Section 31 of the Copyright Act was under consideration, an interim compulsory licence could be granted. The High Court also held that where the dispute is over the quantum of licence fee, an interim compulsory licence had to be granted. The impugned order directs the Copyright Board to grant an interim compulsory licence against Super Cassettes with the further direction to the Board to fix its own terms for such licences, after hearing the parties.

5. Appearing for Super Cassettes, Mr. Amit Sibal, learned counsel, submitted that on 16th May, 2008, this Court had decided the two set of cases, in which it upheld the setting aside of the compulsory licence granted against Super Cassettes by the Copyright Board in relation to Entertainment Network India Ltd., hereinafter referred to as "ENIL", a radio broadcaster. In the other set of matters, where Super Cassettes was not a party, this Court upheld the grant of compulsory licence in relation to the works administered by Phonographic Performance Ltd., hereinafter referred to as "PPL", and remanded the matter to the Copyright Board to fix the rates at which the compulsory licences, in relation to the works administered by PPL, were to be granted.

6. Pursuant to the decision of this Court, the Copyright Board passed the order on 25th August, 2010, fixing the rates, not just for PPL, but for all music providers, including Super Cassettes, although, it was not a party to the proceedings. Mr.

Sibal submitted that on 9th September, 2010, Music Broadcast Pvt. Ltd., hereinafter referred to as "MBPL", wrote to Super Cassettes informing it that MBPL proposed to broadcast the works in which copyright was owned by Super Cassettes on the terms fixed in the aforesaid order of the Copyright Board dated 25th August, 2010. Mr. Sibal submitted that this was done despite the fact that MBPL had an existing voluntary licence from Super Cassettes, which had subsisted since 25th March, 2002, and had been amended and renewed a number of times since then. It was also submitted that several other broadcasters with existing voluntary licence from Super Cassettes wrote similar letters to it.

7. Super Cassettes filed Writ Petition No.6255 of 2010, questioning the order passed by the Copyright Board dated 25th August, 2010. After hearing Super Cassettes and the Respondents, including MBPL, on 15th September, 2010, the Delhi High Court passed an interim order to the effect that the order dated 25th August, 2010, passed by the Board would not be relied upon by any of the Respondents or any other party for a compulsory licence against Super Cassettes. Despite the aforesaid order of the Delhi High Court dated 15th September, 2010, MBPL filed an application for compulsory licence under Section 31(1)(b) of the Copyright Act, relying solely on the rates fixed by the Copyright Board for PPL by its order dated 25th August, 2010. Other eight broadcasters also filed applications for compulsory licence against Super Cassettes, relying solely on the order of the Copyright Board dated 25th August, 2010. Super Cassettes responded to the said offer made by MBPL on the same terms as were prevalent under the expired voluntary licence agreement. The said proposal made by Super Cassettes was rejected by MBPL, while other broadcasters continued to broadcast the work of Super Cassettes on existing mutually agreed terms which were different from the terms set out in the order of the Copyright Board dated 25th August, 2010. By its order dated 28th March, 2011, the Copyright Board dismissed the application for interim relief filed by MBPL

holding that it did not have the power to grant any interim compulsory licence.

8. Mr. Sibal submitted that even though MBPL did not broadcast the works of Super Cassettes after 25th December, 2010, its radio station, known as "Radio City", improved its listenership ratings to become the most popular radio station in Mumbai and was maintaining its position as the fifth most popular radio station in Delhi. Mr. Sibal urged that MBPL thereafter preferred an appeal against the order dated 28th March, 2011, before the Delhi High Court and vide the impugned order, the High Court held that the Copyright Board had the power to issue interim compulsory licence.

9. Mr. Sibal submitted that the impugned order of the Delhi High Court, inter alia, held that the power to grant interim relief is not dependent upon a specific statutory empowerment to this effect. The power is a common law principle and is not founded on any statute or legislation. Mr. Sibal submitted that the Delhi High Court also held that the refusal of the copyright holder to grant a licence would, in effect, compel the broadcaster or any other party similarly placed, into succumbing to the demands of the owners and that since, litigation is protracted over years, a party would be unable to play or broadcast music, owned by the copyright holder, even though it was willing to pay a reasonable fee for making such broadcast and may also have to give up its action under Section 31 of the Copyright Act. Mr. Sibal urged that the High Court went on to hold that refusal to grant interim relief would frustrate the rights of a broadcaster under Section 31 of the Copyright Act, which would render the provisions of the statute futile and nugatory.

10. It was further held by the High Court that where the controversy concerns only the quantum of licence fee, an interim protection should be granted and even though Super Cassettes was not a party to the order of the Copyright Board dated 25th August, 2010, it is similarly placed as PPL, which was bound by the order passed by the Board on 25th August, 2010.

Accordingly, it was appropriate that Super Cassettes should also receive 2% of the net advertisement revenue as licence fee in the interim period for broadcasting of its sound recordings.

11. Mr. Sibal urged that the Division Bench of the Bombay High Court chose not to differ with the decision of the Single Judge in *Music Choice India Pvt. Ltd. Vs. Phonographic Performance Ltd.* [(2009) 39 PTC 597], in which the learned Single Judge had held that the Copyright Act did not prohibit the Copyright Board from passing any interim order for determination of reasonable fees by way of royalty or compensation by the plaintiff. The High Court disposed of the appeal by making an interim arrangement, whereby Super Cassettes was to receive an aggregate of 4% of the advertisement revenue of MBPL for broadcasting its sound recordings, music and literary work, while remanding the matter to the Copyright Board for interim order, making it clear that the Board need not be bound by the interim arrangement devised by the Court.

12. Mr. Sibal submitted that the High Court had erred in law in holding that even in the absence of an express conferment by statute, the Copyright Board had the power to grant an interim compulsory licence under Section 31 of the Copyright Act. He urged that the Copyright Board is a Tribunal created under Section 11 of the Copyright Act, 1957, and being a creature of statute, its powers were confined to the powers given to it by the statute. Mr. Sibal urged that while Section 12 of the Act vested the Copyright Board with the authority to regulate its own procedure and Section 74 conferred certain limited powers of a civil court on the Board, the same were procedural in nature and did not vest the Board with a substantive right to grant interim orders under Section 31 of the Act. Mr. Sibal submitted that the High Court had erred in holding that grant of interim relief was not dependent upon a specific statutory empowerment to this effect. Learned counsel

submitted that being a creature of statute, the Copyright Board could only exercise such powers as were expressly vested in it by the statute and that the power to grant an interim compulsory licence not having been vested with the Board, it could not exercise such substantive power, which it did not possess.

13. In support of his submissions, Mr. Sibal referred to the decision of this Court in *Rajeev Hitendra Pathak & Ors. Vs. Achyut Kashinath Karekar & Anr.* [2011 (9) SCALE 287], wherein three learned Judges of this Court were called upon to consider as to whether the District Forum and the State Commission as established under the Consumer Protection Act, 1986, had the power to recall an ex parte order. After examining various provisions of the Consumer Protection Act, this Court held that such an express power not having been conferred on the District Forum and the State Commission, they had no jurisdiction to exercise such powers which had not been expressly given to them.

14. Mr. Sibal also referred to the decision of this Court in *Morgan Stanley Mutual Fund Vs. Kartick Das* [(1994) 4 SCC 225], wherein this Court was considering the scope of the provisions of the Consumer Protection Act, 1986. On construction of Section 14 of the said Act, this Court came to the conclusion that there was no power under the Act to grant any interim relief, even of an ad interim nature. Their Lordships who decided the matter, observed as follows :

> "..... If the jurisdiction of the Forum to grant relief is confined to the four clauses mentioned under Section 14, it passes our comprehension as to how an interim injunction could ever be granted disregarding even the balance of convenience."

15. Reference was also made to a decision of the Punjab and Haryana High Court in Sham Lal Vs. State Election Commission [AIR 1997 P&H 164], in which the High Court was

considering a similar question as to whether the Election Tribunal constituted under the Punjab State Election Commission Act, 1994, had the power to pass an injunction so as to restrain an elected representative from assuming office pending adjudication of an election petition filed against him. After considering various provisions of the 1994 Act, the Court observed that "if the legislature had so desired, nothing prevented it from conferring statutory power upon the Election Tribunal to grant interim stay or injunction or restraint order during the pendency of the election petition." Accordingly, the Court went on to hold that the Election Tribunal did not have the power to pass any order of injunction or stay which would impede the implementation of the result of election.

16. Mr. Sibal cited yet another decision on the same issue rendered by a Full Bench of the Karnataka High Court in *Lingamma Vs. State of Karnataka* [AIR 1982 Karnataka 18], where the question involved was as to whether the Appellate Tribunal constituted under the Karnataka Appellate Tribunal Act, 1976, was empowered to pass interim orders when there was no express provision which conferred such substantive power on the Appellate Tribunal. The Full Bench held that "in the absence of express conferment, power to grant temporary injunction was not implied." The Full Bench further held that the fact that no express provision had been made conferring on the Tribunal jurisdiction to make interlocutory orders, clearly indicates that the legislature did not want the Tribunal to have such powers.

17. Mr. Sibal urged that in view of the aforesaid decisions and having regard to the fact that the Copyright Act did not specifically vest the Copyright Board with substantive powers to pass interim orders under Section 31 of the Copyright Act, the High Court erred in taking a view which was contrary to the well-established principle that a statutory body could exercise only such powers that were vested in it by a statute and not otherwise. Learned counsel urged that by making an interim

arrangement and granting an interim compulsory licence to the Respondent, the High Court had conferred upon itself a jurisdiction which the Copyright Board and, consequently, the High Court did not possess under Section 31 of the Copyright Act.

18. Mr. Sibal went on to submit further that all tribunals constituted under different statutes, were not the same and some enjoyed powers to pass certain orders which had been vested in them by statute, which made them different from other tribunals to whom such express powers had not been given. Learned counsel urged that there were certain tribunals which completely supplemented the jurisdiction of the Civil Court and, therefore, exercised all the powers of the Civil Court in respect of the matters entrusted to them by statute. In this regard, reference was made to Section 41(1) of the Armed Forces Tribunal Act, 1985, which specifically provides that the Tribunal shall have all jurisdiction, powers and authority exercisable by all courts in matters relating to service. Reference was also made to other Tribunals, such as, the Telecom Disputes Settlement & Appellate Tribunal, the National Green Tribunal and also the Debts Recovery Tribunal, which had been expressly vested with powers to pass interim orders under the statutes under which they had been created. Mr. Sibal submitted that there were no similar provisions in the Copyright Act, which granted such powers to the Copyright Board.

19. Mr. Sibal then submitted that notwithstanding the fact that the Copyright Board was discharging quasi-judicial functions, it did not possess inherent powers to pass interim orders, since it continued to be a tribunal governed by the statute under which it had been created. It did not, therefore, have jurisdiction to pass interim orders which inheres in other Tribunals. Referring to the decision of this Court in *Bindeshwari Prasad Singh Vs. Kali Singh* [(1977) 1 SCC 57], Mr. Sibal urged that in the said decision, this Court was called upon to decide as to whether a Magistrate had the authority to review

or recall his order. It was held that unlike Section 151 of the Civil Procedure Code, which vests the civil courts and certain tribunals with inherent powers, the subordinate criminal courts had no such inherent power, since there was absolutely no provision in the Code of Criminal Procedure empowering a magistrate to exercise such powers.

20. Mr. Sibal lastly referred to the decision of this Court in *Transcore Vs. Union of India* [(2008) 1 SCC 125], and submitted that in the said case, this Court had observed that the Debts Recovery Tribunal is a tribunal and a creature of statute and it does not have inherent powers which existed in the civil courts.

21. Mr. Sibal also submitted that apart from the decisions rendered in the case of *Morgan Stanley Mutual Fund* (supra), the Supreme Court had held on several occasions that while entertaining matters, final relief ought not to have been granted at the interim stage. In fact, as submitted by Mr. Sibal, the courts will not imply a power in a particular provision of the statute if the legislative intent behind the statute suggested a contrary view. Learned counsel submitted that implying a power to exercise the powers under Section 31 of the Act was not the legislative intent which is easily discernible. It was urged that implying such a power would transform compulsory licensing to statutory licensing without any statutory mandate to do so. Mr. Sibal also reiterated the principle that power would not be implied to displace a pre-existing vested statutory right and the court would not, therefore, exercise such powers as a statutory right unless a statute expressly allowed the same. The power to over-ride such pre-existing right had to be in express terms and could not be implied. Various other decisions were referred to by Mr. Sibal, which will only amount to repetition to what has already been stated.

22. Mr. Sibal submitted that the High Court erred in holding that the Copyright Board had power to grant an interim compulsory licence and that when there was a dispute as to

the quantum of fees payable by the licencee, an interim compulsory licence had to be given. Mr. Sibal submitted that in the face of the well-established propositions of law, the High Court's order could not stand and was liable to be set aside.

23. Dr. Abhishek Manu Singhvi, learned Senior Advocate, appearing for the Respondent, firstly contended that although Section 31 of the Copyright Act may not have expressly vested the power to pass interim orders on the Copyright Board pending disposal of an application for grant of a compulsory licence, the same would have to be read into the Section as being incidental to the powers granted by the Statute to the Board to grant compulsory licences. Dr. Singhvi urged that it could not have been the intention of the legislature that pending the determination of the right of an applicant to a compulsory licence, the public should be deprived of the entertainment of listening to music in respect of which the owner has the copyright, in this case, Super Cassettes.

24. Dr. Singhvi urged that if it were to be held that the Board did not have such power to grant an interim compulsory licence, the consequences would be contrary to public interest, since it was not possible to assess the time that could be taken by the Copyright Board for disposing of an application for grant of compulsory licence. Dr. Singhvi submitted that the Copyright Act is a Code in itself and that matters relating to copyrights and grant of licences had been left to the Copyright Board for decision, which only lend strength to the submission that the Board is vested with incidental and ancillary powers under Section 31 of the Act to give effect to the final relief which it is empowered to give under the said Section.

