RAMDAS BANSAL (D)
v.
KHARAG SINGH BAID & ORS.
(Civil Appeal No. 684 of 2012)

JANUARY 19, 2012

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Land Laws - Calcutta Thika Tenancy Act, 1949 - Calcutta Thika and Other Tenancies and Land (Acquisition and Regulation) Act, 1981 - West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 - Respondent had leased out building structure standing on landed premises in favour of appellant - After expiry of lease period, respondents filed suit for recovery of vacant possession - Appellant filed application under Order XLI Rule 27 CPC seeking to raise plea that respondents were Thika tenants of the suit premises under the State of West Bengal and appellant had become "Bharatia"(sub-tenant) of the demised structure under the respondents - High Court rejected the application and decreed the suit - Stand of appellant that relationship between the parties was no longer governed by the provisions of the Transfer of Property Act and the appellant could be evicted only on the grounds set out in s.13 of the 1956 Tenancy Act, however, none of such grounds had been pleaded or proved - Held: Having been granted a lease for a period of twenty one years in respect of the building standing on the suit premises, in which a Cinema theatre was located, the appellant could never claim to be a Thika Tenant in respect of the suit premises as defined either under the 1949 Act, the 1981 Act as well as the 2001 Act - Appellant did not come within the ambit of any of the definitions of "Thika Tenancy" under the aforesaid three Acts having been granted a lease of the structures which had already been erected on the lands long before the coming into operation of either the 1949 Act or the

1981 Act or even the 2001 Act - Provisions of the 1956 Tenancy Act not applicable to appellant, whose lease stood excluded from the operation of the aforesaid Act u/s.3 thereof - Order of High Court accordingly upheld - West Bengal Premises Tenancy Act, 1956 - ss.3 and 13.

In the year 1972, respondent had leased building structure standing on landed premises in favour of the appellant for a period of twenty one years. After expiry of the lease period, respondents filed suit against the appellant for recovery of vacant possession and also prayed for rectification of the misdescription of the premises in the lease deed as it did not tally with the description of the suit premises in the plaint. The prayer for rectification was allowed and the suit decreed by a Single Judge of the High Court. In the pending appeal before the Division Bench, the appellant filed application under Order XLI Rule 27 of CPC, to bring on record certain documents showing that by operation of law the respondents were the Thika tenants of the suit premises under the State of West Bengal and the appellant had become a "Bharatia" (sub-tenant) of the demised structure under the respondents. The Division Bench rejected the application under Order XLI Rule 27 C.P.C. and dismissed the appeal.

Hence the present appeal. The appellant urged that the relationship between the parties was no longer governed by the provisions of the Transfer of Property Act and the appellant could now be evicted only on the grounds set out in Section 13 of the West Bengal Premises Tenancy Act, 1956, however, none of the grounds on which eviction could be ordered under the aforesaid Act had, in fact, been pleaded or proved.

Dismissing the appeal, the Court

HELD: 1.1. The Respondents had filed Title Suit

against the appellant, inter alia, for (i) a decree for vacant possession in respect of the suit property comprising the demised premises described in the schedule to the plaint and delineated in the map annexed thereto and marked with the letter 'B'; and (ii) if necessary, the mis-description in the lease deed dated 19.9.1972 be rectified so as to reflect the true intention of the parties with regard to the identity of the suit property. Such a prayer was made on account of the fact that the description of the suit properties in the plaint did not tally with the description of the property in the Lease Deed itself. While in the Lease Deed, the demised property was described as premises No.91, Mahatma Gandhi Road, Kolkata, in the plaint, the suit property was described as being the property situated at premises No.91-A, Mahatma Gandhi Road and portion of premises No.6A, Sambhu Chatterjee Street, Kolkata. It is in such context that a separate prayer had been made in the plaint for rectification of the schedule in the Deed of lease, if necessary. The said two reliefs were more or less connected with each other, but even without such rectification, it was possible for the decree to be executed. [Para 26] [603-H; 604-A-E]

1.2. The said question has been dealt with in detail both by the Single Judge, as well as the Division Bench of the High Court, and both the Courts had held that the said issue was not of much consequence, since, as is evident from paragraph 2 of the Written Statement, the Appellant was fully aware at the time of granting of the lease that the demised premises consisted of a building constructed on the premises which consisted of both premises No.91-A, Mahatma Gandhi Road, as well as 6-A, Sambhu Chatterjee Street, and that the said two premises were inseparable. Both the Courts, accordingly, rejected the plea of the Appellant that the suit was not maintainable as the description of the suit property did not tally with the description of the property in the lease

deed. Consequently, both the Courts allowed the prayer of the Respondent/Plaintiff to rectify the schedule of the lease deed to correct the mis-description of the suit property therein, as there was no doubt as to the identity of the suit property on which Grace Cinema Hall was situate, and the building erected on the two plots was inseparable. In the facts of the case, there is no reason to interfere with the decision of the High Court in this regard. [Paras 27, 28] [604-F-H; 605-A-B]

2.1. The point relating to a portion of the demised premises being a Thika Tenancy and thus covered by the provisions of the Calcutta Thika and Other Tenancies and Land (Acquisition and Regulation) Act, 1981, was raised before the Division Bench of the High Court, which, however, negated such contention upon holding that the Respondents were not Thika Tenants since the building had been constructed on the land in question before the Calcutta Thika Tenancy Act, 1949, came into operation. Placing reliance on the doctrine of separation of possession from ownership, the Division Bench further held that the Appellant had failed to establish that the Respondents or their predecessors-in-interest were Thika Tenants of the suit property. The Division Bench also held that even after execution of the lease deed in favour of the Respondents, the lessor remained the owner of the property, whereas the Respondents' father merely got the right to enjoyment of the property and could not, therefore, be said to be the Thika Tenant within the meaning of the definition given in the subsequent legislations. On such reasoning, the Division Bench rejected the application filed on behalf of the Appellant under Order XLI Rule 27 CPC to bring on record subsequent facts to prove his status as a tenant of a portion of the structure in relation to which the Appellant had acquired the status of a Bharatia after the acquisition of Thika Tenancies under the 1981 Act. [Para 29] [605-C-G]

2.2 The law relating to Thika Tenancies in relation to Calcutta and Howrah, as it existed prior to the Acquisition Act of 1981, was the Calcutta Thika Tenancy Act, 1949, which excluded leases of land exceeding 12 years' duration. The instant lease being one for 20 years, the same stood excluded from the operation of the 1949 Act, when it was executed. In any event, having been granted a lease for a period of twenty one years in respect of the building standing on the suit premises, comprising premises No.91-A, Mahatma Gandhi Road and 6-A, Sambhu Chatterjee Street, Kolkata, in which the Grace Cinema was located, the Appellant could never claim to be a Thika Tenant in respect of the suit premises as defined either under the Calcutta Thika Tenancy Act, the Calcutta Thika and other Tenancies and Lands (Acquisition and Regulation) Act, 1981, as well as The West Bengal (Acquisition and Regulation) Act, 2001. [Para 30] [605-H; 606-A-C]

2.3. A "Thika Tenant" under the Calcutta Thika Tenancy Act, 1949, was defined to mean any person who, inter alia, held, whether under a written lease or otherwise, land under another person and has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose and includes the successors-in-interest of such person, except for the exceptions indicated in Sub-Section (5) of Section 2 of the said Act. As also indicated hereinbefore, the aforesaid Act stood repealed by the Calcutta Thika Tenancy and Other Tenancies and Lands (Acquisition and Regulation) Act, 1981, which provided for the acquisition of interest of landlords in respect of lands comprised in Thika Tenancies and certain other tenancies and other lands in Kolkata and Howrah for development and equitable utilization of such lands. In the said Act, a "Thika Tenant" has been defined to mean any person who occupies, whether under a written lease or otherwise land

under another person and is or but for a special contract liable to pay rent, at a monthly or periodical rate, for the land to the said person and has erected or acquired by purchase or gift any structure on such land for residential, manufacturing or business purpose and includes the successors-in-interest of such person. What is significant in the definition of Thika Tenant under the 1981 Act is the persons who had been excluded from the definition in the 1949 Act, were also brought within the ambit of the 1981 Act. Consequently, certain lands which were earlier excluded from the definition of "Thika Tenancy", were now brought within its ambit. [Para 31] [606-D-H; 607-A]

2.4. The circumstances were further altered with the enactment of the West Bengal Thika Tenancy (Acquisition & Regulation) Act, 2001, to provide for the acquisition of interests of landlords in respect of lands comprised in Thika Tenancies and certain other tenancies in Kolkata and Howrah and other Municipalities of West Bengal for development and equitable utilization of such lands with a view to sub-serve the common good. It is clear that the main object of the 2001 Act was to extend the acquisition of lands beyond Kolkata and Howrah, in other Municipalities of West Bengal, for development and proper utilization of such lands. [Para 32] [607-B-C]

2.5. The Appellant does not come within the ambit of any of the definitions under the aforesaid three Acts having been granted a lease of the structures which had already been erected on the lands long before the coming into operation of either the 1949 Act or the 1981 Act or even the 2001 Act. Consequently, the provisions of the West Bengal Premises Tenancy Act, 1956, will not also be applicable to the Appellant, whose lease stood excluded from the operation of the aforesaid Act under Section 3 thereof. Consequently, the Appellant's

application under Order XLI Rule 27 CPC was quite rightly rejected by the High Court. [Para 33] [607-D-F]

Lakshmimoni Das v. State of West Bengal **AIR 1987 Cal 326;** *Gnan Ranjan Sengupta v. Arun Kumar Bose* **(1975) 2 SCC 526;** *Astulla v. Sadatu* **AIR 1918 Cal 809;** *Mahendra Nath Mukherjee v. Jogendra Nath Roy Choudhury* **(2 Calcutta Weekly Notes, 260);** *Pabitra Kumar Roy v. Alita D'souza* **(2006) 8 SCC 344: 2006 (6) Suppl. SCR 678 and** *Jatadhari Daw vs. Radha Devi* **1986 (1) CHN 21 - cited.**

Case Law Reference:

AIR 1987 Cal 326	**Cited**	**Para 14**
(1975) 2 SCC 526	**Cited**	**Para 14**
(2 Calcutta Weekly Notes, 260)	**Cited**	**Para 23**
2006 (6) Suppl. SCR 678	**Cited**	**Para 23**
1986 (1) CHN 21	**Cited**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 684 of 2012.

From the Judgment and Order dated 16.07.2007 of the High Court of Calcutta in CS No. 102 of 1994, APDT No. 12 of 2004, APD No. 274 of 2005 and GA No. 2719 of 2006.

Jaideep Gupta, H.K. Puri, Kunal Chatterjee and Priya Puri for the Appellant.