25. Dr. Singhvi referred to Section 25 of the Trade Marks Act as also Section 25(i) and (ii) of the Patents Act, which vested the authorities under the said Acts to pass appropriate orders in aid of the final relief. Dr. Singhvi urged that it is in situations such as these, that the doctrine of "implied power" comes into play. Learned counsel submitted that without

holding that the Copyright Board had the authority to direct the grant of interim compulsory licences in keeping with the doctrine of implied power, the provisions of the Copyright Act would be rendered somewhat unworkable.

26. Dr. Singhvi urged that the Copyright Board is a quasi-judicial body discharging quasi-judicial functions and under the scheme of the Act, it has been vested with the power to determine the reasonableness of royalties claimed by performing rights societies and to fix the rates thereof and to consider applications for general licences for public broadcasting of works. Dr. Singhvi submitted that it is in that context that Section 12 of the Copyright Act would have to be read. Under Section 12, which defines the powers and procedure of the Copyright Board, it has been stipulated that the Board would, subject to any rules that may be made under the Act, have the power to regulate its own procedure, including the fixing of places and times of its meetings. Referring to Sub-section (7) of Section 12, Dr. Singhvi urged that the Copyright Board is to be deemed to be a Civil Court for certain purposes and all proceedings before the Board are to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code.

27. Dr. Singhvi then drew the Court's attention to Section 19-A of the Copyright Act, which was inserted by amendment with effect from 9th August, 1984, in regard to disputes with respect to assignment of copyright. It was submitted that the said provision clearly indicated that the Board was an adjudicating authority in regard to disputes between the parties and would, therefore, be deemed to be vested with ancillary powers to make interim orders in aid of the final relief that could be granted under Section 31 of the Act.

28. Dr. Singhvi urged that the Copyright Act contemplated the grant of three types of licences, namely :-

(i) voluntary;

(ii) compulsory; and

(iii) statutory.

Dr. Singhvi urged that Sections 30, 31 and 31-A of the Act deal with grant of voluntary, compulsory and statutory licences. However, while Section 30 deals with grant of voluntary licences by the owners of the copyright, Sections 31 and 31-A speak of grant of licences for broadcasting works which had been withheld from the public, either by the copyright owners, or where the owner of an Indian work is either dead or untraceable. However, Section 52 of the Act also made provision that certain acts performed by broadcasters were not to be considered as infringement of copyright. In particular, reference was made by Dr. Singhvi to Section 52(1)(j)(iv) which indicates that the making of sound recordings in respect of any literary, dramatic or musical work would not amount to infringement of copyright if the person making such sound recording allowed the owner of the right or his duly authorised agent or representative to inspect all records and books of accounts relating to such sound recording. Dr. Singhvi urged that, in any event, any decision in respect of the above provisions would be appealable under Section 72 of the Copyright Act. Dr. Singhvi urged that the powers now vested in the Copyright Board were, in fact, powers which had been vested in it as high a body as Judicial Committee of the Privy Council under Section 4 of the Copyright Act, 1911, which had been passed by the Parliament of the United Kingdom and modified in its application to India by the Indian Copyright Act, 1914.

29. In support of the submissions made by him, Dr. Singhvi referred to various decisions, beginning with the decision of this Court in *Income Tax Officer Vs. M.K. Mohammed Kunhi* [(1969) 2 SCR 65], wherein the power of the Income Tax Appellate Tribunal to stay recovery of penalty was under consideration. Although, such power was not directly vested in the Tribunal, the High Court held that the power to order the stay or recovery of penalty is an incidental and ancillary power

possessed by the Tribunal in its appellate jurisdiction. Reference was also made to the decision cited on behalf of the Appellant in *Morgan Stanley's* case (supra). Dr. Singhvi urged that the same was no longer good law on account of the subsequent decisions of this Court. Dr. Singhvi urged that in *Allahabad Bank, Calcutta Vs. Radha Krishna Maity & Ors.* [(1999) 6 SCC 755], this Court was considering the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, hereinafter referred to as "the DRT Act", wherein it was held that in a Suit under Section 19(1) for recovery of monies, the Tribunal acted within its powers in passing an interim order to restrain the defendants from recovering any money from a particular party. It was held that in view of Section 22(1) of the Act, the Tribunal could exercise powers contained in the Civil Procedure Code and could even go beyond the Code as long as it passed orders in conformity with the principles of natural justice. This Court held further that Section 19(6) of the Act did not in any manner limit the generality of the powers of the Tribunal under Section 22(1) and that Section 19(6) was an enabling provision and that certain types of stay orders and injunctions mentioned therein could be passed by the Tribunal, but the same could not be deemed to be exhaustive nor restricting the Tribunal's powers only to those types of injunctions or stay orders mentioned therein. It was also observed that in addition, Rule 18 enabled the Tribunal to pass orders to secure the ends of justice. Dr. Singhvi urged that the aforesaid decision of this Court was based on its earlier decision in *Industrial Credit & Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. & Ors.* [(1999) 4 SCC 710], wherein it had been held that the Debts Recovery Tribunal had jurisdiction under Section 19(6) of the DRT Act to grant interim orders, since such power inheres in a Tribunal.

30. Dr. Singhvi lastly contended that the decision in *Rajeev Hitendra Pathak's* case (supra) could not be relied upon for a decision in this case on account of the fact that in the said case this Court was called upon to consider as to whether the

District Forum and the State Commission had been vested with powers of revision, in the absence whereof they could not exercise such powers which had not been expressly vested in them. Dr. Singhvi urged that having regard to the various decisions of this Court which have categorically held that powers to pass certain interim orders were incidental and ancillary to the exercise of powers conferred on a Tribunal by the Statute, the doctrine of implied power would stand attracted and the orders of the High Court could not, therefore, be faulted.

31. Mr. Bhaskar P. Gupta, learned Senior Advocate, appearing for some of the interveners, adopted Dr. Singhvi's submissions and reiterated the concept that the Copyright Act is a complete code in itself and the parties to the dispute would have to take recourse to the provisions of the Act and not the Civil Code which lends support to Dr. Singhvi's submissions that the "doctrine of implied power" would have to be incorporated in the provisions of the Copyright Act, as far as the Copyright Board is concerned.

32. Mr. Gupta also raised the question as to whether during the pendency of an existing licence granted under Section 30, a dispute could be raised with regard to the fees charged under Section 31(1)(b) which may subsequently convert the voluntary licence given under Section 30 of the Copyright Act into a compulsory licence under Section 31 thereof. Mr. Gupta contended that since Section 31(1)(b) of the Act contemplates adjudication, the Copyright Board had the trappings of a quasi-judicial authority which inheres in itself the right to pass interim orders in the interest of the parties and to apply the principles of natural justice, keeping in mind the public interest. In this regard, Mr. Gupta also submitted that Section 75 of the Copyright Act provides that the orders for payment of money passed by the Registrar of Copyrights, the Copyright Board or by the High Court would be deemed to be decrees of a Civil Court and would be executable in the same manner as a decree of such Court. Mr. Gupta contended that the intention of the

legislature would be clear from the scheme of the Act that matters relating to copyright should be dealt with by the authorities under the Act and not the Civil Court.

33. Mrs. Prathiba Singh, learned Advocate, who appeared for one of the parties, while reiterating the submissions made by Dr. Singhvi and Mr. Gupta, submitted that the powers of the Board had been gradually increased by legislation from time to time and even in regard to the question of subsisting licences and the grant of new licences, there could be no dispute as to the powers vested in the Copyright Board and the orders which it was competent to pass. Mrs. Singh, however, introduced another dimension into the debate by contending that the membership of the Copyright Board is drawn from various quarters. There being 14 members, it does not meet regularly and decisions in cases are, therefore, deferred for long intervals. In fact, as pointed out by Mrs. Singh, sometimes it is not possible to hold even one meeting in a month. In such cases, unless the power to grant interim orders were read into the provisions of Section 31 of the Act, there would be a complete stalemate in regard to cases where matters were pending before the Board and the public would be deprived of the pleasure of listening to such music and sound broadcasting.

34. Mr. Harish Salve, learned Senior Advocate, in his turn provided another twist to the question under consideration in urging that inherent powers exist in an appellate forum. Mr. Salve urged that this was not a case where the Copyright Board was not entitled to pass orders of an interim nature, but whether it should exercise such power. Mr. Salve further urged that the power under Section 31(1)(b) was in respect of matters which were already in the public domain and the transaction being purely of a commercial nature, the Board was only called upon to decide how much charges were required to be paid for broadcasting music and sound recordings in respect whereof Super Cassettes had the copyright. Mr. Salve urged that Section 31(1)(b) merely enumerated the right of the Copyright

Board to decide and compute the amount of fees payable for the use of the copyright, which was being withheld from the public. According to Mr. Salve, the essence of the Copyright Act is the delicate balance between intellectual property rights and the rights of access to the copyright material. In such a situation, according to Mr. Salve, a private right of copyright would have to give way to the public interest as contemplated in Section 31 of the Copyright Act.

35. Replying to the submissions made on behalf of the Respondents and the interveners, Mr. Sibal urged that the powers which were inherent in a Tribunal as against the implied powers, stood on a different footing and, in any event, the provisions of Sections 19(4) and 19-A were not relevant to the doctrine of implied power in the facts of this case.

36. Mr. Sibal submitted that the concept of public interest was nothing but a bogey introduced on behalf of the Respondents, when the entire transaction only involved the computation of the fees payable to a copyright owner for use of the copyright when the same was withheld from the public. Referring to the decision between ENIL and the Appellant in *Entertainment Network (India) Limited Vs. Super Cassette Industries Limited* [(2008) 13 SCC 30], Mr. Sibal referred to paragraph 116 thereof, which is extracted hereinbelow :-

> "116. Section 31(1)(b) in fact does not create an entitlement in favour of an individual broadcaster. The right is to approach the Board when it considers that the terms of offer for grant of licence are unreasonable. It, no doubt, provides for a mechanism but the mechanism is for the purpose of determination of his right. When a claim is made in terms of the provisions of a statute, the same has to be determined. All cases may not involve narrow commercial interest. For the purpose of interpretation of a statute, the court must take into consideration all situations including the interest of the person who intends to have a licence for replay of the sound recording in

respect whereof another person has a copyright. It, however, would not mean that all and sundry can file applications. The mechanism to be adopted by the Board for determining the right of a complainant has been provided under the Act."

Mr. Sibal urged that the decision of the High Court was liable to be set aside and that of the Copyright Board was liable to be restored.

37. What emerges from the submissions made on behalf of the respective parties is the dispute as to the width of the powers vested in the Copyright Board under Section 31 of the Copyright Act. There is no dispute that the Copyright Act is a Code by itself and matters relating to copyrights and grant of licences in respect of such copyrights have been left to the Copyright Board for decision. Chapter II of the Copyright Act, 1957, deals with the establishment of a Copyright Office and the constitution of a Copyright Board and the powers and procedure to be exercised and formulated for the functioning of the said Board. Section 11 of the Act, which comes within the said Chapter, provides for the constitution of a Copyright Board, which would hold office for such period and on such terms and conditions as may be prescribed. Section 12 enumerates the powers and procedure of the Board and is extracted hereinbelow :-

"12.Powers and procedure of Copyright Board. - (1) The Copyright Board shall, subject to any rules that may be made under this Act, have power to regulate its own procedure, including the fixing of places and times of its sittings:

Provided that the Copyright Board shall ordinarily hear any proceeding instituted before it under this Act within the zone in which, at the time of the institution of the proceeding, the person instituting the proceeding actually

and voluntarily resides or carries on business or personally works for gain.

Explanation.-In this sub-section "zone" means a zone specified in section 15 of the States Reorganisation Act, 1956. (37 of 1956).

(2) The Copyright Board may exercise and discharge its powers and functions through Benches constituted by the Chairman of the Copyright Board from amongst its members, each Bench consisting of not less than three members:

[Provided that, if the Chairman is of opinion that any matter of importance is required to be heard by a larger Bench, he may refer the matter to a special Bench consisting of five members.]

(3) If there is a difference of opinion among the members of the Copyright Board or any Bench thereof in respect of any matter coming before it for decision under this Act, the opinion of the majority shall prevail:

[Provided that where there is no such majority, the opinion of the Chairman shall prevail.]

(4) The [Chairman] may authorise any of its members to exercise any of the powers conferred on it by section 74 and any order made or act done in exercise of those powers by the member so authorised shall be deemed to be the order or act, as the case may be, of the Board.

(5) No member of the Copyright Board shall take part in any proceedings before the Board in respect of any matter in which he has a personal interest.

(6) No act done or proceeding taken by the Copyright Board under this Act shall be questioned on the ground

merely of the existence of any vacancy in, or defect in the constitution of, the Board.

(7) The Copyright Board shall be deemed to be a civil court for the purposes of [sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974)] and all proceedings before the Board shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860)".

As would be noticed, the Copyright Board has been empowered to regulate its own procedure and is to be deemed to be a Civil Court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973, and all proceedings before the Board shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code. The provisions clearly indicate that the Copyright Board discharges quasi-judicial functions, which as indicated in Sections 19-A, 31, 31-A, 32 and 52, requires the Board to decide disputes in respect of matters arising therefrom. In fact, Section 6 also spells out certain disputes which the Copyright Board has to decide, and its decision in respect thereof has been made final. However, for the purposes of these appeals we are concerned mainly with Section 31, which has been extracted hereinabove.

38. Elaborate submissions have been made regarding the power of the Copyright Board to grant interim compulsory licences in works withheld from the public, in relation to matters which were pending before it. Having considered the said submissions, we are unable to accept the submissions made by Dr. Abhishek Manu Singhvi, Mr. Bhaskar P. Gupta, Mr. Harish Salve and the other learned counsel appearing for the different interveners. The Copyright Board has been empowered in cases where the owner of a copyright in a work has withheld the same from the public, after giving the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may consider

necessary and on being satisfied that the grounds for withholding the work are not reasonable, to direct the Registrar of Copyrights to grant to the complainant a licence to republish the work, perform the work in public or communicate the work to the public by broadcast, as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Board may determine. The language used in the Section clearly contemplates a final order after a hearing and after holding an inquiry to see whether the ground for withholding of the work from the public was justified or not. There is no hint of any power having been given to the Board to make interim arrangements, such as, grant of interim compulsory licences, during the pendency of a final decision of an application.

39. As has been held by this Court in innumerable cases, a Tribunal is a creature of Statute and can exercise only such powers as are vested in it by the Statute. There is a second school of thought which propagates the view that since most Tribunals have the trappings of a Court, it would be deemed to have certain ancillary powers, though not provided by the Statute, to maintain the status-quo as prevailing at the time of filing of an application, so that the relief sought for by the Applicant is not ultimately rendered otiose. While construing the provisions of Section 14 of the Consumer Protection Act, 1986, in the *Morgan Stanley Mutual Fund's* case (supra), this Court categorically held that in the absence of any specific vesting of power, no interim relief could be granted, not even of an ad-interim nature. The decision in the recent judgment of this Court in *Rajeev Hitendra Pathak's* case (supra) also supports the case made out by Mr. Sibal to the extent that in the absence of any express power conferred on the District Forum and the State Commission under the Consumer Protection Act, they had no jurisdiction to exercise powers which had not been expressly given to them.

40. Even the decision rendered in *Bindeshwari Prasad*

Singh's case (supra), which was a decision as to the jurisdiction of a Magistrate to review or recall his order, it was held that in the absence of any specific power in the Code of Criminal Procedure, the Magistrate was not entitled to exercise such a power.

41. On the other hand, the various decisions cited on behalf of the Respondent and the interveners were in the context of the question as to whether a Tribunal has incidental powers, which were inherent though not specifically vested, in order to preserve the status-quo as in *M.K. Mohammed Kunhi's* case (supra), *Allahabad Bank, Calcutta's* case (supra) or even in *Grapco Industries Ltd.'s* case (supra), till a decision was reached in the pending matter.

42. In the instant case, the power being sought to be attributed to the Copyright Board involves the grant of the final relief, which is the only relief contemplated under Section 31 of the Copyright Act. Even in matters under Order XXXIX Rules 1 and 2 and Section 151 of the Code of Civil Procedure, an interim relief granting the final relief should be given after exercise of great caution and in rare and exceptional cases. In the instant case, such a power is not even vested in the Copyright Board and hence the question of granting interim relief by grant of an interim compulsory licence cannot, in our view, arise. Mr. Salve's submission that the substratum of the scheme of Section 31 is commercial in nature and only involves computation of the charges to be paid to the holder of the copyright who withholds the same from the public, is no answer to the proposition that under Section 31 only an ultimate relief by way of grant of a licence on payment of reasonable charges to the copyright owner to publish and/or broadcast the work could be given. To grant an interim compulsory licence during the stay of the proceedings would amount to granting the final relief at the interim stage, although the power to grant such relief has not been vested in the Board.

43. It is no doubt true, that Tribunals discharging quasi-judicial functions and having the trappings of a Court, are generally considered to be vested with incidental and ancillary powers to discharge their functions, but that cannot surely mean that in the absence of any provision to the contrary, such Tribunal would have the power to grant at the interim stage the final relief which it could grant.

44. As also indicated hereinbefore, such incidental powers could at best be said to exist in order to preserve the status-quo, but not to alter the same, as will no doubt happen, if an interim compulsory licence is granted. If the legislature had intended that the Copyright Board should have powers to grant mandatory injunction at the interim stage, it would have vested the Board with such authority. The submission made that there is no bar to grant such interim relief in Section 31 has to be rejected since the presence of a power cannot be inferred from the absence thereof in the Statute itself.

45. In the aforesaid circumstances, we have no hesitation in allowing the appeals and setting aside the impugned judgment and order of the Division Bench of the High Court. The Appeals are, accordingly, allowed. There will be no order as to costs.

K.K.T. Appeals allowed.

SUPREME COURT BAR ASSOCIATION & ORS.
v.
B.D. KAUSHIK
I.A. NO.1 OF 2012
IN
(Civil Appeal Nos. 3401 of 2003 etc.)

MAY 7, 2012

[ALTAMAS KABIR & SURINDER SINGH NIJJAR, JJ.]

Bar Associations:

Supreme Court Bar Association – Eligibility of the members to contest and vote at the election to the Executive Committee – Directions given by Supreme Court in its judgment dated 26.9.2011 – Implementation Committee carrying out the exercise to identify the regular practitioners in Supreme Court – Propriety of General Body Meeting held on 16.1.2012 and its resolutions – Held: Although the General Body Meeting had been convened to consider the implications of the judgment dated 26.9.2011, what transpired later is a complete departure therefrom – The members of the SCBA present at the meeting were bent upon their own agendas, which were directed against the three senior members of the Bar, who had been appointed as members of the Implementation Committee, together with the President – This was not a method which should have been resorted to for the said purpose – The Court cannot accept the manner in which the purported General Body Meeting of the SCBA was conducted on 16.1.2012, and the Resolutions adopted therein, as well as the resolutions purportedly adopted by the Executive Committee of the SCBA on 18.1.2012 – All the Resolutions purported to have been adopted in the General Body Meeting of the SCBA held on 16.1.2012, and the meeting of the Executive Committee being in flagrant

violation of the judgment delivered by the Court on 26.9.2011 are held to be invalid and are set aside – Consequently, the composition of the Office Bearers of the SCBA prior to the adoption of the alleged resolutions of 16.1.2012, stands restored – The Implementation Committee shall, therefore, continue with the work assigned to it for identification of the members of the SCBA eligible to vote in the elections in terms of the directions given in the judgment dated 26.9.2011 – Thereafter, the SCBA shall set the dates for the election schedule, including publication of the list of members of the SCBA eligible to vote in the elections, so that the elections can be held once the final list is approved and published – Rules and Regulations of the Supreme Court Bar Association – r.18.

Constitution of India, 1950:

Art. 142 read with Art.141 – Expression 'matter pending before it' occurring in Art. 142 – Held: Would include matters in which orders of the Supreme Court were yet to be implemented when, particularly, such orders were necessary for doing complete justice to the parties to the proceedings – When a judgment has been delivered by the Supreme Court, it is the obligation of all citizens to act in aid thereof and to obey the decision and the directions contained therein, in view of the provisions of Art. 141 until and unless the same are modified or recalled – It is the duty of all the members of the SCBA to abide by and to give effect to the judgments of the Court and not to act in derogation thereof – Once the directions had been given in the judgment disposing of the two civil appeals, the members of the SCBA were bound by the directions contained therein and the said directions had to be obeyed, however aggrieved a member of the SCBA might be.

In pursuance of the directions issued by the Supreme Court in its judgment dated 26.9.2011[1] passed

1. [2011] 15 SCR 736.

in Civil Appeal Nos. 3401 and 3402 of 2003, and to implement the Resolution of "One Bar One Vote" adopted by the Supreme Court Bar Association (SCBA) in the General Body Meeting of 18.2.2003, the Implementation Committee issued a questionnaire to all the Members of the SCBA and in order to identify regular practitioners of the SCBA, adopted certain criteria in its meetings held on 11.1.2012 and 15.1.2012. When the exercise was in progress, meanwhile, in the General Body Meeting which was scheduled to be held on 16.1.2012, apart from the regular practitioners, a large number of persons who were not even members of the SCBA, were stated to have assembled at the venue of the meeting and obstructed the elected President of the SCBA from conducting the meeting. I.A. 1 of 2012 in C.A. 3401 of 2003 was filed setting out in detail the events of the General Body Meeting convened on 16.1.2012. The applicant prayed that in furtherance of the judgment dated 26.9.2011, only those Members of the SCBA, whose names would be identified and declared by the Implementation Committee, would be entitled to participate in the elections and/or General Body Meeting of the SCBA or to vote either in the election or in the General Body Meeting or to sign any requisition. Prayer was also made for a direction that the meeting held on 16.1.2012 and the decisions purportedly taken therein were null and void.

Disposing of the I. As. and the contempt petition, the Court

HELD: 1.1. In the two appeals, one of the major issues which was canvassed was that in connection with the holding of elections to the Executive Committee of the SCBA, one of the methods resorted to for the purpose of ensuring a candidate's success in the election was to enroll a large number of members to vote for a particular

candidate. The same had given rise to a lot of discussion and deliberation which ultimately resulted in the amendment of Rule 18 of the Rules and Regulations of the SCBA regarding the eligibility of such members to contest and vote at any election. It was also proposed that a member who exercised his right to vote in any High Court or District Court, Advocates' Association or Bar Association, would not be eligible to contest for any post of the SCBA or to cast his vote at the elections; and that every member before casting his vote would, in a prescribed form, give a declaration that he had not voted in any other election of advocates in the High Court/ District Court Bar Association. Any false declaration would invite automatic suspension of the member from the membership of the SCBA for a period of three years. The requisition dated 10.1.2003, was placed for consideration at a Special General Body meeting of the SCBA on 18.2.2003, and the amendment was adopted by a majority of 85% of the members present and voting. Despite an attempt by some of the members to stall the proceedings, in the meeting of 10.3.2003, it was resolved to constitute an Implementation Committee to implement the Resolution on "One Bar One Vote" which had been adopted at the General Body Meeting on 18.2.2003. [para 43] [266-H; 267-A-G]

1.2. The matter was considered in detail by the Supreme Court in the appeals. It was felt necessary to identify the regular practitioners for the purpose of establishing the eligibility of the members who would be entitled to vote in the elections and, accordingly, the Court, in its judgment dated 26.9.2011, directed that for the said purpose the best course would be to adopt the methodology set out in *Vinay Balchandra Joshi's case, and, thereafter, it would be open to the Office Bearers of the SCBA or a Small Committee, which may be appointed by the SCBA, consisting of three Senior Advocates, to**

collect information and to prepare a list of regular members practising in this Court and another separate list of members not regularly practising in this Court and a third list of temporary members of the SCBA. After placing the list on the SCBA website and inviting objections, the Committee could then take a final decision which would be final and binding on the members of the SCBA, and, thereafter the final list of regular practitioners of the Supreme Court would be displayed by the SCBA. [para 45] [268-B-E]

******Vinay Balchandra Joshi Vs. Registrar General of Supreme Court of India* **(1998) 7 SCC 461 – relied on**

1.3. Once the directions had been given in the judgment disposing of the two civil appeals, the members of the SCBA were bound by the directions contained therein and the said directions had to be obeyed, however aggrieved a member of the SCBA might be. The agenda for the meeting of the General Body which was convened on 16.1.2012, to consider the implications of the judgment dated 26.9.2011 did not permit the members to consider any other agenda for which notice had not been given, whatever may have been the mood of the members present at the meeting. [para 46] [268-F-G]

Claude-Lila Parulekar (Smt.) Vs. Sakal Papers (P) Ltd. & Ors. **2005 (2) SCR 1063 = (2005) 11 SCC 73;** *Life Insurance Corporation of India Vs. Escorts Ltd. & Ors.* **1985 (3) Suppl. SCR 909 = (1986) 1 SCC 264 – cited.**

2.1. The Resolutions adopted at the General Body Meeting on 16.1.2012, and, thereafter, on 18.1.2012 were not only an affront to the majesty and dignity of the Supreme Court, but were outright contumacious. It is highly regrettable that the members of the Supreme Court Bar Association, which is the leading Bar Association in the country and whose members are expected to provide

leadership and example to other Bar Associations of the country and to act in aid of the judgments of the Courts, should have resorted to a Resolution not to abide by the judgment and to even act in defiance thereof by resolving that all members of the Bar Association would be entitled to vote in the elections. [para 46] [268-H; 269-A-C]

2.2. The attempt to justify the conduct of the members of the SCBA at its meeting held on 16.1.2012 cannot be supported. The Senior Advocate, who was present at the meeting and was stated to have chaired the meeting in no uncertain terms stated that he had not chaired the General Body Meeting convened on 16.1.2012, and was not a party to the Resolution which was adopted at such meeting. [para 46] [269-C-E]

2.3. Although the General Body Meeting had been convened to consider the implications of the judgment dated 26.9.2011, what transpired later is a complete departure therefrom. The members of the SCBA present at the meeting were bent upon their own agendas, which were directed against the three senior members of the Bar, who had been appointed as members of the Implementation Committee, together with the President. This was not a method which should have been resorted to for the said purpose. The meeting degenerated into a chaotic situation in which various things were done, which were not in accordance with the provisions of the Rules and Regulations of the SCBA, and were against the normal rules of decorum and cannot be supported. [para 47] [269-G-H; 270-A-B]

2.4. The manner in which the three members of the Implementation Committee whose names had been referred to in the judgment dated 26.9.2011, were treated, speaks volumes of the manner in which the Members of the SCBA conducted themselves. If any member is

aggrieved by the actions of any other member and seeks his removal from the membership of the SCBA, the rules provide the manner in which the same is to be done and certainly not arbitrarily. It is no doubt true, that some of the members were aggrieved by the methodology adopted by the Implementation Committee for preparing the list of eligible voters for the election, but the same was done pursuant to the directions given by this Court in its judgment dated 26.9.2011. If the members were aggrieved by the questionnaire which was promulgated, nothing prevented them from approaching this Court and asking for modification of the contents thereof. [para 47] [270-B-E]

2.5. The Court cannot accept the manner in which the purported General Body Meeting of the SCBA was conducted on 16.1.2012, and the Resolutions adopted therein, some of which the members themselves were unwilling to support, as well as the same resolutions purportedly adopted by the Executive Committee of the SCBA on 18.1.2012. [para 47] [270-E-F]

3.1. The need to implement the directions contained in the judgment does not cease upon the judgment being delivered. In order to enforce its orders and directions, the Supreme Court can take recourse to the powers vested in it under Art. 142 of the Constitution to do complete justice to the parties. In such cases, the lis does not cease and the expression "matter pending before it" mentioned in Art. 142 of the Constitution, would include matters in which orders of the Supreme Court were yet to be implemented, when particularly such orders were necessary for doing complete justice to the parties to the proceedings. To take any other view would result in rendering the orders of the Supreme Court meaningless. [para 49] [271-A-C]