Roibat Banerjee, Ashok Matur, K. Singh for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. From the materials on record, it appears that premises

No. 91, Mahatma Gandhi Road and premises No.6, Sambhu Chatterjee Street, Calcutta, together comprised lands on a portion whereof a building was erected and now known the "Grace Cinema Hall". Out of the said two plots, premises Nos.91-A, Mahatma Gandhi Road and premises No.6A, Sambhu Chatterjee Street were carved out. Out of the said lands, one Atal Coomar Sen was the owner of lands measuring 3 Cottahs 3 Chittacks and 30 Sq. feet, situated at 91-A, Mahatma Gandhi Road, Calcutta, which was leased to one Gunput Rai Bagla and Radha Kissen Bagla with the right to construct a building thereupon, for a period of twenty years commencing from 1st April, 1905. Pursuant to the right granted in the lease, the Baglas constructed a building on the demised premises. On 3rd March, 1908, a registered Agreement was entered into between Atal Coomar Sen, Gunput Rai Bagla and Radha Kissen Bagla and one Cowasji Pallenjee Khatow, whereby the Baglas surrendered their rights for the unexpired period of the lease with regard to the land to Atal Coomar Sen, while the structure standing on the land was sold to Cowasji Pallenjee Khatow. Atal Coomar Sen granted a fresh lease of the land to Cowasji Pallenjee Khatow for 42 years from 1st April, 1908. Atal Coomar Sen died on 5th November, 1927, leaving behind his son Achal Coomar Sen, who sold the said land to Aditendra Nath Mitter, Anitendra Nath Mitter, Ajitendra Nath Mitter, Ashitendra Nath Mitter and Abanitendra Nath Mitter, on 12th May, 1939. On 17th June, 1943, M/s. Moolji Sicka & Company, which had succeeded to the interest of Cowasji Pallenjee Khatow, by a registered Agreement assigned the unexpired portion of the Lease Deed to Chagganlal Baid and Parashmal Kankaria. On 6th October, 1945, Parashmal Kankaria assigned his share in the property in favour of Chagganlal Baid.

3. On 21st Decembr, 1947, the Mitters filed Suit No.22 of 1948 in the Calcutta High Court against Chagganlal Baid and Parashmal Kankaria for their ejectment from the suit premises. During the pendency of the said suit, on 15th January, 1958,

Chagganlal Baid executed six Deeds of Settlement in favour of his six sons in regard to the said property. On 19th September, 1972, Kharag Singh Baid and Barhman Baid as Trustees in the Deed of Settlement dated 15th January, 1958, granted a lease in favour of one Ramdas Bansal for a period of twenty one years commencing from 1st November, 1972, in respect of :

a) House and building standing on 1 bigha 3 cottahs 14 chittacks and 30 sq. feet of land comprising premises No.91, Mahatma Gandhi Road, Calcutta (being the freehold portion) and

b) House and building standing on 3 cottahs 30 sq. feet of land comprised in 91-A, Mahatma Gandhi Road.

4. The said transactions prompted the Mitters to file Suit No.441 of 1973 in the Calcutta High Court against Chagganlal Baid for recovery of possession of the said property. The Respondents herein, in their turn, filed C.S. No.102 of 1994, against the Appellant, Ramdas Bansal, praying for rectification of the misdescription of the property in the Deed of Lease dated 19th September, 1972 and for recovery of possession of the lands in question.

5. It is the specific case of the Appellant in the instant appeal that the property mentioned in the First Schedule to the plaint contained in Part I and Part II is not identical to the area shown in the map annexed to the Deed of Lease. Apart from the above, several other contentions were raised in the written statement filed by the Appellant, namely,

(i) that no notice of eviction, as envisaged under Section 13(6) of the West Bengal Premises Tenancy Act, 1956, had been given before filing of the eviction suit;

(ii) the particulars given in Parts I and II of the First Schedule and the map as Annexure B to the plaint were incorrect;

(iii) the lease had never been acted upon by the parties and the same was, by necessary implication, cancelled; and

(iv) movables indicated in Annexure C to the plaint belong to the Appellant and the question of payment of damages does not, therefore, arise.

6. On 15th July, 2003, the learned Single Judge framed issues to go to trial in the suit. After diverse proceedings, the learned Single Judge decreed Suit No.102 of 1994, in favour of the Respondents herein. An appeal was filed by the Appellant herein, against the order of the learned Single Judge in the Calcutta High Court, being APOT No.12 of 2005. On 28th June, 2005, the Division Bench of the High Court stayed the operation of the judgment and order of the learned Single Judge dated 11th April, 2005.

7. Nothing further transpired till the month of August, 2006, when the Appellant filed an application under Order XLI Rule 27 of the Code of Civil Procedure ('C.P.C.', for short), being G.A.No.2719 of 2006, in the pending appeal (APOT No.12 of 2005) to bring on record certain documents showing that a portion of the demised property was governed by the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001, which meant that by operation of law the Appellant had become a "Bharatia", of the demised structure on 6A, Sambhu Chatterjee Street, under the Respondents who were already the Thika tenants of the said land. The said application was directed to be taken up along with the Appeal. The Appellant also filed certain additional grounds in support of his claim that he was a Thika tenant in the premises. It was also mentioned that in view of the option clause in the Lease Deed dated 19th September, 1972, the provisions of the proviso to Section 3(2) of the West Bengal Premises Tenancy Act, 1956, would not be attracted to the facts of the case. The appeal was dismissed

by the High Court by its order dated 16th July, 2007, giving rise to the Special Leave Petition and the Appeal arising therefrom.

8. Appearing for Shri Ramdas Bansal, the Appellant herein, Mr. Jaideep Gupta, learned Senior Advocate, submitted that the question involved in the Appeal was whether a portion of the leased property comprised a Thika Tenancy, and if so, what would be the consequence thereof, vis-à-vis the said portion for which notice under Section 106 of the Transfer of Property Act, 1882, had been given prior to filing of the suit for eviction.

9. Mr. Gupta submitted that prior to 1949, within the municipal limits of Calcutta and Howrah in the State of West Bengal, there existed a category of tenancy known as "Thika Tenancy". Under such system of tenancy, vacant land was leased by the landlord to a tenant with liberty to erect structures thereupon of a temporary nature, which were referred to as "Kutcha Structures". The structures would be owned by the tenant of the land and the tenant was further entitled to grant lease of the structure or portion thereof in favour of sub-tenants. In this kind of tenancy, the tenant of the land was referred to as the "Thika Tenant" and the sub-tenant was referred to as "Bharatia". Such tenancies were unregulated and came to be regulated for the first time by the Calcutta Thika Tenancy Act, 1949, in which a Thika Tenant was described in Sub-Section (5) of Section 2 in the manner following :-

> "Section 2(5) - "thika tenant" means any person who holds, whether under a written lease or otherwise, land under another person, and is or but for a special contract would be liable to pay rent, at monthly or any other periodical rate, for the land to that another person and has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose and includes the successors in interest of such person, but does not include a person -

> (a) who holds such land under that another person in perpetuity; or
>
> (b) who holds such land under that another person under a registered lease, in which the duration of the lease is expressly stated to be for a period of not less than twelve years; and
>
> (c) who holds such land under that another person and uses or occupies such land as a khattal."

10. In the said Act a Bharatia was described in Sub-Section (1) of Section 2 in the following manner :-

> "Section 2 -
>
> (1) "Bharatia" means any person by whom, or on whose account rent is payable for any structure or part of a structure erected by thika tenant in his holding."

11. Mr. Gupta submitted that the aforesaid Act dealt only with the rights and obligations of the landlord, Thika Tenant and Bharatia, in relation to each other.

12. In 1981, there were fresh developments in relation to Thika Tenancies in Calcutta with the enactment of the Calcutta Thika and Other Tenancies and Land (Acquisition & Regulation) Act, 1981. The said Act was for the acquisition of the interest of landlords in relation to the lands comprised in Thika Tenancies and certain other tenancies and other lands in Calcutta and Howrah, for development and equitable utilization of such lands. In the 1981 Act, "Thika Tenancy" was defined in Sub-section (8) of Section 3 as follows :-

> "Section 3 -
>
> (8) "thika tenant" means any person who occupies, whether under a written lease or otherwise, land under another person, and is or but for a special contract would be liable to pay rent, at a monthly or at any other periodical rate,

for that land to that another person and has erected or acquired by purchase or gift any structure on such land for residential, manufacturing or business purpose and includes successors-in-interest for such person."

13. As may be noticed in the definition of Thika Tenancy in the 1981 Act, clauses (a), (b) and (c) of Sub-Section (5) of Section 2 of the 1949 Act were omitted which had the effect of including the said lands described therein within the ambit of Thika Tenancies under the 1981 Act. Consequently, the definition of "Bharatia" in Sub-Section (1) of Section 3 was also amended in the 1981 Act to read as follows :-

"Section 3 -

(1) "Bharatia" means any person by whom, or on whose account, rent is payable for any structure or part thereof, owned by thika tenant or tenant of other lands in his holdings or by a landlord in a bustee or his khas land."

14. Mr. Gupta urged that in several judgments delivered by the Calcutta High Court, it was held that prior to coming into force of the Acquisition Act of 1981, only those tenancies where Kutcha structures had been erected by the Thika Tenant would be considered to be a Thika Tenancy. Learned counsel submitted that this proposition had never been decided by this Court despite the fact that the State of West Bengal had preferred an appeal in the case of *Lakshmimoni Das Vs. State of West Bengal* [AIR 1987 Cal 326]. The Appeal was not, however, pursued by the State of West Bengal because it subsequently amended the Acquisition Act of 1981, once in 1993 and again in 2001, as a result whereof the decision in *Lakshmimoni Das* case (supra) ceased to have any effect. According to Mr. Gupta, the subsequent amendments of 1993 and 2001 have been challenged in the High Court, but the matter is yet to be decided. Mr. Gupta urged that the interpretation given by the High Court to the word "structure" to mean Kutcha structures only, does not appear to be sound and is contrary

to a plain reading of the Section. Mr. Gupta submitted that it is a well-settled principle of interpretation that when the meaning of a provision in a Statute is clear from a plain reading thereof, no other interpretation ought to be given to the same. Mr. Gupta pointed out that in the context of this very Act, this Court in *Gnan Ranjan Sengupta Vs. Arun Kumar Bose* [(1975) 2 SCC 526] had observed that since the legislation is a beneficial legislation, nothing must be read into such definition that is not expressly made a part thereof.

15. Mr. Gupta further submitted that the interpretation which had been put by the High Court on the definition of Thika Tenancy must be held to have been impliedly set aside, since the law itself had been amended with retrospective effect from 18th February, 1982, when the 1981 Act was brought into effect. It was submitted that after the amendment, the Controller of Thika Tenancy has consistently included permanent "Pucca Structures" within the definition of Thika Tenancy, since the impact of the earlier judgments had been taken away by the amendments. According to Mr. Gupta, it can no longer be said that a Thika Tenant must be the owner of a Kutcha structure alone. Reference was also made to the changes in the definition of "Thika Tenancy" in the 1981 Act, whereby various types of tenancies, which had previously been omitted from the definition, were now brought within the ambit of such tenancies. In this regard, Mr. Gupta laid special stress on the fact that in the definition of "Thika Tenanvu" under the 1949 Act, lands held in lease for over 12 years were omitted from its purview, whereas in the 1981 Act such exclusion was omitted, thereby bringing even such tenancies on lease beyond 12 years within the purview and ambit of "Thika Tenancies" and as a further consequence by virtue of Section 5 of the 1981 Act, even leases held for periods beyond 12 years came to be vested in the State free from all encumbrances. On account of such vesting, M/s. Kharag Singh Baid & others became Thika Tenants directly under the State of West Bengal and Ramdas Bansal became a Bharatia within the meaning of the Vesting

Act. Mr. Gupta submitted that the further consequence of the above is that the relationship between the Thika Tenant and Bharatia came to be governed by the provisions of the West Bengal Premises Tenancy Act, 1956.

16. Mr. Gupta submitted that on account of the change in the legal equations after the enactment of the 1981 Vesting Act, a portion of the suit premises had definitely vested, insofar as the interest of the landlord was concerned, in the State of West Bengal with effect from 8th February, 1982 and M/s Kharag Singh Baid & others, therefore, became tenants directly under the State of West Bengal, subject to the provisions of the Vesting Act, and Ramdas Bansal became a Bharatia under them within the meaning of the said Act. Mr. Gupta urged that as a result of the above changes, the relationship between the parties would no longer be governed by the provisions of the Transfer of Property Act and the Appellant could now be evicted only on the grounds set out in Section 13 of the West Bengal Premises Tenancy Act, 1956. It was submitted that none of the grounds on which eviction could be ordered under the aforesaid Act had, in fact, been pleaded or proved. The suit proceeds on the basis that the relationship between the parties continued to be governed by the provisions of the Transfer of Property Act, 1882, and that the Appellant was liable to be evicted by efflux of time on the expiry of the period mentioned in the lease. Mr. Gupta urged that the land in question has, in fact, been classified by the Thika Controller as a Thika Tenancy and has, therefore, vested in the State of West Bengal.

17. Mr. Gupta submitted that the aforesaid question as to whether the lands did vest in the State of West Bengal in 1982 arises in the context of an application made under Order XLI Rule 27 of the Code of Civil Procedure by the Appellant. The High Court summarily dismissed the said application on the erroneous basis that M/s Kharag Singh Baid & others did not acquire any title to the structures, but merely got a right of enjoyment from the owners. Mr. Gupta submitted that the rejection of the Appellant's application under Order XLI Rule 27

C.P.C. was erroneous in view of the changes in the law which had taken place since the filing of the suit and its pendency in the Courts. Mr. Gupta submitted that in view of the coming into operation of the 1981 Act and the vesting provisions contained therein, the Courts were required to consider the matter differently from what existed at the time of filing of the plaint.

18. Mr. Gupta lastly submitted that one of the prayers made in the suit filed by the Respondents is that the description of the property in the schedule to the lease is different from the description of the property in the schedule to the plaint, as a result whereof one of the express prayers in the suit was for leave to rectify the schedule to the lease on the ground of mutual mistake. According to Mr. Gupta, the said contention and prayer of the Respondents was clearly barred by limitation, since the suit for rectification had been instituted more than twenty one years after the execution of the lease. In this connection, Mr. Gupta submitted that the decision in *Astulla Vs. Sadatu* [AIR 1918 Cal 809] has no application to the facts of the present case, as the principle laid down therein was totally different and is incapable of being compared with the existing law. Mr. Gupta also denied the applicability of the doctrine of estoppel as contained in Section 116 of the Evidence Act on the submission that such estoppel operates and is available only at the beginning of a tenancy and that it is well-settled that if since the date of tenancy the title of the landlord comes to an end, the doctrine of tenant's estoppel can no longer arise.

19. Mr. Gupta urged that not only was the entire position altered with the coming into operation of the 1981 Vesting Act, but the equation between M/s Kharag Singh Baid & others and Ramdas Bansal underwent a sea change, in the context whereof the application filed on behalf of the Appellant under Order XLI Rule 27 CPC ought to have been allowed. He further submitted that the judgment of the High Court was, therefore, erroneous and was liable to be set aside.

20. On the other hand, Mr. Ahin Chowdhury, learned Senior

Advocate, appearing for the Respondents, contended that the Lease which had been granted by the Respondent, Kharag Singh Baid, in favour of the Appellant, Ramdas Bansal, was for a period of twenty one years commencing from 1st November, 1972. Since, after the expiry of the full term of the lease, the Appellant refused to hand back possession of the leasehold premises, wherein Grace Cinema Hall was situated, the Respondents were compelled to file the suit for recovery of the suit premises. Mr. Chowdhury urged that at the time of trial of the suit, no contention had been raised on behalf of the Appellant that the tenancy was either a Thika Tenancy or that he was a monthly tenant and enjoyed the protection of the West Bengal Premises Tenancy Act, 1956. Mr. Chowdhury submitted that such a point was taken for the first time in regard to 3 Cottahs out of the entire suit premises comprising about 19 Cottahs, before the Division Bench which held that the question of Thika Tenancy did not arise in the present case, since all the constructions had been raised before the Calcutta Thika Tenancy Act, 1949, came into operation. The Division Bench rejected the application made under Order XLI Rule 27 C.P.C., on the ground that none of the conditions of the said provisions had been satisfied.

21. Mr. Chowdhury submitted that the first contention before the Trial Court was with regard to the description and identity of the demised property. It was urged that confusion was sought to be created by the Defendant in the suit by contending that the Respondents were not entitled to relief, inasmuch as, they were seeking relief in a property which was different from the property mentioned in the Lease Deed. However, both the Trial Court, as well as the Division Bench, held that in this case there was no difficulty at all in identifying the property, inasmuch as, what was leased out by the Respondents to the Appellant was the Grace Cinema Hall and what was to be recovered by the Respondents in the suit was also the said Cinema Hall and nothing else.

22. Mr. Chowdhury submitted that the Appellant had

himself stated in Paragraph 2 of his Written Statement that he was a monthly tenant of the very same property situated at 91-A, Mahatma Gandhi Road, Calcutta, and a portion of 6A, Sambhu Chatterjee Street, Calcutta, under the Respondents. Furthermore, in his evidence-in-chief, the Appellant had stated that the property of which he was a tenant, was built on the premises which comprised 91-A, Mahatma Gandhi Road, Calcutta and a portion of 6A, Sambhu Chatterjee Street, Calcutta. He further submitted that the building which had been constructed on premises No.91-A, Mahatma Gandhi Road, Calcutta, and a portion of 6A, Sambhu Chatterjee Street, Calcutta, was inseparable and a Cinema Hall was housed therein. Mr. Chowdhury urged that the Trial Court had held that there was no confusion in the minds of the parties with regard to the identity of the demised premises and that the Appellant had not disputed the execution of the Lease Deed. There was, therefore, no difficulty in identification of the subject matter of the suit. Mr. Chowdhury submitted that there was an obvious mistake with regard to the description of the suit premises in respect whereof rectification had been sought. The premises on which Grace Cinema always stood, was 91-A, Mahatma Gandhi Road and 6A, Sambhu Chatterjee Street and the same building covered both the plots and it was nobody's case that the possession of the Appellant herein was relatable to any other transaction apart from the lease dated 19th September, 1972. Mr. Chowdhury submitted that the Trial Court had very aptly recorded that after enjoying the fruits of the lease, the Appellant herein had wanted the Court to disregard the Deed of Lease because, according to the Appellant, it related to some other premises.

23. Mr. Chowdhury submitted that one of the other points which had been raised by the Appellant for determination before the Trial Court was that the Respondent was not entitled to have the Lease deed rectified, since the suit for rectification was barred by limitation. It was submitted that the said objection was considered and rejected by the Trial Court, since the suit was

not one for rectification but for recovery of possession of the demised property after expiry of the period of the lease. Learned counsel submitted that it was not even necessary for the Respondent to expressly pray for a decree for rectification and even without such a prayer the Court could pass a decree for eviction in respect of the property which was demised. It was submitted that it was within the Court's domain to construe as to which premises had been demised and for what term and on what conditions. According to Mr. Chowdhury, the bar of limitation could be raised only if the Respondent had come with a prayer for rectification of the document simplicitor. However, the primary relief sought for by the Respondents was for recovery of possession and rectification was sought as an incidental relief. Mr. Chowdhury submitted that as early as in the case of *Mahendra Nath Mukherjee Vs. Jogendra Nath Roy Choudhury* (2 Calcutta Weekly Notes, 260), the Calcutta High Court had held that title could be established without rectification of the instrument itself, even though the time to secure rectification of the instrument had elapsed. Mr. Chowdhury submitted that it had been consistently held by the Courts that if in a plaint a prayer for possession of the property or for declaration of title is made, rectification is only a formality and incidental to the relief granted. It was submitted that, in any event, the point relating to limitation had not been seriously urged before the Division Bench of the High Court. Mr. Chowdhury submitted that the only other point argued before the Trial Court, but not before the Division Bench, was that the lease was a precarious lease since it had an option clause, which entitled the Appellant to protection under Section 3 of the West Bengal Premises Tenancy Act, 1956. It was submitted that the said contention had been rejected by the Trial Court. Mr. Chowdhury submitted that in *Pabitra Kumar Roy Vs. Alita D'souza* [(2006) 8 SCC 344], it was held that the law was clear that a Lease Deed for a period of 20 years or more would stand excluded from the operation of the 1956 Act, unless the same was terminable before its expiration at the option of the landlord or of the tenant. After the lease was allowed to run its

full course, both the lease and the conditions contained therein would come to an end and would cease to be operative and the clause for prior determination would no longer be available as a defence against eviction. The Trial Court, therefore, held that the contention regarding the sooner determination clause would not be of any help to the Appellant in the instant case, since the lease had run its full course and this point of precariousness was not pressed before the Division Bench.

24. Mr. Chowdhury submitted that the only other point which was canvassed before the Division Bench and not before the Trial Court was the point relating to Thika Tenancy. The learned counsel submitted that the documents which the Appellant had wanted to introduce at the appellate stage had not been produced before the Trial Court. It was also sought to be contended by the Appellant that by operation of the Thika Tenancy Act, Kharag Singh Baid was the Thika Tenant of the land while the Appellant, Ramdas Bansal, was a Bharatia under him and, consequently, was entitled to the protection of the Thika Tenancy Act, 1981, as far as the 3 Cottahs of land comprising 6A, Sambhu Chatterjee Street was concerned. According to Mr. Chowdhury, the provisions of the Thika Tenancy Act were not attracted to the facts of the present case at all, since the Baids never claimed that they were Thika Tenants. On the other hand, the Baids and their predecessors were holding under registered leases and all the Pucca constructions were made before 1949. So the Baids never became Thika Tenants of the land in question at any point of time.

25. Mr. Chowdhury further submitted that it is only on the basis of the documents, which the Appellant had sought to introduce before the Division Bench, that the contention was sought to be raised that by operation of law, the Baids became Thika Tenants and Bansal became a Bharatia in respect of the suit property. Mr. Chowdhury submitted that this contention was rejected since the Calcutta Thika Tenancy Act came into

operation in 1949 and prior thereto it could not be said that either the Respondents had become the Thika Tenants or that the Appellant had become a Bharatia under them. On the other hand, the Baids came into the picture for the first time in 1949, and could not, therefore, be said to be Thika Tenants. Mr. Chowdhury submitted that there was a fully built-up running Theatre House on the land in question and as had been held in several decisions of the High Court, Thika Tenancy applies only to Kutcha structures. In fact, in 1986 the Calcutta High Court held in *Jatadhari Daw Vs. Radha Devi* [1986 (1) CHN 21], that the expression "structures' in the statute did not include permanent structures and when permanent structures had been raised, such occupation could not be considered to be a Thika Tenancy within the meaning of the 1949 Act. Mr. Chowdhury submitted that the said interpretation had been approved in the judgment of the Special Bench of the Calcutta High Court in the case of in *Lakshmimoni Das* case (supra). It was urged that in the absence of any Kutcha structure on the demised land, the Division Bench of the High Court had rightly decided that no Thika Tenancy was involved in this case. As far as the rejection of the application to adduce additional evidence is concerned, Mr. Chowdhury submitted that the Division Bench of the High Court had rightly rejected the application made under Order XLI Rule 27 CPC, since the Appellant did not fulfil the pre-conditions for asking for such relief. Mr. Chowdhury submitted that all the arguments advanced on behalf of the Appellant were arguments of desperation and the Division Bench had rightly disallowed the Appellant's prayer for retrial of the suit on the basis of the new documents sought to be proffered on behalf of the Respondents. Mr. Chowdhury submitted that the appeal was wholly misconceived and was liable to be dismissed with appropriate costs.