Supreme Court Bar Association Vs. Union of India & Anr. **1998 (2) SCR 795 = (1998) 4 SCC 409 – relied on.**

Durgesh Sharma Vs. Jayshree **2008 (13) SCR 1056 = (2008) 9 SCC 648;** *R. Antulay Vs. R.S. Nayak & Anr.* **1988 (1) Suppl. SCR 1 = (1988) 2 SCC 602;** *Union Carbide Corporation Vs. Union of India* **1991 (1) Suppl. SCR 251 = (1991) 4 SCC 584 - referred to.**

3.2. When a judgment has been delivered by this Court, it is the obligation of all citizens to act in aid thereof and to obey the decision and the directions contained therein, in view of the provisions of Art. 141 of the Constitution, until and unless the same are modified or recalled. Therefore, each of the Resolutions said to have been adopted at the purported meeting of the General Body of the SCBA on 16.1.2012, do not muster scrutiny and must be held to be in violation of Art. 141 of the Constitution and cannot, therefore, be countenanced. Apart from the fact that the agenda for the meeting did not include the matters in respect whereof the resolutions have been adopted, the resolutions themselves, being in flagrant violation of the judgment delivered by this Court on 26.9.2011, have to be set aside. [para 50] [272-B-E]

3.3. It is the duty of all the members of the SCBA to abide by and to give effect to the judgments of this Court and not to act in derogation thereof. The purported resolution expelling the three senior members of the Implementation Committee, appointed under the directions of this Court, from the primary membership of the Association, speaks volumes as to the illegality thereof and the deliberate and willful attempt on the part of the members, who are alleged to have passed such a resolution to over-reach the orders of this Court. The same is sufficient ground to set aside the resolutions purportedly adopted at the meeting held on 16.1.2012. [para 50] [272-E-G]

3.4. All the Resolutions purported to have been adopted in the General Body Meeting of the SCBA held on 16.1.2012, and the meeting of the Executive Committee dated 18.1.2012 are held to be invalid and are set aside. Consequently, the composition of the Office Bearers of the SCBA prior to the adoption of the alleged resolutions of 16.1.2012, stands restored. [para 52] [273-B-C]

3.5. The alleged resolution expelling the three senior members of the SCBA constituting the Implementation Committee appointed under the directions of this Court, is set aside. The Implementation Committee shall, therefore, continue with the work assigned to it for identification of the members of the SCBA eligible to vote in the elections in terms of the directions given in the judgment dated 26.9.2011. However, if any member of the SCBA is aggrieved by the methodology adopted by the Implementation Committee for identification of such eligible members, he/she may make a representation to the Executive Committee of the SCBA, which will look into such objections and take a decision thereupon and, if necessary, to apply to the Court, before further steps are taken by the Implementation Committee in regard to identification of members eligible to vote at the elections. [para 52] [273-C-F]

3.6. The process of identifying the members of the SCBA eligible to vote in the elections for selection of the members of the Executive Committee must be completed within four weeks from the date of individual objections received, if any, are decided finally. Thereafter, the SCBA shall set the dates for the election schedule, including publication of the list of members of the SCBA eligible to vote in the elections, so that the elections can be held once the final list is approved and published. [para 52] [273-G-H; 274-A]

Case Law Reference:

(1998) 7 SCC 461	**relied on**	**para 9**
2008 (13) SCR 1056	**referred to**	**para 22**
2005 (2) SCR 1063	**referred to**	**para 22**
1985 (3) Suppl. SCR 909	**referred to**	**para 22**
1988 (1) Suppl. SCR 1	**referred to**	**para 33**
1991 (1) Suppl. SCR 251	**referred to**	**para 33**
1998 (2) SCR 795	**referred to**	**para 33**
1998 (2) SCR 795	**relied on**	**para 49**

CIVIL APPELLATE JURISDICTION

I.A. 1 & 3.
IN
Civil Appeal No. 3401 of 2003.
AND
I.A. No. 4
IN
I.A. No. 1
IN
Civil Appeal No. 3401 of 2003 etc.

From the Judgment & Order dated 05.04.2003 of the Civil Judge, Delhi in Civil Suit No. 101 of 2003.

WITH

I.A. No. 1 & 3 in C.A. No. 3402 of 2003.

Conmt. Pet. (C) No. 45 of 2012.

Ashok Desai, Rakesh Khanna, Dinesh Dwivedi, S.P. Singh, Ranjit Kumar (A.C.), Rajesh Aggarwal, Mridul Aggarwal, N. Rajaraman, Dr. Pravin Kumar Mutreja, Ashok Kumar (Appellant-In-Person), Arun Kumar, Pareena Swarup, H.L. Srivastava (for Milind Kumar), B.K. Choudhary, D.K. Thakur,

Baldev Atreya, Sushil Kumar, Ranjit Kumar, Parmanand Pandey, Ravi Shankar Kumar, B.P. Yadav, Yugal Kishore Prasad, Rajesh Ranjan Rajesh, Devendra Jha, Nitin Kumar Thakur, Dinesh Kumar Garg, Caveator in person, Shivaji M. Jadhav, Md. Izhar Alam, M.P. Singh, Parmanand Pandey, S. Simson for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. I.A. No.1 of 2012 has been filed by the Supreme Court Advocate-on-Record Association (SCAORA) in Civil Appeal Nos.3401 and 3402 of 2003, which were disposed of on 26th September, 2011, and form the genesis of the events leading to the filing of the said application. It has been a painful experience for us to have had to hear this matter as it involves two sections of the Supreme Court Bar Association whose unbecoming posturing has cast dark shadows on the functioning of the Bar Association even in the eyes of the general public and the litigants who throng the Supreme Court each day for their cases.

2. While Civil Appeal No.3401 of 2003 was filed by three Appellants, namely, (i) Supreme Court Bar Association (Regd.) through its Honorary Secretary, Mr. Ashok Arora; (ii) Mr. Ashok Arora in his capacity as the Honorary Secretary of the Supreme Court Bar Association; and (iii) Ms. Sunita B. Rao, Coordinator, Implementation Committee, Supreme Court Bar Association, (hereinafter referred to as "SCBA"), on the other hand, Civil Appeal No.3402 of 2003 has been filed by the Supreme Court Bar Association through its Honorary Secretary. Both the Appeals are directed against the interim order dated 5th April, 2003, passed by the learned Civil Judge on an application filed under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908, filed in Civil Suit Nos.100 and 101 of 2003. By the common order, the Appellants were restrained from implementing the Resolution dated February 18, 2003, amending Rule 18 of the Rules and Regulations of SCBA till the final disposal of both the suits. While Shri B.D. Kaushik

is the sole Respondent in Civil Appeal No.3401 of 2003, Shri A.K. Manchanda is the sole Respondent in Civil Appeal No.3402 of 2003. Both the Respondents are Advocates who are practising in Delhi and are Members of the SCBA, the Delhi Bar Association and the Bar Association of the Tis Hazari Courts, Delhi.

3. The Supreme Court Bar Association is a Society registered under the Societies Registration Act, 1860, on 25th August, 1999, under Registration No.35478 of 1999. In keeping with the provisions of the Societies Registration Act, 1860, the SCBA has framed its Memorandum of Association and Rules and Regulations, Rule 4 whereof divides the Members into four separate classes, namely, :-

(i) Resident Members;

(ii) Non-Resident Members;

(iii) Associate Members; and

(iv) Non-Active Members.

Rule 5(v)(a) provides that in terms of Rule 5, an Applicant found to be suitable to be made a Member of the Association would be made Member initially on temporary basis for a period of two years. It also provides that a person who is made such a Member, would be identified as a temporary Member who would be entitled to avail the facilities of the Association, such as library and canteen, but would not have a right to participate in general meetings, as prescribed in Rule 21 or to contest and vote at the elections, as provided in Rule 18.

4. On 23rd January, 2003, the Office of the SCBA received a requisition dated 10th January, 2003, signed by 343 Members seeking an amendment to Rule 18 regarding the eligibility of the Members to contest and vote at an election. It was proposed that the Member, who exercised his right to vote in any High Court or District Court Advocates/Bar Association,

would not be eligible to contest for any post of the SCBA or to cast his vote at the elections. The said requisition dated 10th January, 2003, was considered in the meeting of the Executive Committee of the SCBA on 1st February, 2003 and a decision was taken to hold a Special General Body Meeting on 18th February, 2003, to consider the requisition. It appears that notice for the said General Body Meeting was issued by the SCBA on 6th February, 2003, and copies of the same were sent to the Members along with the cause list. The notice was also displayed on the Notice Board of the office of the SCBA situated in the Supreme Court premises. The notices were also sent to different Bar Associations at Delhi, including the Delhi Bar Association. On 18th February, 2003, the General Body Meeting was convened in which 278 Members participated. Some of the Members of the Association had spoken against the requisition, but when the Resolution proposing the amendment in Rule 18 of the Rules was put to vote, it was passed by a majority of 85% of the Members present and voting. Subsequently, at a meeting of the Executive Committee convened on 3rd March, 2003, a Resolution was adopted to hold election of the Office Bearers for the next session and for the constitution of the Election Committee on 25th April, 2003. An Election Committee of three Members of the SCBA was constituted for the purpose of conducting the election. In the said meeting, a requisition signed by 237 Members of the SCBA to recall the Resolution dated 18th February, 2003, was taken up for consideration, but deferred on account of the fact that the elections had been declared. Moreover, in the meeting of the Executive Committee held on 10th March, 2003, it was resolved to constitute an Implementation Committee to implement the Resolution of "One Bar One Vote", which was adopted in the General Body Meeting of 18th February, 2003.

5. The apparent differences, which have surfaced between the two groups of Members within the SCBA, resulted in Mr. B.D. Kaushik filing Suit No.100 of 2003 in the Court of Shri Sanjeev Jain, Commercial Civil Judge, Delhi, challenging the

validity of the Resolution adopted by the Executive Committee of the SCBA on 18th February, 2003. While seeking a decree for a declaration that the Resolution dated 18th February, 2003, was illegal and ineffective, the Plaintiff also prayed for a decree of perpetual injunction to restrain the SCBA and the Office Bearers from implementing the said Resolution dated 18th February, 2003, in the elections of the SCBA which were proposed to be held on 25th April, 2003. A further prayer was made to restrain the SCBA from debarring any of the Members of the SCBA who had already paid their subscription from casting their votes in the elections which were scheduled to be held on 25th April, 2003. A similar Suit No.101 of 2003 was filed before the same learned Judge by Shri A.K. Manchanda, seeking the same relief as had been sought by Mr. B.D. Kaushik in his Suit No.100 of 2003.

6. As indicated hereinbefore, applications were filed by the Plaintiffs in both the suits under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure to restrain the Defendants, who are the Appellants in the two civil appeals, from implementing the Resolution dated 18th February, 2003, till the final disposal of the suits. By a common order dated 5th April, 2003, the learned Judge allowed the two applications filed for injunction and restrained the Appellants herein from implementing the Resolution dated 18th February, 2003, amending Rule 18 of the Rules and Regulations of the SCBA, till the final disposal of the suits.

7. The Supreme Court Bar Association through its Honorary Secretary thereupon filed the two Civil Appeal Nos.3401 and 3402 of 2003 against the said common order dated 5th April, 2003, passed by the learned Civil Judge, Delhi. Both the matters were placed before the Court in the mentioning list of 10th April, 2003, when the matters were taken on Board and leave was granted. Pending the proceedings, the common order passed by the Trial Court was also stayed. It was also made clear that if any elections were held, the same would be

subject to the result of the Appeals. Thereafter, this Court appointed Mr. Ranjit Kumar, learned Senior Advocate, as Amicus Curiae to assist the Court in the two matters. In addition, the Court also requested the learned Attorney General to assist the Court. Accordingly, the Appeals were taken up for hearing in the presence of the Amicus Curiae, the learned Attorney General, Mr. Rajesh Aggarwal, who appeared on behalf of the Appellants and Mr. Dinesh Kumar Garg, learned Advocate, who appeared on behalf of the original plaintiffs. Since the matter involved the learned Advocates practising in the Supreme Court, the Court also heard senior counsel Mr. P.P. Rao, the former President of the SCBA, Mr. Pravin Parekh, the present President of the SCBA and Mr. Sushil Kumar Jain, the President of SCAORA. The Court also considered the Memorandum of Association of SCBA as well as its Rules and Regulations.

8. During the hearing, one of the more important issues that surfaced was the escalating number of Members of the SCBA to about 10,000 Members, of whom only around 2,000 Members were said to be regularly practising in the Supreme Court. The manner in which the membership was infiltrated was also brought to the notice of the Court and a definite and deliberate allegation was made that out of the 10,000 Members of the SCBA, not more than 2,000 Members were seen to attend the Supreme Court regularly and the remaining 8,000 Members are seen in the Supreme Court premises only on the day of the SCBA elections. It was alleged that apart from the above, these 8,000 floating members had no interest whatsoever in the functioning of the SCBA or the well-being of its Members, or even the functioning of the Supreme Court of India as a Court.

9. Mr. P.P. Rao, learned Senior Counsel, and a past President of the SCBA, with a lot of experience behind him, asserted that in view of the overwhelming number of advocates admitted to the membership of the SCBA, it was necessary to

identify the advocates who actually practised in the Supreme Court in keeping with the criteria adopted by this Court for allotment of chambers in *Vinay Balchandra Joshi Vs. Registrar General of Supreme Court of India* [(1998) 7 SCC 461]. Mr. Rao submitted that the said criteria could be adopted in identifying the regular practitioners in the Supreme Court. In the judgment dated 26th September, 2011, the Hon'ble Judges had recorded that the learned advocates who had appeared in the matter had urged the Court to give guidelines/directions for effective implementation of the amended rule which projects the principle of "One Bar One Vote". Accepting the submissions for the need to identify the members of the SCBA who regularly practised in the Supreme Court, and also taking note of Mr. Rao's suggestions, the Court directed that the criteria adopted by this Court for allotment of chambers, as explained in *Vinay Balchandra Joshi's* case (supra), should be adopted by the SCBA in this case also. The Court also observed that to identify regular practitioners in the Supreme Court, it would be open to the Office Bearers of the SCBA or a small Committee appointed by the SCBA, consisting of three senior advocates, to collect information about those members who had contested elections in any of the Court-annexed Bar Associations, such as, the High Court Bar Association, District Court Bar Association, Taluka Bar Association, etc., from 2005 to 2010. The Committee of the SCBA to be appointed was, inter alia, directed as follows :

> "The Committee of SCBA to be appointed is hereby directed to prepare a list of regular members practising in the Supreme Court and another separate list of members not regularly practising in the Supreme Court and third list of temporary members of the SCBA. The lists were directed to be put up on the SCBA website and also on the SCBA notice board. The committee was also directed to send a letter to each member of the SCBA informing him about his status of membership on or before 28th February, 2012. An aggrieved member would be

entitled to make a representation within 15 days from the date of receipt of the letter from the SCBA to the Committee, which is to be appointed by the SCBA."

10. It was subsequently mentioned in the judgment that once a declaration had been made by the Committee, it would be valid till it was revoked and once it was revoked, the Member would forfeit his right to vote or contest any election to any post to be conducted by the SCBA, for a period of three years from the date of revocation. It was also categorically indicated that the Members of the SCBA, whose names did not figure in the final list of regular practitioners, would not be entitled to either vote at an election of the Office Bearers of the SCBA or to contest any of the posts for which elections would be held by the SCBA. On the suggestion of the SCBA, the Hon'ble Judges recommended the names of Mr. K.K. Venugopal, Mr. P.P. Rao, and Mr. Ranjit Kumar, learned Senior Advocates, practising in the Supreme Court, for constituting the Implementation Committee, subject to their consent and convenience.

11. As it appears from the materials disclosed before us, the three aforesaid senior members of the Bar, whose names had been suggested, were ultimately appointed by the SCBA to be the members of the Implementation Committee to implement the directions given by the Hon'ble Judges in Civil Appeal Nos.3401 and 3402 of 2003.

12. For the purpose of implementing the directions of this Court contained in the judgment dated 26th September, 2011, the Implementation Committee issued a Questionnaire to all the Members of the SCBA. Furthermore, in order to identify the regular practitioners of the Court, the Implementation Committee adopted certain criteria vide its Resolution dated 11th January, 2012, and the Members who fulfilled the said criteria were to be treated as regular practitioners of this Court, along with the 754 Members to whom Chambers had already been allotted or whose names were already included in the approved Waiting List for allotment of Chambers. The

Resolution adopted by the Implementation Committee in its meeting held on 11th January, 2012, is reproduced hereinbelow :-

"RESOLUTION

1. The Implementation Committee of the Supreme Court Bar Association, in its meeting held on 11.01.2012 at 1:10 p.m. has resolved as follows:

2. In view of the directions of the Supreme Court of India, in its judgment in SCBA Vs. B.D. Kaushik, to the effect that "the Committee of the SCBA to be appointed is hereby directed to prepare a list of regular members practising in this Court……", the following categories of members of SCBA, in addition to the list of members already approved by the Implementation Committee, are entitled to vote at, and contest, the election of the office bearers of the SCBA as 'regular members practising in this Court':

(i) All Advocates on Record who have filed cases during the calendar year 2011.

(ii) All Senior Advocates designated as Senior Advocates by the Supreme Court of India, who are resident in Delhi and attending the Supreme Court of India.

(iii) All members who subscribed to any of the cause lists of the Supreme Court of India during the calendar year 2011.

(iv) All members who have been members of the SCBA for the last 25 years, commencing 01.01.1986, and have been paying subscription to the SCBA regularly, in each one of the 25 years.

3. The list of such members who are eligible to vote and contest elections will be put up on the SCBA notice board for the information of all members and will also be circulated in the usual manner including circulation with the daily cause list. Copies of this list will also be available at the reception desk in Library I.

4. The persons whose names figure in this list need not reply to the questionnaire issued earlier.

Sd/- Sd/- Sd/-

K.K. VENUGOPAL P.P. RAO RANJIT KUMAR"

13. Thereafter, pursuant to a request made by some of the Members of the SCBA to the Implementation Committee, the said Committee by its Resolution dated 15th January, 2012, included two other categories of Members who were to be treated as regular Members of the SCBA, namely :-

(i) All Members of the SCBA, who have attended the Supreme Court of India on at least 90 days in the Calendar Year 2011, as established from the database showing the use of Proximity Cards maintained by the Registry of the Supreme Court of India; and

(ii) All Live Members of the SCBA, other than temporary Members, as on 31.12.2011.

14. While the aforesaid exercise was being undertaken by the Implementation Committee, on 12th January, 2012, about 240 Members of the SCBA requested the convening of a General Body Meeting of the SCBA. As the Executive Committee of the SCBA had at its meeting held on 6th January, 2012, already decided to call such Meeting on 16th January,

2012, a Circular in this regard was issued informing the Members that the Meeting would be held on 16th January, 2012. It is alleged that on 16th January, 2012, apart from the regular practitioners, a large number of persons who were not even members of the SCBA, assembled at the venue of the meeting and obstructed Shri P.H. Parekh, the elected President of the SCBA, from conducting the meeting.

15. In view of the aforesaid circumstances, Mrs. B. Sunita Rao, learned Advocate and the Secretary of the Applicant Association, filed an application for directions, setting out in detail the events of the General Body Meeting convened on 16th January, 2012, to consider the implementation of the recommendations of the Implementation Committee. In the said background, the Applicant prayed that in furtherance of the judgment dated 26th September, 2011, only those Members of the SCBA, whose names would be identified and declared by the Implementation Committee, consisting of Shri K.K. Venugopal, Shri P.P. Rao and Shri Ranjit Kumar, Senior Advocates, would be entitled to participate in the elections and/or General Body Meeting of the SCBA or to vote either in the election or in the General Body Meeting or to sign any requisition. Among the other prayers was a prayer for a direction that the meeting held on 16th January, 2012, and the decisions purportedly taken therein, were null and void. A direction was also sought that the Implementation Committee comprised of Shri K.K. Venugopal, Shri P.P. Rao and Shri Ranjit Kumar, Senior Advocates, and no other person, should be allowed to complete the task of implementing the judgment dated 26th September, 2011.

16. The said two applications were taken up for consideration and extensive submissions were made, both in support of and against the reliefs sought for therein.

17. Appearing on behalf of the Appellant Association, Mr. Ashok Desai, learned Senior Advocate, submitted that the events which occurred on 16th January, 2012, at the

Requisition Meeting convened at the instance of some of the members of the SCBA, were highly condemnable and left much to be desired. Mr. Desai submitted that after Mr. P.H. Parekh, the elected President of the SCBA had been shouted down, it was unceremoniously declared that he had resigned and his resignation from the post of President of the SCBA had been accepted in the meeting by a Resolution said to have been adopted at the meeting itself. Mr. Desai submitted that seeing the manner in which the meeting was being taken over by a certain section of the persons present at the venue of the meeting, Mr. Parekh requested Mr. Ram Jethmalani, learned Senior Advocate and a former President of the SCBA, to preside over and conduct the meeting. Mr. Desai further submitted that even Mr. Ram Jethmalani was not permitted to preside over the meeting and Mr. Pramod Swarup, a Senior Advocate and Member of the Executive Council, was prevailed upon to preside over the meeting, where certain resolutions were allegedly adopted, which were not only unlawful, but even contumacious.

18. Mr. Desai then referred to the letter dated 17th January, 2012, addressed by one Mr. Arun Kumar, Advocate, to Hon'ble the Chief Justice of India enclosing copies of the Resolution purportedly passed by the Members of the SCBA on 16th January, 2012, in its Special General Meeting. The said Resolution purported to have been adopted on 16th January, 2012, is extracted hereinbelow :-

"RESOLUTION

Special General Body Meeting held on 16.01.2012 at 4.15 PM at Supreme Court Lawns passed the following Resolutions through Voice Vote and Show of Hands :

The Special General Body of the SCBA, presided over by Mr. Ram Jethmalani, Sr. Advocate (who was invited to

preside over the meeting by President Mr. P.H. Parekh), has resolved that :

(1) Under the Rule making powers of SCBA (General Body) it is resolved that the judgment of Hon'ble Supreme Court dated 26.9.2011 passed in the case of *HCBA Vs. B.D. Kaushik* should not be given effect to.

(2) The Implementation Committee proposed by the Hon'ble Supreme Court vide its judgment dated 26th September, 2011 passed in the case of *SCBA Vs. B.D. Kaushik* has itself ignored the judgment and is left with no authority to issue any list of the regular practicing Members of SCBA as it has acted in a manner which is detrimental to the interest of Members of SCBA and, therefore, the Implementation Committee stands dissolved.

(3) The Members of Implementation Committee, namely, (i) Shri P.P. Rao, Sr. Advocate, (ii) Shri K.K. Venugopal, Sr. Advocate, and (iii) Shri Ranjit Kumar, Sr. Advocate, are forthwith expelled from the Primary Membership of the SCBA.

(4) All the active Members of SCBA, without any classification, will be eligible to vote in the annual elections, subject to their clearing the annual subscription/ dues and filing of the Declaration Form.

(5) Mr. P.H. Parekh, President of SCBA has publicly announced his resignation from his post with immediate effect. His resignation is forthwith accepted by the General Body.

The Meeting ended with thanks to the Chair.

Resolution signed by more than 400 SCBA Members present during the Special General Body Meeting."

19. Mr. Desai also drew our attention to the minutes of the meeting of the Executive Committee purported to have been held on 18th January, 2012, chaired by Mr. Pramod Swarup, Senior Executive Member, who had purportedly chaired the General Body Meeting held on 16th January, 2012. Mr. Desai pointed out from the minutes that the same resolution which had been adopted at the General Body Meeting of 16th January, 2012, was also adopted at the purported meeting of the Executive Committee held on 18th January, 2012.

20. On the resolutions said to have been adopted both at the Special General Body Meeting and the meeting of the Executive Committee of the SCBA allegedly held thereafter, Mr. Desai submitted that the said resolutions are per se in disregard of the judgment of this Court in *SCBA Vs. B.D. Kaushik* and are, therefore, null and void. Mr. Desai also pointed out that the resolution starts by recording that "The Special General Meeting of the SCBA was presided over by Mr. Ram Jethmalani, Sr. Advocate", but Mr. Ram Jethmalani, who was present in the Court stated that he did not preside over the meeting and he had also expressed his view that everybody should speak in a decorous manner. Mr. Parekh, the President and all concerned parties should be given a full hearing and all grievances should be ventilated in accordance with law. Mr. Desai submitted that the statement made by Mr. Ram Jethmalani in Court had not been contradicted by anyone.

21. Mr. Desai also submitted that the Special General Body Meeting of the SCBA had been convened on 16th January, 2012, only for the purpose of considering the implication of the judgment dated 26th September, 2011, passed in Civil Appeal Nos.3401 and 3402 of 2003, and the agenda of the said meeting clearly reflected the same. Mr. Desai submitted that there was no suggestion that the meeting was held to consider:

(a) that the validity of the aforesaid judgment should not be given effect to;

(b) that the Implementation Committee should be dissolved;

(c) that the Members of the Implementation Committee, namely, Mr. K.K. Venugopal, Mr. P.P. Rao and Mr. Ranjit Kumar, learned Senior Advocates should be expelled from primary membership of the Association;

(d) that the members who were not eligible should be entitled to vote, notwithstanding the judgment delivered in *B.D. Kaushik's* case (supra); or

(e) that anybody's resignation should be accepted.

22. Referring to Section 173(2) of the Companies Act, 1956, Mr. Desai contended that as had been repeatedly held by this Court, at any Extraordinary General Meeting, along with a notice of the meeting, a statement setting out all material facts in respect of each item of business to be transacted at the meeting, had to be annexed. In this regard, Mr. Desai referred to the decision of this Court in *Claude-Lila Parulekar (Smt.) Vs. Sakal Papers (P) Ltd. & Ors.* [(2005) 11 SCC 73], in which it was categorically held that in respect of special business an explanatory statement had to be annexed to the notice of the Board Meeting and in the absence thereof, any decision taken in connection with such special business would be invalid. A similar view had earlier been expressed in *Life Insurance Corporation of India Vs. Escorts Ltd. & Ors.* [(1986) 1 SCC 264].

23. Mr. Desai submitted that even Mr. Dinesh Dwivedi and Mr. S.P. Singh, learned Senior Advocates, had, at the very first instance, submitted that Resolution Nos.1 and 4 relating to the decision not to give effect to the judgment of this Court dated

26th September, 2011, and that all active members of SCBA without any classification would be eligible to vote in the annual elections, could not be defended and submitted that the same be disregarded and treated as withdrawn. Mr. Desai urged that even the decision to expel the three senior members of the SCBA, who had been appointed as the members of the Implementation Committee, was not only irregular, but in complete violation of the Rules relating to expulsion of members of the SCBA and in breach of the principles of natural justice. Mr. Desai also urged that when the aforesaid resolution was sent to the Vice-President of the SCBA on 17th January, 2012, the majority of the members of the Executive Committee by a circular resolution of even date requested him to withdraw the same and on such request being communicated to Mr. Parekh, he withdrew his resignation on 18th January, 2012. The meeting of the Executive Committee on 18th January, 2012, was, therefore, wholly unauthorized and all the members of the Executive Committee were so informed by way of SMS and E-mails dated 18th January, 2012. Mr. Desai submitted that the Minutes of the meeting held on 18th January, 2012, were unanimously recalled by the Executive Committee on 19th January, 2012, in their entirety. It was also pointed out that out of the 21 members, 18 members were present in that meeting of the Executive Committee held on 19th January, 2012.