26. As indicated hereinabove, the Respondents had filed Title Suit No.102 of 1994 against the Appellant, inter alia, for

(i) a decree for vacant possession in respect of the suit property comprising the demised premises described in the schedule to the plaint and delineated in the map annexed thereto and marked with the letter 'B'; and

(ii) if necessary, the mis-description in the lease deed dated 19.9.1972 be rectified so as to reflect the true intention of the parties with regard to the identity of the suit property.

Such a prayer was made on account of the fact that the description of the suit properties in the plaint did not tally with the description of the property in the Lease Deed itself. While in the Lease Deed, the demised property was described as premises No.91, Mahatma Gandhi Road, Kolkata, in the plaint, the suit property was described as being the property situated at premises No.91-A, Mahatma Gandhi Road and portion of premises No.6A, Sambhu Chatterjee Street, Kolkata. It is in such context that a separate prayer had been made in the plaint for rectification of the schedule in the Deed of lease, if necessary. The said two reliefs were more or less connected with each other, but even without such rectification, it was possible for the decree to be executed.

27. The said question has been dealt with in detail both by the learned Single Judge, as well as the Division Bench of the High Court, and both the Courts had held that the said issue was not of much consequence, since, as is evident from paragraph 2 of the Written Statement, the Appellant herein was fully aware at the time of granting of the lease that the demised premises consisted of a building constructed on the premises which consisted of both premises No.91-A, Mahatma Gandhi Road, as well as 6-A, Sambhu Chatterjee Street, and that the said two premises were inseparable. Both the Courts, accordingly, rejected the plea of the Appellant that the suit was not maintainable as the description of the suit property did not tally with the description of the property in the lease deed. Consequently, both the Courts allowed the prayer of the

Respondent/Plaintiff to rectify the schedule of the lease deed to correct the mis-description of the suit property therein, as there was no doubt as to the identity of the suit property on which Grace Cinema Hall was situate, and the building erected on the two plots was inseparable.

28. In the facts of the case, we see no reason to interfere with the decision of the High Court in this regard.

29. The point relating to a portion of the demised premises being a Thika Tenancy and thus covered by the provisions of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981, was raised before the Division Bench of the High Court, which, however, negated such contention upon holding that the Respondents were not Thika Tenants since the building had been constructed on the land in question before the Calcutta Thika Tenancy Act, 1949, came into operation. Placing reliance on the doctrine of separation of possession from ownership, the Division Bench further held that the Appellant had failed to establish that the Respondents or their predecessors-in-interest were Thika Tenants of the suit property. The Division Bench also held that even after execution of the lease deed in favour of the Respondents, the lessor remained the owner of the property, whereas the Respondents' father merely got the right to enjoyment of the property and could not, therefore, be said to be the Thika Tenant within the meaning of the definition given in the subsequent legislations. On such reasoning, the Division Bench rejected the application filed on behalf of the Appellant under Order XLI Rule 27 CPC to bring on record subsequent facts to prove his status as a tenant of a portion of the structure in relation to which the Appellant had acquired the status of a Bharatia after the acquisition of Thika Tenancies under the 1981 Act.

30. The law relating to Thika Tenancies in relation to Calcutta and Howrah, as it existed prior to the Acquisition Act of 1981, was the Calcutta Thika Tenancy Act, 1949, which excluded leases of land exceeding 12 years' duration. The

instant lease being one for 20 years, the same stood excluded from the operation of the 1949 Act, when it was executed. In any event, having been granted a lease for a period of twenty one years in respect of the building standing on the suit premises, comprising premises No.91-A, Mahatma Gandhi Road and 6-A, Sambhu Chatterjee Street, Kolkata, in which the Grace Cinema was located, the Appellant could never claim to be a Thika Tenant in respect of the suit premises as defined either under the Calcutta Thika Tenancy Act, the Calcutta Thika and other Tenancies and Lands (Acquisition and Regulation) Act, 1981, as well as The West Bengal (Acquisition and Regulation) Act, 2001.

31. As has been indicated hereinbefore, a "Thika Tenant" under the Calcutta Thika Tenancy Act, 1949, was defined to mean any person who, inter alia, held, whether under a written lease or otherwise, land under another person and has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose and includes the successors-in-interest of such person, except for the exceptions indicated in Sub-Section (5) of Section 2 of the said Act. As also indicated hereinbefore, the aforesaid Act stood repealed by the Calcutta Thika Tenancy and Other Tenancies and Lands (Acquisition and Regulation) Act, 1981, which provided for the acquisition of interest of landlords in respect of lands comprised in Thika Tenancies and certain other tenancies and other lands in Kolkata and Howrah for development and equitable utilization of such lands. In the said Act, a "Thika Tenant" has been defined to mean any person who occupies, whether under a written lease or otherwise land under another person and is or but for a special contract liable to pay rent, at a monthly or periodical rate, for the land to the said person and has erected or acquired by purchase or gift any structure on such land for residential, manufacturing or business purpose and includes the successors-in-interest of such person. What is significant in the definition of Thika Tenant under the 1981 Act is the persons who had been excluded from the definition in the 1949 Act, were

also brought within the ambit of the 1981 Act. Consequently, certain lands which were earlier excluded from the definition of "Thika Tenancy", were now brought within its ambit.

32. The circumstances were further altered with the enactment of the West Bengal Thika Tenancy (Acquisition & Regulation) Act, 2001, to provide for the acquisition of interests of landlords in respect of lands comprised in Thika Tenancies and certain other tenancies in Kolkata and Howrah and other Municipalities of West Bengal for development and equitable utilization of such lands with a view to sub-serve the common good. It is clear that the main object of the 2001 Act was to extend the acquisition of lands beyond Kolkata and Howrah, in other Municipalities of West Bengal, for development and proper utilization of such lands.

33. The Appellant does not come within the ambit of any of the definitions under the aforesaid three Acts having been granted a lease of the structures which had already been erected on the lands long before the coming into operation of either the 1949 Act or the 1981 Act or even the 2001 Act. Consequently, the provisions of the West Bengal Premises Tenancy Act, 1956, will not also be applicable to the Appellant, whose lease stood excluded from the operation of the aforesaid Act under Section 3 thereof. Consequently, the Appellant's application under Order XLI Rule 27 CPC was quite rightly rejected by the High Court.

34. We, therefore, see no reason to interfere with the judgment and order of the Division Bench of the Calcutta High Court impugned in this appeal and the appeal is, accordingly, dismissed with costs assessed at Rs.25,000/- to be paid by the Appellant to the Supreme Court Legal Services Committee.

B.B.B. Appeal dismissed.

STATE OF PUNJAB
v.
DALBIR SINGH
(Criminal Appeal No. 117 of 2006)

FEBRUARY 01, 2012

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

Arms Act, 1959 - s.27(3) - Vires of - Mandatory death penalty as imposed u/s.27(3) - If justified - Held: Mandatory death penalty has been found to be constitutionally invalid in various jurisdictions where there is an independent judiciary and the rights of the citizens are protected in a Constitution - In s.27(3), the provision of mandatory death penalty is more unreasonable inasmuch it provides whoever uses any prohibited arms or prohibited ammunition or acts in contravention of s.7 and if such use or act results in the death of any other person then that person guilty of such use or acting in contravention of s.7 shall be punishable with death - The word 'use' has not been defined in the Act - Therefore, the word 'use' has to be viewed in its common meaning - In view of such very wide meaning of the word 'use' even an unintentional or an accidental use resulting in death of any other person shall subject the person so using to a death penalty - Both the words 'use' and 'result' are very wide - Such a law is neither just, reasonable nor is it fair and falls out of the 'due process' test - The concepts of 'due process' and the concept of a just, fair and reasonable law has been read by this Court into the guarantee u/Articles 14 and 21 of the Constitution - s.27(3) is thus violative of Articles 14 and 21 of the Constitution - Principles of Eighth Amendment of the U.S. Constitution (which provides for guarantee against cruel and harsh punishment) have also been incorporated in our laws - Direct mandate of the Constitution under Article 13 is that the State shall not make any law which takes away or abridges

the right conferred by Part III of the Constitution and any law made in contravention of the same is, to the extent of contravention, void - s.27(3) is in clear contravention of Part III rights - It also deprives the judiciary from discharging its Constitutional duties of judicial review whereby it has the power of using discretion in the sentencing procedure - s.27(3) is against the fundamental tenets of our Constitutional law as developed by this Court - It is ultra vires the Constitution and is void - Constitution of India, 1950 - Articles 13, 14 and 21.

Penal Code, 1860 - ss. 302 and 307 - Acquittal of accused on ground of benefit of doubt - Justification - Accused CRPF constable, who had been warned by his officer for non-performance of duty, opened fire from a self-loading rifle (SLR) whereupon the officer was hit on the back and another officer sustained multiple bullet injuries causing his death - Conviction of accused-respondent by trial court inter alia u/ ss. 302 and 307 IPC - High Court found irreconcilable inconsistencies in the prosecution case relating to a) deposition of witnesses and b) number of cartridges fired and recovered, and acquitted respondent by giving him benefit of doubt - On appeal, held: In the facts and circumstances of the case, it cannot be said that the order of the High Court was either perverse or not based on proper appreciation of evidence - No interference called for u/Article 136 of the Constitution.

The prosecution case was that respondent, a CRPF constable, who had been warned by the Deputy Commandant Quarter Master for his refusal to carry out fatigue duty as assigned to him, opened fire towards the Deputy Commandant's office from a Self Loading Rifle (SLR) whereupon the Deputy Commandant was hit in his back while the Battalion Havaldar Major (B.H.M.), who was also inside the office at the relevant time, sustained multiple bullet injuries in his shoulders which ultimately caused his death. The trial court convicted the respondent under Section 302 IPC, sentencing him to

rigorous imprisonment for life and fine of Rs.2,000/-, under Section 307 IPC, sentencing him to rigorous imprisonment for 5 years and fine of Rs.2,000/-, and under Section 27 of the Arms Act, sentencing him to rigorous imprisonment for 3 years and fine of Rs.1,000/-. The substantive sentences were ordered to run concurrently. The High Court, however, reversed the order of conviction on the ground that there were irreconcilable inconsistency in the prosecution case.

The High Court found that while PW.9 the alleged eye witness had deposed that respondent was apprehended at the spot, disarmed handed over to the Court, however, according to the Investigating Officer (IO) PW.12, the respondent was handed over to him outside the CRPF headquarters three days after the incident and then on his disclosure statement the SLR was recovered. The High Court further found that even though the prosecution allegation was that 20 cartridges were fired, only 7 empties were recovered and none of the bullets were recovered. The High Court gave benefit of doubt to the respondent and acquitted him, and therefore the instant appeal.

However, since the accused-respondent had been charged under Section 27(3) of the Arms Act, 1959 as well and since the vires of Section 27(3) of the said Act had been questioned, the instant appeal was heard both on merits of the High Court order and also on the question of vires of Section 27(3) of the Arms Act, 1959.