24. Mr. Desai further submitted that Rule 35 of the SCBA Rules and Regulations provided for the removal of a member from the SCBA on receipt of a written complaint. Rule 35 provides the procedure for dealing with such complaints and categorically indicates that only if the Committee was satisfied that there was a prima facie case against a member complained against, it would direct the complaint, together with the report of the Committee or Sub-Committee, to be placed before a General Meeting of the Association and afford the member concerned a reasonable opportunity of being heard in person.

25. Mr. Desai submitted that certain subsequent developments are also required to be taken note of and, in particular, a requisition notice dated 23rd March, 2012, signed by 2/3rd of the Members of the SCBA, many of whom were signatories to the General Body Meeting resolution dated 16th January, 2012, requiring the Executive Committee to initiate the process of election and to publish the list of voters on or before 17th April, 2012, failing which the Members would call a General Body Meeting and pass a resolution of "No Confidence" against the Executive Committee. Mr. Desai submitted that the requisition was considered by the Executive Committee of the SCBA and in its meeting of 11th April, 2012, it was resolved that since the matter had been heard by this Court and judgment had been reserved on 4th April, 2012, the requisition notice dated 23rd March, 2012, should be placed before this Court with an application seeking proper directions.

26. Mr. Desai submitted that yet another requisition notice dated 18th April, 2012, was received on 20th April, 2012, purported to have been signed by 252 advocates, calling upon the members of the Executive Committee to convene a General Body Meeting on 25th April, 2012, failing which the requisitionists would hold a General Body Meeting on that day and pass a resolution of 'No Confidence' and also fix the date of holding of the elections of the SCBA in the month of May, 2012.

27. Mr. Desai submitted that the manner in which the Special General Meeting was held on 16th January, 2012, was highly contumacious and, therefore, void, and was liable to be declared as such. Furthermore, the subsequent notices received for holding Requisition Meetings containing a demand for finalization of the Voters' List, was completely contrary to the directions given in the judgment dated 26th September, 2011, particularly, when an illegal resolution was purportedly adopted expelling the three members of the Implementation Committee from the primary membership of the SCBA.

28. Mr. Harish N. Salve, learned Senior Advocate, who appeared for the Supreme Court Advocate-on-Record Association, submitted that as far as the maintainability of Interlocutory Application No.1 of 2012 is concerned, there could not be any doubt that the directions issued under Article 142 of the Constitution are binding upon all, unless they are recalled or set aside in a manner known to law. Mr. Salve submitted that any attempt to defy the directions would empower this Court with jurisdiction to take appropriate action for compelling compliance, including by way of contempt. Mr. Salve submitted that the application had been made in furtherance of the judgment dated 26th September, 2011, and the underlying object of the application was to uphold the majesty of this Court and to ensure that the directions were duly implemented in the spirit in which they were given. Mr. Salve submitted that since the resolutions said to have been adopted by the General Body of the Association on 16th January, 2012, were in defiance of the directions issued by this Court, this Court would always have jurisdiction to deal with such violation or to give further directions for effective implementation thereof.

29. Mr. Salve submitted that the Respondents had themselves accepted that Resolution No.1 was in defiance of the judgment of this Court. As a result, the other Resolutions were a fall-out of Resolution No.1 and could not, therefore, be accepted. Referring to Resolution No.5 relating to Mr. P.H. Parekh's resignation, Mr. Salve submitted that the same was not part of the agenda for the meeting held on 16th January, 2012. Mr. Salve submitted that the minutes of the meetings held on 16th and 18th January, 2012, lacked credence and acceptability on account of the circumstances in which they were adopted.

30. On the question of whether the Implementation Committee acted contrary to the judgment dated 26th September, 2011, Mr. Salve submitted that the Implementation Committee acted in keeping with the guidelines in *Vinay*

Balchandra Joshi's case (supra) as was directed by this Court and the object of the directions given in the judgment dated 26th September, 2011, was to make a list of those who regularly practise in the Supreme Court, as they alone would have voting rights in the matter of elections of the Office Bearers of the Supreme Court Bar Association in terms of the judgment. Such task had to be performed by the Committee within a given time and whatever steps that were taken by the Implementation Committee were in the light of such directions.

31. Mr. Salve submitted that given the manner in which the purported Resolutions were adopted in the meetings said to have been held on 16th and 18th January, 2012, the same were liable to be declared as non est in law. Mr. Salve further submitted that a direction should be given to the Implementation Committee to continue with the work of finalizing the Voters' List, as per the directions given in the judgment dated 26th September, 2012, on a war footing and to publish the Voters' List as early as possible, so that the subsequent steps could be taken for conducting the elections of the Office Bearers of SCBA expeditiously.

32. Appearing on behalf of some of the members of the SCBA, Mr. Dinesh Dwivedi, learned Senior Advocate, firstly submitted that Interlocutory Application No.1 filed in Civil Appeal No.3401 of 2003, was not maintainable, either under Order 47 of the Supreme Court Rules, 1966, or under Order 13 Rule 3 thereof. Furthermore, since the judgment dated 26th September, 2011, was not under challenge, even the provisions of Order 40 of the Supreme Court Rules were not applicable to the application. Mr. Dwivedi, however, accepted the fact that Resolution Nos.1 and 4, which, according to him, had been adopted at the Special General Body Meeting of the SCBA held on 16th January, 2012, could not be supported and he was not, therefore, pressing the same.

33. Mr. Dwivedi urged that once the judgment had been delivered, the Court became functus officio and any further

proceeding in relation to the disposed of matter could be only by way of the provisions for review, both under the Code of Civil Procedure, as also under Order 47 of the Supreme Court Rules, 1966. Reiterating his earlier submissions, Mr. Dinesh Dwivedi submitted that the judgment dated 26th September, 2011, had attained finality and could not be modified or altered in any manner. In support of his aforesaid submissions, Mr. Dwivedi firstly referred to and relied upon the decision of this Court in *Durgesh Sharma Vs. Jayshree* [(2008) 9 SCC 648], wherein, as a general principle, it was held that the inherent powers vested in a Court, could not be invoked when there were specific provisions in law in that regard. The decisions in *A.R. Antulay Vs. R.S. Nayak & Anr.* [(1988) 2 SCC 602]; *Union Carbide Corporation Vs. Union of India* [(1991) 4 SCC 584] and *Supreme Court Bar Association Vs. Union of India & Anr.* [(1998) 4 SCC 409], were also referred to, wherein, it had, inter alia, been held that Article 142 of the Constitution empowering the Supreme Court to pass a decree or to make such order, as is necessary for doing complete justice in any case or matter pending before it, cannot be invoked as a matter of course. It was urged that a lis would have to be pending before the Supreme Court in order to invoke jurisdiction under Article 142 of the Constitution. Mr. Dwivedi urged that in the present case, since the appeals themselves had been disposed of, there was no pending lis which would allow the invocation of the extraordinary powers vested in the Supreme Court under Article 142 of the Constitution.

34. Mr. Dwivedi submitted that in an application of this nature, the extraordinary powers vested in the Supreme Court under Article 142 of the Constitution could not be invoked to allow the prayers made and the same being entirely misconceived, were liable to be rejected.

35. Representing the Supreme Court Advocates Association (Non-AOR), Mr. S.P. Singh, learned Senior Advocate, firstly submitted that I.A. Nos.1 and 2 of 2012, filed

on behalf of the SCAORA, were not maintainable, since they neither fell within the ambit of a Review Petition under Article 137 of the Constitution of India or Order XL of the Supreme Court Rules, 1966. It was also urged that SCAORA was not a necessary party and the application filed by it was in gross abuse of the process of the Court. Mr. Singh submitted that none of the rights of any of the members of SCAORA have been affected by the Resolutions adopted by the Governing Body of the SCBA on 16th January, 2012 and, if at all any clarification was required, the members of the Implementation Committee could have come and obtained directions from the Court.

36. Mr. Singh submitted that the main intention of the requisition meeting was to bring to the notice of the Executive Committee of the SCBA various irregularities committed by the Implementation Committee which needed to be rectified. It was submitted that what had transpired at the meeting of the General Body of SCBA on 16th January, 2012, was a reflection of the mood of the members of the SCBA, who were of the view that the Executive Committee of the SCBA was trying to stall the elections which were required to be conducted within the month of May, 2012. Mr. Singh reiterated the submissions made by Mr. Dwivedi and submitted that since the General Body of the SCBA had accepted the resignation of Mr. Parekh given voluntarily, the subsequent meeting of the Executive Committee held in his absence could not be faulted, since even the Vice-President of the Association refused to preside over the meeting.

37. Mr. Singh also urged that the Implementation Committee had deviated from the directions given in the judgment passed by this Court on 26th September, 2011, and the questionnaire issued by it contained various anomalies and excluded even Senior Advocates practising in this Court but living outside Delhi, such as in Noida and Gurgaon, from being eligible to vote.

38. Apart from the above, the names of various Advocates and Advocates-on-Record had been wrongly shown in the list which was also bound to create confusion. For example, the name of Shri M.C. Bhandare, the present Governor of Orissa and the name of a sitting Judge of the Madras High Court, have been included in the list, which clearly went to show that the Implementation Committee had not applied its mind to the preparation of the Voters' List. Mr. Singh also urged that the consideration of valid members who were eligible to vote was to be considered by the SCBA which meant the General Body and not the Executive Committee alone. Accordingly, even the appointment of Mr. K.K. Venugopal, Mr. P.P. Rao and Mr. Ranjit Kumar, Senior Advocates, as members of the Implementation Committee, was irregular and unlawful and any decision taken by the Committee must be held to be void.

39. Mr. Singh submitted that various mal-practices were resorted to by the persons who have been at the helm of affairs of SCBA, by throwing lavish parties and using other means to attract votes at the time of election to the Executive Committee of the Association. Mr. Singh submitted that far from protecting the interests of the members of the Bar, some of the present members of the Executive Committee were more concerned about their own aggrandizement to the detriment of the interests of the members of the Bar. Mr. Singh submitted that the Resolutions adopted by the General Body Meeting of the SCBA at the meeting held on 16th January, 2012 and the subsequent meeting of the Executive Committee held on 18th January, 2012, had been legally adopted and could not be interfered with, especially in a Petition which was not maintainable.

40. Dr. Rajiv Dhawan, learned Senior Advocate, briefly appeared for some of the members and urged that having regard to the questionnaire published by the members of the Implementation Committee, some clarification was necessary as to the voting rights of the members of the Association.

41. Apart from Dr. Dhawan, among others who addressed the Court, were Mr. Ashok Arora, learned Advocate and former Honorary Secretary of the SCBA, Mr. Pramod Swarup, Senior Executive Member of the SCBA, Mr. Dinesh Kumar Garg, former President of SCAORA. Each of them spoke, either in support of the submissions made by Mr. Dinesh Dwivedi and Mr. S.P. Singh or in favour of those made by Mr. Harish Salve and Mr. Ashok Desai.

42. Since Mr. Ranjit Kumar, learned Senior Advocate, besides being a member of the Implementation Committee, was also appointed as amicus curiae by this Court in the matter, we requested him to file written submissions in the matter. In a brief submission, Mr. Ranjit Kumar submitted that despite all the apprehensions expressed by Mr. Dinesh Dwivedi and Mr. S.P. Singh, that the rights of the practising lawyers in the Supreme Court to form an Association had been curtailed or that the provisions of the Societies Registration Act were being violated by the Implementation Committee, none of the aforesaid rights of the members of the SCBA had been curtailed in any manner. Mr. Ranjit Kumar submitted that all that the judgment dated 26th September, 2011 in B.D. Kaushik's case had done was to regulate the right to vote and for that purpose the Implementation Committee was appointed to oversee the same. The membership of the members of SCBA was not affected in any way on account of such regulations.

43. From the facts as narrated hereinabove, one thing is clear that in view of the order of interim injunction passed in the two suits filed by Mr. B.K. Kaushik and Mr. A.K. Manchanda restraining the SCBA from implementing its Resolution dated 18th February, 2003, amending Rule 18 of the Rules and Regulations, till the final disposal of both the suits, the two appeals were filed by SCBA through its Honorary Secretary, Mr. Ashok Arora, and Ms. Sunita B. Rao as Coordinator of the Implementation Committee. When the two appeals were taken up for hearing, one of the major issues which was canvassed

was that in connection with the holding of elections to the Executive Committee of the SCBA, one of the methods resorted to for the purpose of ensuring a candidate's success in the election was to enroll a large number of members to vote for a particular candidate. The same had given rise to a lot of discussion and deliberation which ultimately resulted in the amendment of Rule 18 regarding the eligibility of such members to contest and vote at any election. It was also proposed that a member who exercised his right to vote in any High Court or District Court, Advocates' Association or Bar Association, would not be eligible to contest for any post of the SCBA or to cast his vote at the elections. It was also proposed that every member before casting his vote would, in a prescribed form, give a declaration that he had not voted in any other election of advocates in the High Court/District Court Bar Association. Any false declaration would invite automatic suspension of the member from the membership of the SCBA for a period of three years. The requisition dated 10th January, 2003, was placed for consideration at a Special General Body meeting of the SCBA on 18th February, 2003, and the amendment was adopted by a majority of 85% of the members present and voting. Thereafter, at a further meeting of the Executive Committee convened on 3rd March, 2003, it was resolved to hold election of the Office Bearers/Executive Members for the next session and for the constitution of the Election Committee. It was further resolved to hold elections on 25th April, 2003. Despite an attempt by some of the members to stall the proceedings, in the meeting of 10th March, 2003, it was resolved to constitute an Implementation Committee to implement the Resolution on "One Bar One Vote" which had been adopted at the General Body Meeting on 18th February, 2003.

44. As indicated hereinbefore, the challenge to the Resolution dated 18th February, 2003, in the two suits filed by Mr. B.K. Kaushik and Mr. A.K. Manchanda resulted in the

appeals being preferred in this Court by the SCBA through its Honorary Secretary, Mr. Ashok Arora.

45. The matter was, thereafter, considered in detail by the Hon'ble Judges who took up the appeals for hearing and directed that it was necessary to identify the regular practitioners for the purpose of establishing the eligibility of the members who would be entitled to vote in the elections and, accordingly, the Hon'ble Judges directed that for the said purpose the best course would be to adopt the methodology set out in *Vinay Balchandra Joshi's* case (supra), and, thereafter, it would be open to the Office Bearers of the SCBA or a Small Committee, which may be appointed by the SCBA, consisting of three Senior Advocates, to collect information and to prepare a list of regular members practising in this Court and another separate list of members not regularly practising in this Court and a third list of temporary members of the SCBA. After placing the list on the SCBA website and inviting objections, the Committee could then take a final decision which would be final and binding on the members of the SCBA, and, thereafter the final list of regular practitioners of the Supreme Court would be displayed by the SCBA.

46. Once such directions had been given in the judgment disposing of the two civil appeals filed by the SCBA through Mr. Ashok Arora, the members of the SCBA were bound by the directions contained therein and the said directions had to be obeyed, however aggrieved a member of the SCBA might be. The agenda for the meeting of the General Body which was convened on 16th January, 2012, to consider the implications of the judgment in B.D. Kaushik's case, did not permit the members to consider any other agenda for which notice had not been given, whatever may have been the mood of the members present at the meeting. If any member felt aggrieved by the judgment delivered on 26th September, 2011, he could have taken recourse to other lawful means available to him under the law. The Resolutions adopted at the General Body

Meeting on 16th January, 2012, and, thereafter, on 18th January, 2012, were not only an affront to the majesty and dignity of the Supreme Court, but were outright contumacious. It is highly regrettable that the members of the Supreme Court Bar Association. which is the leading Bar Association in the country and whose members are expected to provide leadership and example to other Bar Associations of the country and to act in aid of the judgments of the Courts, should have resorted to a Resolution not to abide by the judgment and to even act in defiance thereof by resolving that all members of the Bar Association would be entitled to vote in the elections. Although, Mr. Dinesh Dwivedi did concede that the second and fourth Resolutions adopted at the meeting of 16th January, 2012, should not be taken into consideration, the attempt to justify the conduct of the members of the SCBA at its meeting held on 16th January, 2012, cannot be supported. Mr. Ram Jethmalani, learned Senior Advocate, who was present at the meeting submitted in no uncertain terms that he had not chaired the General Body Meeting convened on 16th January, 2012, and was not a party to the Resolutions which had been adopted at such meeting. On the other hand, Mr. Jethmalani submitted that he had cautioned the Members not to act in an unruly manner and to allow the proceedings to be conducted in a lawful and free manner and to allow each member, who had a grievance, including Mr. Parekh, to express his views and then to adopt any Resolution that the members felt was needed to be adopted in the light of the agenda of the meeting.

47. We cannot help but notice that although the General Body Meeting had been convened to consider the implications of the judgment dated 26th September, 2011, what transpired later is a complete departure therefrom. The members of the SCBA present at the meeting were bent upon their own agendas, which were directed against the three senior members of the Bar, who had been appointed as members of the Implementation Committee, together with the President. In our view, this was not a method which should have been

resorted to for the said purpose. The meeting degenerated into a chaotic situation in which various things were done, which were not in accordance with the provisions of the Rules and Regulations of the SCBA, and were against the normal rules of decorum and cannot be supported, despite attempts made to do so by Mr. Dwivedi and Mr. Singh. The manner in which the three members of the Implementation Committee whose names had been referred to by the Hon'ble Judges in the judgment dated 26th September, 2011, were treated, speaks volumes of the manner in which the Hon'ble Members of the SCBA conducted themselves. If any member is aggrieved by the actions of any other member and seeks his removal from the membership of the SCBA, the rules provide the manner in which the same is to be done and certainly not arbitrarily. It is no doubt true, that some of the members were aggrieved by the methodology adopted by the Implementation Committee for preparing the list of eligible voters for the election, but the same was done pursuant to the directions given by this Court in its judgment dated 26th September, 2011. If the members were aggrieved by the questionnaire which was promulgated, nothing prevented them from approaching this Court and asking for modification of the contents thereof. We are, therefore, unable to accept the manner in which the purported General Body Meeting of the SCBA was conducted on 16th January, 2012, and the Resolutions adopted therein, some of which the members themselves were unwilling to support, as well as the same resolutions purportedly adopted by the Executive Committee of the SCBA on 18th January, 2012.

48. At this stage, it will also be necessary for us to deal with the question of maintainability of I.A. Nos.1 and 2 raised both by Mr. Dinesh Dwivedi and by Mr. S.P. Singh. Their main contention is that once the judgment has been delivered by the Court, the Court becomes functus officio and in the absence of any pending lis, this Court could not have entertained the said two applications.

49. We are unable to accept the said submission made by Mr. Dwivedi and Mr. Singh, since the need to implement the directions contained in the judgment does not cease upon the judgment being delivered. In order to enforce its orders and directions, the Supreme Court can take recourse to the powers vested in it under Article 142 of the Constitution to do complete justice to the parties. In such cases, the lis does not cease and the expression "matter pending before it" mentioned in Article 142 of the Constitution, would include matters in which orders of the Supreme Court were yet to be implemented, when particularly such orders were necessary for doing complete justice to the parties to the proceedings. To take any other view would result in rendering the orders of the Supreme Court meaningless. In this regard, reference may be made to the Constitution Bench decision of this Court in *Supreme Court Bar Association Vs. Union of India & Anr.* [(1998) 4 SCC 409], referred to hereinbefore, wherein the question before the Bench was the power of the Supreme Court to punish for contempt of itself under Article 129 read with Article 142 of the Constitution. While considering the same and holding that the power vested in the Supreme Court under Article 142 should not be used to supplant substantive law applicable to a case, being curative in nature, their Lordships also observed that the plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes, though are not limited by those statutes. This Court held that these powers also exist independent of the statutes with a view to doing complete justice between the parties. This power exists as a separate and independent basis of jurisdiction, apart from the statutes, and stands upon the foundation for preventing injustice in the process of litigation and to do complete justice between the parties. This Court further observed that this plenary jurisdiction is thus the residual source of power which this Court may draw upon as necessary, whenever it is just and equitable to do so and, in particular, to ensure the observance of the due process of law, to do complete justice between the

parties, while administering justice according to law. In the event the parties do not or refuse to abide by its decision, the Supreme Court would have no option, but to take recourse to the provisions of Article 129 of the Constitution or under the provisions of the Contempt of Courts Act, 1971.

50. When a judgment has been delivered by this Court, it is the obligation of all citizens to act in aid thereof and to obey the decision and the directions contained therein, in view of the provisions of Article 141 of the Constitution, until and unless the same are modified or recalled. In the said background, each of the Resolutions said to have been adopted at the purported meeting of the General Body of the SCBA on 16th January, 2012, do not muster scrutiny and must be held to be in violation of Article 141 of the Constitution and cannot, therefore, be countenanced. Apart from the fact that the agenda for the meeting did not include the matters in respect whereof the resolutions have been adopted, the resolutions themselves, being in flagrant violation of the judgment delivered by this Court on 26th September, 2011, have to be set aside. It is the duty of all the members of the SCBA to abide by and to give effect to the judgments of this Court and not to act in derogation thereof. The purported resolution expelling the three senior members of the Implementation Committee, appointed under the directions of this Court, from the primary membership of the Association, speaks volumes as to the illegality thereof and the deliberate and willful attempt on the part of the members, who are alleged to have passed such a resolution to over-reach the orders of this Court. The same is sufficient ground to set aside the resolutions purportedly adopted at the meeting held on 16th January, 2012, notwithstanding the technical arguments advanced by Mr. Dwivedi and Mr. Singh.

51. Since the members of the Bar are involved, we do not wish to add anything further, except to express the hope that in future this kind of unruly and undignified behaviour will not be repeated. Even if the members of the SCBA have any grievance against the judgment delivered on 26th September,

2011, they have to obey the same in the scheme of judicial discipline.

52. Accordingly, I.A. No.1 of 2012 in Civil Appeal Nos.3401 and 3402 of 2003 is allowed. All the Resolutions purported to have been adopted in the General Body Meeting of the SCBA held on 16th January, 2012, and the meeting of the Executive Committee are held to be invalid and are set aside. Consequently, the composition of the Office Bearers of the SCBA prior to the adoption of the alleged resolutions of 16th January, 2012, stand restored. The alleged resolution expelling the three senior members of the SCBA constituting the Implementation Committee appointed under the directions of this Court, is set aside. The Implementation Committee shall, therefore, continue with the work assigned to it for identification of the members of the SCBA eligible to vote in the elections in terms of the directions given in the judgment dated 26th September, 2011. However, if any member of the SCBA is aggrieved by the methodology adopted by the Implementation Committee for identification of such eligible members, he/she may make a representation to the Executive Committee of the SCBA within a fortnight from date and if such a representation or representations is or are received within the specified period, the Executive Committee of the SCBA will look into such objections and take a decision thereupon and, if necessary, to apply to the Court, before further steps are taken by the Implementation Committee in regard to identification of members eligible to vote at the elections. For a period of two weeks, the Implementation Committee shall not take any further steps in the matter, and shall, thereafter, resume the work of identification of members of the SCBA eligible to vote on the instructions that may be given by the Executive Committee of the SCBA in this regard. The process of identifying the members of the SCBA eligible to vote in the elections for selection of the members of the Executive Committee must be completed within four weeks from the date of individual objections received, if any, are decided finally. Thereafter, the

SCBA shall set the dates for the election schedule, including publication of the list of members of the SCBA eligible to vote in the elections, so that the elections can be held once the final list is approved and published.

53. We expect all the members of the SCBA to cooperate with the Implementation Committee and the Executive Committee of the SCBA to complete the publication of the list of members of the SCBA eligible to vote in the elections within the time specified, and, thereafter, to cooperate in the conducting of the elections for the election of the Office Bearers of the SCBA.

54. I.A. No.1 of 2012 in Civil Appeal Nos.3401 and 3402 of 2003 is thus disposed of. Let copies of this order be made available to the President of the SCBA and the members of the Implementation Committee for immediate compliance. A copy of the operative portion of this judgment may also be put up on the web-site and Notice Board of the SCBA for general information of all of its members. All connected IAs are also disposed of by this order.

55. Having regard to the observations made hereinabove, the Contempt Petition No.45 of 2012, filed in the civil appeals by Dr. Parvin Kumar Mutreja, Advocate, and two others, is also disposed of by virtue of this order.

R.P. Matters disposed of.

CHHANGA SINGH AND ANR.
v.
UNION OF INDIA AND ANR.
(Civil Appeal No. 4322 of 2012)

MAY 08, 2012

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

Land Acquisition Act, 1894 – Interest on solatium – Entitlement to – Reference Court awarded solatium as provided under the Act – But did not award interest on the amount of solatium – Claim by appellants-landowners for interest on solatium during execution proceedings – Tenability of – Held: Tenable – Respondents directed to make payment of interest on solatium as per the law laid down in Gurpreet Singh case.

Gurpreet Singh v. Union of India **(2006) 8 SCC 457: 2006 (7) Suppl. SCR 422 – followed.**

Land Acquisition Officer and Assistant Commissioner & Anr. v. Shivappa Mallappa Jigalur & Ors. **(2010) 12 SCC 387; 2010 (7) SCR 833;** *Nadirsha Shapurji Patel (dead) by Lrs. & Ors. v. Deputy Collector & Land Acquisition Officer & Anr.* **(2010) 13 SCC 234: 2010 (15) SCR 516 and** *Iyasamy & Anr. v. Special Tahsildar, Land Acquisition* **(2010) 10 SCC 464: 2010 (12) SCR 489 – relied on.**

Sunder v. Union of India **(2001) 7 SCC 211: 2001 (3) Suppl. SCR 176 – referred to.**

Case Law Reference:

2001 (3) Suppl. SCR 176	**referred to**	**Para 3, 6**
2006 (7) Suppl. SCR 422	**followed**	**Para 6**
2010 (7) SCR 833	**relied on**	**Para 7**

2010 (15) SCR 516	**relied on**	**Para 7**
2010 (12) SCR 489	**relied on**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4322 of 2012.

From the Judgment & Order dated 10.9.2008 of the High Court of Delhi at New Delhi in Civil Misc. Main Petition bearing Civil Misc. (Main) No. 196 of 2007.

Naresh Kaushik, Sanjeev Kumar Bhardwaj, Aditi Gupta, Lalita Kaushik for the Appellant.

A. Sharan, Vishnu B. Saharya, Viresh B. Saharya (for Saharya & Co.), Rekha Pandey, Asha G. Nair, B.V. Balram Das, Sadashiv Reddy, Sushma Suri for the Respondent.

The Order of the Court was delivered

O R D E R

1. Leave granted.

2. The controversy in this appeal lies in a very narrow compass. The sole issue involved herein is as to whether the appellants are entitled for interest over the amount of solatium granted to them.

3. Admitted facts necessary to adjudicate upon the controversy in this appeal are that:

I. The land of the appellants stood notified under Section 4 of the Land acquisition Act, 1894 (hereinafter being referred to as 'the Act") on 30th October, 1963. In respect of the said land, Declaration under Section 6 of the Act was made on 16th January, 1969.

II. Compensation was awarded under Section 11 of the Act on 17th September, 1986 assessing the

market value of the land @ Rs.4350 per bigha. Being aggrieved, the appellants made an application for reference under Section 18 of the Act, and the Reference Court vide award dated Ist June, 2001 assessed the market value of the land @Rs.16,750/- per bigha and awarded the solatium as provided under the Act. However, interest was not awarded on the amount of solatium and it restricted only to the enhanced amount of compensation.

III. The appellants filed the execution petition on 3rd September, 2001.

IV. It was during the pendency of the execution proceedings, this Court decided the matter in *Sunder v. Union of India,* (2001) 7 SCC 211 on 19th September, 2001 explaining that persons-interested like the appellants are also entitled for interest on amount of solatium.