Dismissing the appeal, the Court

HELD:

<u>On merits</u>

1. There is no reason to interfere with the order of acquittal given by the High Court under Article 136 of the

Constitution. It cannot be said that the order of the High Court is either perverse or not based on proper appreciation of evidence. Therefore, on the merits of the order of acquittal granted by the High Court there is no reason to interfere. [Para 8] [621-F]

Vires of Section 27(3) of the Arms Act, 1959

2.1. A perusal of Section 27, sub-section (3) of the Arms Act, 1959, the vires of which has been challenged, shows that if by mere use of any prohibited arms or prohibited ammunitions or if any act is done by any person in contravention of Section 7, he shall be punishable with death. Section 7 of the said Act prohibits acquisition or possession, or manufacture or sale of prohibited arms or prohibited ammunitions. [Paras 14, 15] [624-E-F]

2.2. Section 7 imposes a prohibition on certain acts in respect of prohibited arms and ammunitions but Section 7 does not spell out the penalty. The penalty for contravention of Section 7 is provided under Section 27(3) of the Act. [Para 18] [626-C]

2.3. Section 27 is divided into three sub-sections. Sub-section 1 prescribes that if any person who uses any arms or ammunition in contravention of section 5 he shall be punishable with imprisonment for a term which shall not be not less than three years but which may extend to seven years and he shall also be liable to fine. Section 5 prohibits manufacture, sale of arms and ammunition. Sub-section (2) of Section 27 provides for higher punishment, inter alia, on the ground that whoever uses any prohibited arms or prohibited ammunition in contravention of Section 7, he shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and he shall also be liable to fine. [Para 19] [626-D-F]

2.4. Between Section 5 and Section 7 of the Act a distinction has been made since manufacture and sale of arms and ammunition is dealt with in Section 5 but Section 7 deals with prohibition of acquisition or possession, or of manufacture or sale, of prohibited arms and ammunition. Therefore, there is a reasonable classification between Section 5 and Section 7 of the Act. Consequently, there is valid classification between Sections 27(1) and 27(2) on the severity of the punishment. [Para 20] [626-G-H; 627-A]

2.5. But so far as sub-section (3) of Section 27 is concerned, the same stands apart in as much as it imposes a mandatory death penalty. The difference between sub-section (2) and sub-section (3) of Section 27 is that under sub-section (2) of Section 27 if a person uses any prohibited arms or ammunition in contravention of Section 7, he shall be punished with imprisonment for a term of less than seven years which may extend to imprisonment for life and also with fine. But if the said use or act prohibited under Section 7 results in the death of any other person he shall be punishable with death penalty. Therefore, Section 27(3) is very wide in the sense anything done in contravention of Section 7 of the Act and with the use of a prohibited arms and ammunition resulting in death will attract mandatory death penalty. Even if any act done in contravention of Section 7, namely, acquisition or possession, or manufacture or sale, of prohibited arms results in death of any person, the person in contravention of Section 7 shall be punished with death. This is thus a very drastic provision for many reasons. Apart from the fact that this imposes a mandatory death penalty the Section is so widely worded to the extent that if as a result of any accidental or unintentional use or any accident arising out of any act in contravention of Section 7, death results, the only punishment, which has to be mandatorily imposed on

the person in contravention is, death. Notably, the language used is 'results' which is wider than the expression 'causes'. The word 'results' means the outcome and is wider than the expression 'causes'. Therefore, very wide expression has been used in Section 27(3) of the Act and without any guideline leading to mandatory punishment of death penalty. [Paras 21, 22] [627-B-G]

3. In Section 302 of IPC death penalty is not mandatory but it is optional. Apart from that the word 'murder' has been very elaborately defined in Section 300 of IPC with various exceptions and explanations. But in the case of Section 27(3) law is totally devoid of any guidelines and no exceptions have been carved out. [Paras 24 and 25] [628-B; 629-D]

4. The Parliament while making law has to function under the specific mandates of the Constitution. Apart from the restrictions imposed on distribution of legislative powers under Part XI of the Constitution by Article 245 onwards, the direct mandate of the Constitution under Article 13 is that the State shall not make any law which takes away or abridges the right conferred by Part III of the Constitution and any law made in contravention of the same is, to the extent of contravention, void. Article 13(2) clearly prohibits the making of any law by the State which takes away or abridges rights, conferred by Part III of the Constitution. In the event of such a law being made the same shall be void to the extent of contravention. Only the judiciary can give the declaration that a law being in contravention of the mandate of Part-III of the Constitution is void. Therefore, power of judicial review is inherent in our Constitution. Article 13 of the Constitution is, therefore, a unique feature in our Constitution. [Paras 26, 27 and 28] [629-E-F; 630-E-F]

5.1. Mandatory death penalty has been found to be

constitutionally invalid in various jurisdictions where there is an independent judiciary and the rights of the citizens are protected in a Constitution. In our Constitution the concept of 'due process' was incorporated in view of the judgment of this Court in *Maneka Gandhi*. The principles of Eighth Amendment of the U.S. Constitution (which provides for guarantee against cruel and harsh punishment) have also been incorporated in our laws. This has been acknowledged by the Constitution Bench of this Court in Sunil Batra. Almost on identical principles mandatory death penalty provided under Section 303 IPC has been held ultra vires by the Constitution Bench of this Court in Mithu. Apart from that it appears that in Section 27(3) of the Act the provision of mandatory death penalty is more unreasonable inasmuch it provides whoever uses any prohibited arms or prohibited ammunition or acts in contravention of Section 7 and if such use or act results in the death of any other person then that person guilty of such use or acting in contravention of Section 7 shall be punishable with death. The word 'use' has not been defined in the Act. Therefore, the word 'use' has to be viewed in its common meaning. In view of such very wide meaning of the word 'use' even an unintentional or an accidental use resulting in death of any other person shall subject the person so using to a death penalty. Both the words 'use' and 'result' are very wide. Such a law is neither just, reasonable nor is it fair and falls out of the 'due process' test. A law which is not consistent with notions of fairness while it imposes an irreversible penalty like death penalty is repugnant to the concept of right and reason. [Paras 87, 88, 89, 90] [656-G-H; 657-A;, D-H; 658-A]

5.2. The principle of 'due process' is an emanation from the Magna Carta doctrine. This was accepted in American jurisprudence. All these concepts of 'due

process' and the concept of a just, fair and reasonable law has been read by this Court into the guarantee under Articles 14 and 21 of the Constitution. Therefore, the provision of Section 27(3) of the Act is violative of Article 14 and 21 of the Constitution. [Paras 92, 94] [658-C, F]

5.3. Apart from that the said Section 27 (3) is a post Constitutional law and has to obey the injunction of Article 13 which is clear and explicit. In view of the mandate of Article 13 of the Constitution which is an Article within Part-III of our Constitution, Section 27(3) having been enacted in clear contravention of Part-III rights, Section 27(3) of the Act is repugnant to Articles 14 and 21 and is void. [Paras 95, 96] [658-G; 659-B]

5.4. Section 27(3) of the Act also deprives the judiciary from discharging its Constitutional duties of judicial review whereby it has the power of using discretion in the sentencing procedure. This power has been acknowledged in Section 302 IPC and in Bachan Singh case it has been held that the sentencing power has to be exercised in accordance with the statutory sentencing structure under Section 235(2) and also under Section 354(3) of the Code of Criminal Procedure. [Paras 97, 98] [659-C, D]

5.5. Section 27(3) of the said Act while purporting to impose mandatory death penalty seeks to nullify those salutary provisions in the Code. This is contrary to the law laid down in Bachan Singh. [Para 99] [659-E]

5.6. In fact the challenge to the constitutional validity of death penalty under Section 302 IPC has been negatived in Bachan Singh in view of the sentencing structure in Sections 235(2) and 354 (3) of the Criminal Procedure Code. By imposing mandatory death penalty, Section 27(3) of the Act runs contrary to those statutory safeguards which give judiciary the discretion in the

matter imposing death penalty. Section 27(3) of the Act is thus ultra vires the concept of judicial review which is one of the basic features of our Constitution. [Para 100] [659-F, G]

5.7. The ratio in both Bachan Singh and Mithu has been universally acknowledged in several jurisdictions across the world and has been accepted as correct articulation of Article 21 guarantee. Therefore, the ratio in Mithu and Bachan Singh represents the concept of Jus cogens meaning thereby the peremptory non derogable norm in international law for protection of life and liberty. That is why it has been provided by the 44th Amendment Act of 1978 of the Constitution, that Article 21 cannot be suspended even during proclamation of emergency under Article 359(vide Article 359(1)(a) of the Constitution. Therefore Section 27(3) of the Arms Act is against the fundamental tenets of our Constitutional law as developed by this Court. Section 27(3) of Arms Act, 1959 is ultra vires the Constitution and is void. [Paras 100, 101, 102, 103 and 104] [659-H; 660-A-D]

Mithu vs. State of Punjab **(1983) 2 SCC 277: 1983 (2) SCR 690;** *Maneka Gandhi vs. Union of India* **(1978) 1 SCC 248 : 1978 (2) SCR 621;** *Bachan Singh v. State of Punjab* **(1980) 2 SCC 684 and** *Sunil Batra vs. Delhi Administration and Others* **(1978) 4 SCC 494 : 1979 (1) SCR 392 - relied on.**

Subhash Ramkumar Bind Alias Vakil and another vs. State of Maharashtra **(2003) 1 SCC 506 : 2002 (4) Suppl. SCR 65;** *Surendra Singh Rautela vs. State of Bihar* **(now State of Jharkhand) (2002) 1 SCC 266 : 2001 (5) Suppl. SCR 340;** *State of Punjab vs. Swaran Singh Murder* **Reference No. 5 of 2000 decided by Full Bench of Punjab & Haryana High Court on 26.5.2009;** *Santokh Singh vs. State of Punjab,* **2000(3) Recent Criminal Reports 637 - referred to.**

James Tyrone Woodson and Luby Waxton vs. State of North Carolina, **428 US 280 = 49 L Ed 2d 944;** *Stanislaus Roberts vs. State of Louisiana,* **428 US 325 = 49 L Ed 2d 974;** *Harry Roberts vs. State of Louisiana,* **431 US 633 = 52 L Ed 2d 637;** *George Summer vs. Raymond Wallace Shuman,* **483 US 66 = 97 L Ed 2d 56;** *Reyes vs. The Queen,* **(2002) 2 AC 235 = (2002) UKPC 11;** *Regina v. Hughes,* **(2002) 2 AC 259 = (2002) UKPC 12;** *Fox v. The Queen* **(2002 (2) AC 284);** *Bowe & Anr. vs. The Queen* **-(2006) 1 WLR 1623;** *Bernard Coard and Others vs. The Attorney General* **(Criminal Appeal No. 10/2006- unreported judgment of privy council);** *Francis Kafantayeni and Others vs. Attorney General* **[High Court of Malawi- Constitutional Case No.12 of 2005 [2007] M.W.H.C.1];** *Attorney General vs. Susan Kigula* **and 417 others (Supreme Court of Uganda- Constitution Appeal No.03/2006);** *Godfrey Ngotho Mutiso vs. Republic* **(Kenyan Court of Appeal- Criminal Appeal No.17/2008);** *Ong Ah Chuan vs. Public Prosecutor and Another,* **(1981) A.C. 648;** *Munn vs. Illinois,* **24 L Ed. 77 : 94 US 113, 142 (1876) and** *Planned Parenthood of Southeastern Pennsylvania vs. Casey,* **120 L ED 2d 674 - referred to.**

Case Law Reference:

1983 (2) SCR 690	**relied on**	**Para 30**
2002 (4) Suppl. SCR 65	**referred to**	**Para 34**
2001 (5) Suppl. SCR 340	**referred to**	**Para 35**
2000(3) Recent Criminal Reports 637	**referred to**	**Para 38**
1978 (2) SCR 621	**relied on**	**Para 46**
(1980) 2 SCC 684	**relied on**	**Para 46**
1979 (1) SCR 392	**relied on**	**Para 47**
428 US 280 = 49 L Ed 2d 944	**referred to**	**Para 49**

428 US 325 = 49 L Ed 2d 974	**referred to**	**Para 51**
431 US 633 = 52 L Ed 2d 637	**referred to**	**Para 53**
483 US 66 = 97 L Ed 2d 56	**referred to**	**Para 55**
(2002) 2 AC 235 = (2002) UKPC 11	**referred to**	**Para 58**
(2002) 2 AC 259 = (2002) UKPC 12	**referred to**	**Para 62**
(2002 (2) AC 284)	**referred to**	**Para 64**
(2006) 1 WLR 1623	**referred to**	**Para 66**
[2007] M.W.H.C.1- High Court of Malawi)	**referred to**	**Para 75**
(1981) A.C. 648	**referred to**	**Para 83**
24 L Ed. 77: 94 US 113, 142 (1876)	**referred to**	**Para 92**
120 L ED 2d 674	**referred to**	**Para 93**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 117 of 2006.

From the Judgment & Order dated 27.07.2005 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 250-DB of 1996.

Gourab Banerji, ASG (for Ld. Attorney General for India), S.A. Haseeb, Sahil Tagotra, B.K. Prasad Gautam Jha, Ajay Pal, Jagjit Singh Chhabra, Siddhartha Dave, Senthil Jagadeesan, Jentiben A.O., Harinder Mohan Singh for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. This appeal at the instance of the State

has been preferred from the judgment of the Division Bench of the High Court of Punjab and Haryana at Chandigarh, dated July 27, 2005 in Criminal Appeal No. 250/1996 whereby High Court gave the appellant the benefit of doubt and acquitted him of the charges framed against him.

2. Briefly, the facts of the case are that the respondent Dalbir Singh, a constable in 36th Battalion Central Reserve Police Force, at the relevant time was posted at Fatehabad, District Amritsar, Punjab. On April 11th, 1993, Harish Chander, the Battalion Havaldar Major (hereinafter 'B.H.M.') in 'Company D' of the Battalion, reported to Hari Singh, the Deputy Commandant Quarter Master (hereinafter 'Deputy Commandant'), that the accused had refused to carry out the fatigue duty assigned to him. On such report being made, the Deputy Commandant directed the B.H.M. and Sub Inspector Kewal Singh to produce the accused before him. As per these directions, the accused was produced before the Deputy Commandant at 11:15 a.m. Upon being warned verbally about his non compliance of the orders for fatigue duty, the accused requested the warning to be issued in writing. Upon such a response, the Deputy Commandant ordered the B.H.M. and the Sub Inspector to have the accused present before him the next morning.

3. However, immediately after these talks, the Deputy Commandant's office saw firing from a Self Loading Rifle (SLR), even as the Deputy Commandant himself and the B.H.M. were inside it. As the Deputy Commandant positioned himself underneath a table, he allegedly noted that it was the accused who was firing from a rifle from a tent pitched outside. He was allegedly hit in his back. The B.H.M. sustained multiple bullet injuries in his shoulders.

4. This entire incident was allegedly witnessed by Constable Dalip Kumar Mishra and Sub Inspector Kewal Singh. Eventually, when the firing had stopped and the accused was trying to reload his gun, he was overpowered and disarmed by

Constable Mishra. The Deputy Commandant directed the Sub Inspector Kewal Singh to hand over the accused to the police, while he himself and B.H.M. Harish Chander were rushed to Sri Guru Nanak Hospital. Unfortunately, B.H.M. Harish Chander died en route and his body was identified in the hospital. The Deputy Commandant recorded his statement (Ex. PH) and an F.I.R. (Ex. PH/2) was registered at the hospital by Sub Inspector Jaswant Singh.

5. During investigation, the Investigating Officer, in the presence of SI Kewal Singh and Constable Mishra, found 20 empty bullet-cartridges (Ex.P4-P23) at the Battalion Headquarters at Khawaspur. These were taken into possession after putting them in a sealed parcel through recovery memo (Ex.PK). The empty cartridges were sent to the Forensic Science Laboratory on 15.4.1993 and the SLR was forwarded on 23.4.1993.

6. After investigation a challan was put in the Court of the Ilaqua Magistrate who found that the case was exclusively triable by the Court of Session, committed the same to Court of Session. The accused was charged under Section 302 and 307 of IPC and under Section 27 of the Arms Act. The accused pleaded not guilty and the Prosecution was called upon to examine its witnesses including DCQM Hari Singh (PW.6), SI Kewal Singh (PW.7), Constable Mishra (PW.9) and Sub Inspector Jaswant Singh. The accused, upon examination, denied all circumstances and asserted that he was innocent and had been falsely implicated. The Trial Court consequently convicted the accused under Section 302 of IPC, sentencing him to rigorous imprisonment for life and fine of Rs.2,000/-, under Section 307 of IPC, sentencing him to rigorous imprisonment for 5 years and fine of Rs.2,000/-, and under Section 27 of Arms Act, sentencing him to rigorous imprisonment for 3 years and fine of Rs.1,000/-. The substantive sentences were ordered to run concurrently.

7. In the impugned judgment the High Court while reversing

the order of conviction found that there is some irreconcilable inconsistency in the prosecution case. The High Court found that PW.9 the alleged eye witness deposed that the respondent was apprehended at the spot by him and he was disarmed by him and the SLR which was being used by the accused was taken in his possession and the accused was handed over to the Court. But according to the Investigating Officer (IO) PW.12, he went to the place of occurrence on the date of occurrence i.e. on 11.4.93, but neither the accused nor the SLR allegedly used by the accused were handed over to him. The further evidence of the IO is that on 14.4.93, the accused was handed over to him outside the CRPF headquarters. Then on his disclosure statement the SLR was recovered. In view of such irreconcilable discrepancy in the evidence of the prosecution, the High Court came to the finding that the prosecution was trying to suppress a vital part of the case and the incident did not take place in the manner presented by the prosecution. The High Court further found that even though the prosecution allegation is that 20 cartridges were fired, only 7 empties were recovered and none of the bullets were recovered. The High Court found that the same is very surprising when the prosecution version is that 20 bullets were actually fired in a room towards the side where there are no windows. It is, therefore, impossible that none of the bullets had been recovered. In view of the aforesaid finding of the High Court the accused was given the benefit of doubt.

8. We are of the opinion that there is no reason to interfere with the order of acquittal given by the High Court sitting in our jurisdiction under Article 136 of the Constitution. We do not think that the order of the High Court is either perverse or not based on proper appreciation of evidence. Therefore, on the merits of the order of acquittal granted by the High Court we find no reason to interfere. But since in this case the accused was charged under Section 27(3) of the Arms Act (hereinafter, 'the Act') and since the vires of Section 27(3) of the said Act has been questioned, we proceed to examine the said issue in detail.

9. In this matter leave was granted on 16.1.2006. On 31.8.2010, a Division Bench of this Court issued notice to the Attorney General as vires of Section 27(3) of the Act was challenged in the said proceeding.

10. Pursuant to such notice Mr. Gourab Banerjee, the learned ASG initially submitted before this Court on 15th March, 2011 and again on 21st July, 2011 that a proposal to amend Section 27(3) of the Act is under consideration of the Government of India and as such matter was adjourned. Thereafter the matter was heard on 1st December, 2011 and on subsequent dates both on merits of the High Court order and also on the question of vires of Section 27(3) of the Act.

11. Since the Court is to examine the constitutional validity of Section 27, sub-section (3) of the Act, for a proper appreciation of the questions involved, Section 27 of the Act is set out below:-

"27.Punishment for using arms, etc.-

(1) Whoever uses any arms or ammunition in contravention of section 5 shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

(2) Whoever uses any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.

(3) Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person, shall be punishable with death."

12. The present form of Section 27 including Section 27(3)

has come by way of amendment, namely, by Amending Act 42 of 1988, the previous Section 27 was substituted. The Arms Act was enacted in 1959. At the time when it was enacted, Section 27 was in the following form:-

"27. Punishment for possessing arms, etc., with intent to use them for unlawful purpose -

Whoever has in his possession any arms or ammunition with intent to use the same for any unlawful purpose or to enable any other person to use the same for any unlawful purpose shall, whether such unlawful purpose has been carried into effect or not, be punishable with imprisonment for a term which may extend to seven years, or with fine or with both."

13. The Statements of Objects and Reasons of Act 42 of 1988 (the Amending Act) are as follows:-

"Act 42 of 1988. - The Arms Act, 1959 had been amended to provide for enhanced punishments in respect of offences under that Act in the context of escalating terrorist and anti-national activities. However, it was reported that terrorist and anti-national elements, particularly in Punjab had in the recent past acquired automatic firearms, machine guns of various types, rockets and rocket launchers. Although the definitions of the expressions "arms", "ammunitions", "prohibited arms" and "prohibited ammunition" included in the Act are adequate to cover the aforesaid lethal weapons in the matter of punishments for offences relating to arms, the Act did not make any distinction between offences involving ordinary arms and the more lethal prohibited arms and prohibited ammunition. Further while the Act provided for punishment of persons in possession of arms and ammunition with intent to use them for any unlawful purpose, it did not provide for any penalties for the actual use of illegal arms. To overcome these deficiencies, it was proposed to

amend the Act by providing for deterrent punishment for offences relating to prohibited arms and ammunition and for the illegal use of firearms and ammunition so as to effectively meet the challenges from the terrorist and anti-national elements. Accordingly, the Arms (Amendment) Ordinance, 1988 was promulgated by the President on the 27th May, 1988. The Ordinance amended the Act to provide for the followings among other things namely:-

(i) The definitions of "ammunition" and "prohibited ammunition" have been amended to include missiles so as to put the matter beyond any doubt;

(ii) Deterrent punishments have been provided for offences involving prohibited arms and prohibited ammunition;

(iii) Punishments have also been provided for the use of illegal arms and ammunition and death penalty has been provided if such use causes death."

14. A perusal of Section 27, sub-section (3), the vires of which has been challenged, shows that if by mere use of any prohibited arms or prohibited ammunitions or if any act is done by any person in contravention of Section 7, he shall be punishable with death.

15. Section 7 of the said Act prohibits acquisition or possession, or manufacture or sale of prohibited arms or prohibited ammunitions. The said Section 7 is set out below:-

"7. Prohibition of acquisition or possession, or of manufacture or sale, of prohibited arms or prohibited ammunition.-

No person shall--

(a) acquire, have in his possession or carry; or

(b) use, manufacture, sell, transfer, convert, repair, test or

prove; or

(c) expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof;

any prohibited arms or prohibited ammunition unless he has been specially authorised by the Central Government in this behalf."