4. So far as this case is concerned, the respondents made the payment as per the award of the Reference Court dated Ist June, 2001 on 15th April, 2004 partly. The appellants filed an application on 6th May, 2004 for claiming the balance amount including the interest on solatium. The Execution Court rejected the said application vide order dated 22nd November, 2006 which was challenged unsuccessfully before the High Court by the appellants as the High Court rejected their claim for the said relief vide impugned judgment and order dated 10th September, 2008.

Hence, this appeal.

5. We have heard learned counsel for the parties and gone through various judgments.

6. However, learned counsel for the appellants have

placed a very heavy reliance on the judgment of this Court in *Gurpreet Singh v. Union of India* (2006) 8 SCC 457, wherein the legal position in this regard has been explained as under:

> **"54.** One other question also was sought to be raised and answered by this Bench though not referred to it. Considering that the question arises in various cases pending in courts all over the country, we permitted the counsel to address us on that question. That question is whether in the light of the decision in Sunder, the awardee/decree-holder would be entitled to claim interest on solatium in execution though it is not specifically granted by the decree. It is well settled that an execution court cannot go behind the decree. If, therefore, the claim for interest on solatium had been made and the same has been negatived either expressly or by necessary implication by the judgment or decree of the Reference Court or of the appellate court, the execution court will have necessarily to reject the claim for interest on solatium based on Sunder on the ground that the execution court cannot go behind the decree. But if the award of the Reference Court or that of the appellate court does not specifically refer to the question of interest on solatium or in cases where claim had not been made and rejected either expressly or impliedly by the Reference Court or the appellate court, and merely interest on compensation is awarded, then it would be open to the execution court to apply the ratio of Sunder and say that the compensation awarded includes solatium and in such an event interest on the amount could be directed to be deposited in execution. Otherwise, not. We also clarify that such interest on solatium can be claimed only in pending executions and not in closed executions and the execution court will be entitled to permit its recovery from the date of the judgment in Sunder (19-9-2001) and not for any prior period. We also clarify that this will not entail any reappropriation or fresh appropriation by the decree-holder. This we have

indicated by way of clarification also in exercise of our power under Articles 141 and 142 of the Constitution of India with a view to avoid multiplicity of litigation on this question."

While deciding the said case, this Court has considered and explained the judgment in *Sunder* (Supra).

7. The view taken by the Constitution Bench has consistently been re-iterated and followed by this Court as is evident from the judgments in *Land Acquisition Officer and Assistant Commissioner & Anr. v. Shivappa Mallappa Jigalur & Ors.* (2010) 12 SCC 387; *Nadirsha Shapurji Patel (dead) by Lrs. & Ors. v. Deputy Collector & Land Acquisition Officer & Anr.* (2010) 13 SCC 234; and *Iyasamy & Anr. v. Special Tahsildar, Land Acquisition* (2010) 10 SCC 464.

8. In view of the above, the submissions of the appellants are worth acceptance. The appeal is accordingly allowed. The respondents are directed to make the payment of interest on the solatium as per the law laid down in *Gurpreet Singh* (Supra) within a period of three months from today.

B.B.B. Appeal allowed.

M/S. A.B.N.A. AND ORS.

v.

THE MANAGING DIRECTOR, M/S. U.P.S.I.D.C. LIMITED, KANPUR & ANR.

(SLP (C) Nos. 16116-16117 of 2010)

MAY 08, 2012

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

Monopolies and Restrictive Trade Practices Act,1969 – s. 13(2) – Allotment of plot – Possession not given – Allottee's complaint to MRTP Commission – During pendency of complaint, interim application seeking physical possession of the plot – Commission by order dated 13.9.2007 passing direction to handover possession to the allottee – Review application by the opposite party – The Commission recalled the order dated 13.9.2007 whereby it had directed to handover the possession – Review application filed by the allottee dismissed – In SLP, plea of the allottee that the order dated 13.9.2007 could not have been recalled being a consent order and that review application was barred by limitation – Held: There is no infirmity in the order of the Commission whereby it recalled the direction to handover possession to allottee on the ground that the direction could be considered at the stage of final adjudication – The order dated 13.9.2007 was not a consent order – The order dated 13.9.2007 being an interim order could have been modified or revoked – Commission has power u/s. 13 (2) to amend or revoke any order at any time hence it is not barred by limitation – Petition dismissed.

Ghaziabad Development Authority v. Ved Prakash Aggarwal **(2008) 7SCC 686: 2008 (8) SCR 676;** *Kiran Singh and Ors. v. Chaman Paswan and Ors.* **AIR 1954 SC 340: 1955 SCR 117 – referred to.**

Case Law Reference:

2008 (8) SCR 676	**Referred to.**	**Para 4**
1955 SCR 117	**Referred to.**	**Para 4**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 16116-16117 of 2010.

From the Judgment & Order dated 04.03.2009 of the M.R.T.P.C. New Delhi, in RA-16 of 2007 and order dated 05.01.2010 of the Competition Appellate Tribunal, New Delhi in RA-06 of 2009, in UTPE-119 of 2000.

Petitioner-In-Person.

Aarti Upadhyay, Rakesh Uttamchandra Upadhyay for the Respondents.

The Order of the Court was delivered

A.K. PATNAIK, J. 1. These are petitions under Article 136 of the Constitution for leave to appeal against the order dated 04.03.2009 of the Monopolies and Restrictive Trade Practices Commission, New Delhi, (for short 'the MRTP Commission') in Review Application No.16 of 2007 and the order dated 05.01.2010 of the Competition Appellate Tribunal, New Delhi, in Review Application No.06 of 2009.

2. The facts very briefly are that the respondents published an advertisement in the Hindustan Times, New Delhi inviting applications from entrepreneurs for allotment of industrial land in Greater NOIDA on payment of 10% of the cost of allotted land. In response to the advertisement, the petitioners applied for a plot and on 05.03.1994 a plot of 800 square metres in Site-C was allotted. The petitioners paid 10% of the cost of the plot on 23.03.1994. However, physical possession of the plot was not given to the petitioners on the ground that the petitioners had not paid all the dues for the plot. The petitioners then filed a complaint UTPE No.119 of 2000 before the MRTP Commission and after notice to the respondents the complaint

was heard from time to time. While the complaint was pending, petitioners filed I.A. No.18 of 2004 before the MRTP Commission to take possession of the allotted plot. On 13.09.2007, the MRTP Commission passed an order directing that the respondent shall handover possession of the allotted plot within next two weeks to the complainant and as regards the balance amount, if any due, the respondents shall submit a detailed chart giving the dates on which the subsequent installments were due and the amount payable on each due date. By the order dated 13.09.2007, the MRTP Commission also directed the petitioners to furnish a fresh SSI certificate to the respondents and directed that the matter be listed on 01.11.2007 for further directions. Instead of handing over possession of the allotted plot to the petitioners, the respondents filed Review Application No.16 of 2007 on 18.12.2007 and by the impugned order dated 04.03.2009 the MRTP Commission allowed the Review Application and recalled the order dated 13.09.2007 insofar as it directed the respondents to handover possession of the plot to the petitioners. Aggrieved, the petitioners filed Review Application No.06 of 2009 before the Competition Appellate Tribunal and by the impugned order dated 05.01.2010, the Competition Appellate Tribunal dismissed the Review Application of the petitioners.

3. The petitioner No.3, who appeared in-person and argued on behalf of the petitioners, submitted that the order dated 13.09.2007 of the MRTP Commission directing the respondents to handover physical possession of the allotted plot to the petitioners was a consent order as it was passed on the consent of the two advocates appearing for the respondents, namely, Mr. Shakti Singh Dhakray and Mr. D.K. Sharma. He submitted that the order dated 13.09.2007 of the MRTP Commission being a consent order, the same could not have been reviewed by the MRTP Commission and on this ground the impugned order dated 04.03.2009 of the MRTP Commission recalling the order dated 13.09.2007 in Review

Application No.16 of 2007 is illegal and is liable to be set aside. He further submitted that Review Application No.16 of 2007 was filed before the MRTP Commission by the respondents on 18.12.2007 more than thirty days period prescribed for filing of the Review Application. He submitted that by the time Review Application No.16 of 2007 was filed, the petitioners had filed contempt petition for violation of the order dated 18.12.2007 as well as a petition for executing the order dated 18.12.2007 before the MRTP Commission. He submitted that the MRTP Commission should not have entertained the Review Application after such long delay. He finally submitted that the stand taken by the respondents in Review Application No.16 of 2007 was that the MRTP Commission had no jurisdiction to direct the respondents to handover possession of the plot to the petitioners but there are decisions of this Court which make it clear that the MRTP Commission has the power to even direct handing over possession to the complainant.

4. Learned counsel for the respondents, on the other hand, submitted that the order dated 13.09.2007 of the MRTP Commission was an interim order and the MRTP Commission has rightly held in the impugned order dated 04.03.2009 that it could not have directed the respondents by an interim order to handover possession of the plot to the petitioners as this was the final relief claimed by the petitioners in the complaint before the MRTP Commission. Relying on the decision of this Court in *Ghaziabad Development Authority v. Ved Prakash Aggarwal* [(2008) 7 SCC 686], he submitted that the MRTP Commission has no power to direct handing over possession of the plot to the complainant and it is only the Civil Court which could while granting a decree of specific enforcement of the contract direct the defendants to handover possession to the plaintiffs. He submitted that the order dated 13.09.2007 passed by the MRTP Commission directing handing over possession of the plot to the complainant is thus without jurisdiction. He submitted that this Court in *Kiran Singh and Others vs. Chaman Paswan and others* (AIR 1954 SC 340) has held that

an order without jurisdiction is a nullity and can be challenged in collateral proceedings. In reply to the submission on behalf of the petitioners that Review Application No. 16 of 2007 was filed beyond 30 days and belatedly, he submitted that under Section 13(2) of the MRTP Act, the MRTP Commission has the power to revoke any order passed by it "at any time".

5. For deciding the contention raised on behalf of the petitioners that the order dated 13.09.2007 of the MRTP Commission was a consent order, we must look at the order dated 13.09.2007 of the MRTP Commission, which is quoted hereinbelow:

> "We have heard the arguments for some time of the parties. The parties are at issue regarding the balance amount payable by the complainant to the respondent towards balance installments or interest thereon. The other controversy is regarding the formalities namely certificate of SSI Registration and a NOC from Pollution Control Department of the State. Earlier the complainant had submitted a provisional SSI certificate which is already expired.
>
> Complainant now undertakes to furnish the fresh SSI certificate to the respondent positively within one month. Respondent shall handover the possession within next two weeks thereafter to the complainant. As regards the balance amount if any due, the respondents shall submit a detailed chart giving the dates at which the subsequent installments were due and amount payable on each due date.
>
> It has been pointed out by the learned counsel for the respondent that the complainant should hand over these documents to Mr. Dinesh Jain, Legal Adviser of UPSIDC at Surajpur Office with intimation to the counsel for the respondent who will ensure that the possession is delivered to the complainant within next two weeks.
>
> The SSI certificate earlier submitted by the complainant

was provisional and has already expired. Therefore, an issuance of that certificate by the concerned authority will not stand in the way of their issuing a fresh SSI certificate. The General Manager, District Industry Centre, Greater NOIDA is directed to issue the SSI certificate at the earliest after compliance of the necessary formalities. A copy of the order be given "dasti" to the complainant.

List on 1st November, 2007 for further directions.

Sd./- (Hon'ble J. Sri O.P. Dwivedi, Chairman) & (Sri D.C. Gupta, Member)"

On a reading of the order of the order dated 13.09.2007, we do not find that the directions in the said order to the respondents to handover the possession of the plot to the petitioners was based on the consent of the learned Advocates appearing for the respondents and this is what has been held by the MRTP Commission also in the impugned order dated 04.03.2009. Thus, the contention of the petitioners that the order dated 13.09.207 of the MRTP Commission was a consent order is misconceived.

6. It is not disputed by the petitioners that Review Application No. 16 of 2007 was entertained by the MRTP Commission under sub-section (2) of Section 13 of the MRTP Act. Sub-section (2) of Section 13 of the MRTP Act is quoted hereinbelow:

"13(2) Any order made by the Commission may be amended or revoked at any time in the manner in which it was made."

The language of sub-section (2) of Section 13 makes it clear that the MRTP Commission may amend or revoke any order in the manner in which it was made "at any time". The expression "at any time" would mean that no limitation has been prescribed by the legislature for the MRTP Commission to amend or revoke an order passed by it. Hence, the argument on behalf of the petitioners that the MRTP Commission could

not have entertained the Review Application for recalling the order dated 13.09.2007 beyond the period of 30 days has no foundation in law. Moreover, the order dated 13.09.2007 of the MRTP Commission on its plain reading was only an interim order and the MRTP Commission could modify or revoke the interim order directing the respondents to handover physical possession of the plot to the petitioners if it thought that such a direction could only be considered at the time of finally deciding the complaint. We therefore do not find any infirmity in the order dated 04.03.2009 of the MRTP Commission recalling the direction to handover physical possession of the allotted plot to the petitioner saying that this direction can be considered at the stage of final adjudication of the complaint.

7. On a perusal of the impugned order dated 04.03.2009, however, we find that although the respondents cited the judgment of this Court in *Ghaziabad Development Authority v. Ved Prakash Aggarwal* (supra) and contended before the MRTP Commission that the MRTP Commission had no authority to order handing over of possession and that the jurisdiction was only with the Civil Court to order specific performance of the contract, the MRTP Commission has observed that this contention cannot be dealt with while passing the interim order and can only be decided at the time of final adjudication of the complaint. Hence, we are not called upon to decide the question whether the MRTP Commission has power to direct handing over the possession of the plot to the complainant and this question can be decided by the MRTP Commission at the stage of final adjudication of the complaint.

8. In the result, we do not find any merit in these Special Leave Petitions and accordingly we decline to grant special leave to the petitioners to appeal against the order dated 04.03.2009 of the MRTP Commission and the order dated 05.01.2010 of the Competition Appellate Tribunal. The Special Leave Petitions are dismissed with no order as to costs.

K.K.T. Special Leave Petitions dismissed.