16. In the definition clause prohibited ammunitions and prohibited arms have been defined respectively under Section 2, sub-Sections (h) and (i) respectively of the said Act. Those definitions are set out below:-

"(h) "Prohibited ammunition" means any ammunition, containing, or designed or adapted to contain, any noxious liquid, gas or other such thing, and includes rockets, bombs, grenades, shells, missiles articles designed for torpedo service and submarine mining and such other articles as the Central Government may, by notification in the Official Gazette, specify to be prohibited ammunition;"

"(i) "prohibited arms" means--

(i) firearms so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty, or

(ii) weapons of any description designed or adapted for the discharge of any noxious liquid, gas or other such thing,

and includes artillery, anti-aircraft and anti-tank firearms and such other arms as the Central Government may, by notification in the Official Gazette, specify to be prohibited arms;"

17. The word 'acquire', 'possession' or 'carry' has not been defined under the said Act nor the word 'used', 'manufacture', 'sale', 'convert', 'repair', 'test' or 'prove' have been defined in the Act. The word 'transfer' has only been defined in Section 2(k) to mean as follows:-

"(k) "transfer" with its grammatical variations and cognate expressions, includes letting on hire, lending, giving and parting with possession."

18. Section 7 imposes a prohibition on certain acts in respect of prohibited arms and ammunitions but Section 7 does not spell out the penalty. The penalty for contravention of Section 7 is provided under Section 27(3) of the Act as mentioned above.

19. If we look at Section 27, which has been set out above, it is divided into three sub-sections. Sub-section 1 prescribes that if any person who uses any arms or ammunition in contravention of section 5 he shall be punishable with imprisonment for a term which shall not be not less than three years but which may extend to seven years and he shall also be liable to fine. Section 5 prohibits manufacture, sale of arms and ammunition. Sub-section (2) of Section 27 provides for higher punishment, inter alia, on the ground that whoever uses any prohibited arms or prohibited ammunition in contravention of Section 7, he shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and he shall also be liable to fine.

20. Section 7 prohibits acquisition or possession, or of manufacture or sale, of prohibited arms or prohibited ammunition. Therefore, between Section 5 and Section 7 of the Act a distinction has been made since manufacture and sale of arms and ammunition is dealt with in Section 5 but Section 7 deals with prohibition of acquisition or possession, or of manufacture or sale, of prohibited arms and ammunition. Therefore, there is a reasonable classification between Section

5 and Section 7 of the Act. Consequently, there is valid classification between Sections 27(1) and 27(2) on the severity of the punishment.

21. But so far as sub-section (3) of Section 27 is concerned, the same stands apart in as much as it imposes a mandatory death penalty. The difference between sub-section (2) and sub-section (3) of Section 27 is that under sub-section (2) of Section 27 if a person uses any prohibited arms or ammunition in contravention of Section 7, he shall be punished with imprisonment for a term of less than seven years which may extend to imprisonment for life and also with fine. But if the said use or act prohibited under Section 7 results in the death of any other person he shall be punishable with death penalty. Therefore, Section 27(3) is very wide in the sense anything done in contravention of Section 7 of the Act and with the use of a prohibited arms and ammunition resulting in death will attract mandatory death penalty. Even if any act done in contravention of Section 7, namely, acquisition or possession, or manufacture or sale, of prohibited arms results in death of any person, the person in contravention of Section 7 shall be punished with death. This is thus a very drastic provision for many reasons. Apart from the fact that this imposes a mandatory death penalty the Section is so widely worded to the extent that if as a result of any accidental or unintentional use or any accident arising out of any act in contravention of Section 7, death results, the only punishment, which has to be mandatorily imposed on the person in contravention is, death. It may be also noted in this connection that language used is 'results' which is wider than the expression 'causes'. The word 'results' means the outcome and is wider than the expression 'causes'.

22. Therefore, very wide expression has been used in Section 27(3) of the Act and without any guideline leading to mandatory punishment of death penalty.

23. In this connection we may compare Section 302 of the

IPC with Section 27(3) of the Act. Section 302 is as follows:

> **"302. Punishment for murder.**- Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine."

24. In Section 302 of IPC death penalty is not mandatory but it is optional. Apart from that the word 'murder' has been very elaborately defined in Section 300 of IPC with various exceptions and explanations. Section 300 of IPC is set out below:

> **"300. Murder.**-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-
>
> Secondly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or
>
> Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-
>
> Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.
>
> Exception 1.-**When culpable homicide is not murder.**- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

First.-That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.-That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

25. But in the case of Section 27(3) law is totally devoid of any guidelines and no exceptions have been carved out. It is common ground that the said amendment of Section 27 was brought about in 1988 which was much after the Constitution of India has come into operation.

26. The Parliament while making law has to function under the specific mandates of the Constitution. Apart from the restrictions imposed on distribution of legislative powers under Part XI of the Constitution by Article 245 onwards, the direct mandate of the Constitution under Article 13 is that the State shall not make any law which takes away or abridges the right conferred by Part III of the Constitution and any law made in contravention of the same is, to the extent of contravention, void. Article 13 is set out hereinbelow:

"13. Laws inconsistent with or in derogation of the fundamental rights: (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

27. It is obvious from the aforesaid that Article 13(2) clearly prohibits the making of any law by the State which takes away or abridges rights, conferred by Part III of the Constitution. In the event of such a law being made the same shall be void to the extent of contravention.

28. It is obvious that only the judiciary can give the declaration that a law being in contravention of the mandate of Part-III of the Constitution is void. Therefore, power of judicial review is inherent in our Constitution. Article 13 of the Constitution is, therefore, a unique feature in our Constitution.

29. Mr. Banerjee, the learned A.S.G appearing on behalf of Union of India submitted that after notice was issued in this matter to the Attorney General, the matter was examined by the Government of India and a tentative decision to amend Section 27(3) of the Act retrospectively with effect from 27th May, 1988

was under the contemplation of the Government. Pursuant to such exercise, the Union Home Minister gave notice to the Secretary General of the Lok Sabha on 17th November, 2011 of its intention to move for leave to introduce the said Bill in the Lok Sabha and the Bill was introduced in the Lok Sabha in the following form. The form in which it is sought to be introduced in the Lok Sabha is as follows:

"Be it enacted by Parliament in the Sixty-second year of the Republic of India as follows:-

	1. (1) This Act may be called the Arms (Amendment) Act, 2011	Short title and commencement
	(2) It shall be deemed to have come into force on the 27th day of May, 1988	
54 of 1959	2. In the Arms Act, 1959 in Section 27, in sub-section (3), for the words "shall be punishable with death" The words "shall be punishable with death or imprisonment for life and shall also be liable to fine", shall be substituted.	

30. Leaned Addl. Solicitor General submitted that in the light of the aforesaid pronouncement by this Court in *Mithu vs. State of Punjab* - (1983) 2 SCC 277, the government is examining the question of making suitable amendments as indicated above to Section 27(3) of the Act.

31. This Court, however, is not inclined to defer its decision. The Court, however, cannot refuse to examine the provision in view of a very fair stand taken by learned ASG.

32. The Judges of this Court have taken an oath to uphold

and preserve the Constitution and it is well known that this Court has to protect the Constitution as a sentinel on the qui vive against any abridgement of its principles and percepts.

33. It may be noted that Section 27(3) as it stands as on date was considered by this Court in several judgments. Those judgments are noted hereinbelow.

34. It was considered in the case of *Subhash Ramkumar Bind Alias Vakil and another vs. State of Maharashtra* reported in (2003) 1 SCC 506. In that case the appellant Bind was charged under Section 302/34 and also under Section 27(3) of the Act and death sentence was awarded to Bind by the Sessions Court and the same was affirmed by the High Court. This Court while reducing the death sentence awarded by the High Court to one of life did not pronounce on the constitutional validity of Section 27(3) even though this Court referred to the statement of Objects and Reasons of the Amending Act which introduced Section 27(3). This Court found that the arms in question could not be brought within the definition of 'prohibited arms' as defined under Section 2(i) of the Act. This Court held that in order to bring the arms in question within the prohibited arms, the requirement of the statute was to issue a formal notification in the Official Gazette but as the State was relying on an administrative notification, this Court held that the same cannot be treated as a gazette notification and the conviction of Bind under Section 27(3) of the Act was set aside. This Court did not pronounce either way on the constitutional validity of Section 27(3). Therefore, the decision in Bind (supra) is not an authority on the constitutional validity of Section 27(3) of the Act.

35. Section 23 was again considered by this Court in the case of *Surendra Singh Rautela vs. State of Bihar (now State of Jharkhand)* - (2002) 1 SCC 266. The appellant Surendra Singh Rautela was initially convicted under Section 27(3) of the Arms Act and was given death penalty. Thereafter, the same sentence was set aside by the High Court on merits.

36. In *Surendra Singh* (supra), before this Court learned

senior counsel appearing on behalf of the State very fairly stated that he was not in a position to challenge the order of acquittal of the appellant under Section 27(3) on merits. Therefore, the question of constitutional validity of Section 27(3) was neither canvassed nor examined before this Court.

37. The question of constitutional validity of Section 27(3) of the Arms Act was referred to Full Bench of Punjab and Haryana High Court in the case of State of Punjab vs. Swaran Singh - Murder Reference No. 5 of 2000 decided on 26.5.2009.

38. The matter went before the Full Bench as the Division Bench of the High Court of Punjab and Haryana expressed doubt about the correctness of the decision rendered by the Division Bench in Santokh Singh vs. State of Punjab, 2000(3) Recent Criminal Reports 637.

39. The following questions were raised:

(i) Whether the judgment of Division Bench is correct in law?

(ii) Whether section 27(3) of the Arms Act is unconstitutional being violative of Article 14 and 21 of the Constitution of India?

40. The Court found that a 303 rifle has not been notified as a prohibited arm by the Central Government. The Court dealt with the provisions of Rule 3 and Schedule I to the said Rules categorising arms and ammunition for the purpose of Rule 3 under the said Act.

41. On such consideration, the Full Bench, on a careful reading of Rules 3 and 4 and two Schedules, came to a conclusion that in the absence of a notification by the Government declaring 303 rifle as a prohibited arm, the said weapon cannot be treated as the one prohibited under the Act and accordingly affirmed the view taken in the case of *Santokh Singh* (supra). However, the Full Bench did not answer the question No.2 in the light of the law declared in *Mithu* (supra). Therefore the constitutional validity of Section 27(3) has not

been decided by the Full Bench.

42. The question of constitutional validity of mandatory death sentence was examined by this court in *Mithu* (supra). In that case the constitutional validity of Section 303 of IPC came up for consideration. Provision of Section 303 of IPC is set out below:

"303. Punishment for murder by life-convict.- Whoever, being under sentence of imprisonment for life, commits murder shall be punished with death."

43. Chief Justice Y.V. Chandrachud giving the majority opinion held that the sentence of death, prescribed by Section 303 of IPC for the offence of murder committed by a person who is under a sentence of life imprisonment is a savage sentence and this Court held that the same is arbitrary and oppressive being violative of Articles 21 and 14 of the Constitution. Relevant para 23 at page 296 of the report is set out below:

"23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law. The section was originally conceived to discourage assaults by life convicts on the prison staff, but the legislature chose language which far exceeded its intention. The Section also assumes that life convicts are a dangerous breed of humanity as a class. That assumption is not supported by any scientific data. As observed by the Royal Commission in its Report on "Capital Punishment":

> "There is a popular belief that prisoners serving a life sentence after conviction of murder form a specially troublesome and dangerous class. That is not so. Most find themselves in prison because they

have yielded to temptation under the pressure of a combination of circumstances unlikely to recur."

In *Dilip Kumar Sharma v. State of M.P.,* this Court was not concerned with the question of the vires of Section 303, but Sarkaria, J., in his concurring judgment, described the vast sweep of that Section by saying that "the section is Draconian in severity, relentless and inexorable in operation" [SCC para 22, p. 567: SCC (Cri) p. 92]. We strike down Section 303 of the Penal Code as unconstitutional and declare it void. It is needless to add that all cases of murder will now fall under Section 302 of the Penal Code and there shall be no mandatory sentence of death for the offence of murder."

44. In the said judgment, Chief Justice Y.V. Chandrachud, who was delivering the majority judgment observed that the court has to exercise its discretion in the matter of life and death. In the opinion of the learned Chief Justice any sentencing process by which the legislature deprives the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, and compels them to shut their eyes to mitigating circumstances is unconscionable. The relevant observations made in paragraphs 12 and 16 are set out below

"12. The other class of cases in which, the offence of murder is committed by a life convict while he is on parole or on bail may now be taken up for consideration. A life convict who is released on parole or on bail may discover that taking undue advantage of his absence, a neighbour has established illicit intimacy with his wife. If he finds them in an amorous position and shoots the seducer on the spot, he may stand a fair chance of escaping from the charge of murder, since the provocation is both grave and sudden. But if, on seeing his wife in the act of adultery, he leaves the house, goes to a shop, procures a weapon and returns to kill her paramour, there would be evidence of what is

called mens rea, the intention to kill. And since, he was not acting on the spur of the moment and went away to fetch a weapon with murder in his mind, he would be guilty of murder. It is a travesty of justice not only to sentence such a person to death but to tell him that he shall not be heard why he should not be sentenced to death. And, in these circumstances, now does the fact that the accused was under a sentence of life imprisonment when he committed the murder, justify the law that he must be sentenced to death? In ordinary life, we will not say it about law, it is not reasonable to add insult to injury. But, apart from that, a provision of law which deprives the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'theft', 'breach of trust' or 'murder'. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hallmarks of justice. The mandatory sentence of death prescribed by Section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different set of values. For us,

law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead.

16. Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. "The infinite variety of cases and facets to each would make general standards either meaningless 'boiler plate' or a statement of the obvious……." As observed by Palekar, J., who spoke for a Constitution Bench in *Jagmohan Singh v. State of U.P.:* [SCC para 26, p. 35: SCC (Cri) p. 184]

> "The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment.... The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused."

45. In his concurring judgment Justice O. Chinnappa Reddy held as follows:

"25. Judged in the light shed by Maneka Gandhi and Bachan Singh, it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence.

So final, so irrevocable and so irrestitutable [sic irresuscitable] is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional."

46. It is now well settled that in view of decision in *Maneka Gandhi vs. Union of India* - (1978) 1 SCC 248, *Bachan Singh Vs. State of Punjab* - (1980) 2 SCC 684 and *Mithu* (supra) 'due process of law' is part of our Constitutional jurisprudence.

47. The Constitution Bench in *Sunil Batra vs. Delhi Administration and Others* - (1978) 4 SCC 494, has also held that the guarantee against cruel and harsh punishment given in the Eighth Amendment of the U.S. Constitution is also part of our constitutional guarantee. Once the concept of 'due process of law' and the guarantee against harsh and cruel punishment (Eighth Amendment of the U.S. Constitution) are woven in our Constitutional guarantee, it is the duty of this Court to uphold the same whenever any statute even prima-facie seeks to invade the same. This also seems to be the mandate of Article 13(2) of the Constitution of India.

48. Mr. Banerjee, learned ASG has rendered considerable assistance to this Court by placing before the Court judgments from different jurisdiction on the question of mandatory capital punishment and also decisions where Court examined cases of cruel and unusually harsh punishment.

49. In this connection we may refer to the judgment of the U.S. Supreme Court in the case of *James Tyrone Woodson and Luby Waxton vs. State of North Carolina,* 428 US 280 = 49 L Ed 2d 944. In that case the petitioners were convicted of first degree murder in view of their participation in an armed

robbery of a food store. In the course of committing the crime a cashier was killed and a customer was severely wounded. The petitioners were found guilty of the charges and sentenced to death. The Supreme Court of North Carolina affirmed the same. But then certiorari was granted by the U.S. Supreme Court to examine the question whether imposition of death penalty in that case constituted a violation of the Eighth and Fourteenth Amendments of the U.S. Constitution. The factual background of that case is that in 1974 North Carolina General Assembly codified a statute making death the mandatory sentence for all persons convicted of first degree murder. Stewart, J., speaking for the Court held that the said mandatory death sentence was unconstitutional and violated the Eighth Amendment. The learned Judge held:-

> "…A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> .... This Court has previously recognized that "for the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." .... Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. ...While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy

> rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see Trop v Dulles, 356 US, at 100, 2 L Ed 2d 630, 78 S Ct 590 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. ... This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

50. However, strong dissent was expressed by Justice White, Chief Justice Burger and Justice Rehnquist. According to these learned Judges, North Carolina statute providing for mandatory death penalty upon proof of guilt in a case of first degree murder was constitutionally valid.

51. A similar conclusion was pronounced on the same day i.e. 2nd July, 1976 in Stanislaus Roberts vs. State of Louisiana, 428 US 325 = 49 L Ed 2d 974 in a case of death penalty for a crime of first degree murder under the laws of Louisiana. Justice John Paul Stevens giving the majority opinion observed at pages 981-982 of the report as follows:-

> "…The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute. ... A large group of jurisdictions first responded to the unacceptable severity of the common-law rule of automatic death sentences for all murder convictions by narrowing the definition of capital homicide. Each of these

jurisdictions found that approach insufficient and subsequently substituted discretionary sentencing for mandatory death sentences. See *Woodson v North Carolina,* ante, at 290-292, 49 L Ed 2d 944, 96 S Ct 2978."

"The futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender". *Williams v. New York,* 337 US 241, 247, 93 L Ed 1337, 69 S Ct 1079 (1949). See also *Pennsylvania v. Ashe,* 302 US 51, 55, 82 L Ed 43, 58 S Ct 59 (1937)."

"The constitutional vice of mandatory death sentence statutes - lack of focus on the circumstances of the particular offense and the character and propensities of the offender - is not resolved by Louisiana's limitation of first-degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances the particular crime or by the attributes of the individual offender."

52. Here also Chief Justice Burger, White J., Balckmum, J., and Rehnquist, J., dissented and upheld the constitutionality of the Louisiana statute.

53. In *Harry Roberts vs. State of Louisiana,* 431 US 633

= 52 L Ed 2d 637, the case arose out of a Louisiana statute imposing mandatory death penalty for the first degree murder of a police officer. The Court opined:-

"To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

As we emphasized repeatedly in Roberts and its companion cases decided last Term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional."

54. Accordingly, death penalty was set aside by the majority and the matter was remitted for further proceeding. Here also Chief Justice Burger, Justice Blackmum, Justice White and Justice Rehnquist gave strong dissents, opining that the statute was constitutionally valid.

55. Again similar question came up before the U.S. Supreme Court in *George Summer vs. Raymond Wallace Shuman,* 483 US 66 = 97 L Ed 2d 56. This case came from

Nevada which mandated death penalty for murder committed by a person while serving a life sentence without the possibility of parole. The statutory provision considered in this case is somewhat akin to Section 303 of Indian Penal Code. Justice Blackmum delivering the majority opinion held that Nevada statute was unconstitutional being violative of Eighth and Fourteenth Amendments. The learned Judge held:-

> "……This Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime. See, e.g., *Tison v Arizona,* 481 US 137, 95 L Ed 2d 127,107 S Ct 1676 (1987); Enmund Florida*,* 458 US 782, 73 L Ed 2d 1140, 102 S Ct 3368 (1982). Just as the level of an offender's involvement in a routine crime varies, so too can the level of involvement of an inmate in a violent prison incident. An inmate's participation may be sufficient to support a murder conviction, but in some cases it may not be sufficient to render death an appropriate sentence, even though it is a life-term inmate or an inmate serving a particular number of years who is involved.
>
> ……The circumstances surrounding any past offense may vary widely as well. Without consideration of the nature of the predicate life-term offense and the circumstances surrounding the commission of that offense, the label "life-term inmate" reveals little about the inmate's record or character. Even if the offense was first-degree murder, whether the defendant was the primary force in that incident, or a no triggerman like Shuman, may be relevant to both his criminal record and his character. Yet under the mandatory statute, all predicate life-term offenses are given the same weight - a weight that is deemed to outweigh any possible combination of mitigating circumstances."

56. The Court insisted on a guided discretion on the statute by holding:-

> "…state interests can be satisfied fully through the use of a guided-discretion statute that ensures adherence to constitutional mandate of heightened reliability in death-penalty determinations through individualized sentencing procedures. Having reached unanimity on the constitutional significance of individualized sentencing in capital cases, we decline to depart from that mandate in this case today. We agree with the courts below that the statute under which respondent Shuman was sentenced to death did not comport with the Eighth and Fourteenth Amendments."

57. This judgment was also dissented by Justice White, Chief Justice Rehnquist and Justice Scalia.

58. In this connection if we look at some of the judgments delivered by the Privy Council we would find the same principle has been followed in *Reyes vs. The Queen,* (2002) 2 AC 235 = (2002) UKPC 11. In Reyes (supra) the appellant was convicted and sentenced to death under the laws of Belize he committed the murder by shooting. The Privy Council granted leave to the accused to raise two issues on constitutional points - (i) mandatory death penalty infringes both the protection against subjection to inhuman or degrading punishment or other treatment in violation of rights under Section 7 of the Constitution of Belize and also in violation of the right to life protected under Sections 3 and 4 of the said Constitution. The second issue was on the constitutionality of hanging. Section 4(1) and Section 7 of the Constitution of Belize are as follows:-

> "4(1). A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted."
>
> "7. No person shall be subjected to torture or to inhuman

or degrading punishment or other treatment."

59. In the case of *Reyes* (supra) the decision of this Court in Mithu (para 36 page 252 of the report) as also the decision of this Court in Bachan Singh (para 43, page 256 of the report) were considered. The Board observed:-

"...The Board is however satisfied that the provision requiring sentence of death to be passed on the defendant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the Constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect…"

60. In paragraph 44 at page 257 of the report the Board made a very valid and very interesting distinction between mercy and justice, which is set out below:-

"……Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility……. It has been repeatedly held that not only determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions. .... The opportunity to seek mercy from a body such as the Advisory Council cannot cure a constitutional defect in the sentencing process."

61. The Privy Council thus overruled the decision of the Court of Appeal of Belize.

62. In *Regina v. Hughes,* (2002) 2 AC 259 = (2002) UKPC 12, the defendant (accused) was convicted by the High Court of Saint Lucia for murder. The Criminal Code of Saint Lucia provided death sentence to be imposed on anybody who is convicted of murder and Hughes was sentenced to death. The Board found that under Section 178 of the Criminal Code, imposition of death sentence for murder was mandatory and the Court had no power to impose a lesser sentence. The Board held such inhuman and degrading sentencing procedure to be void. In this case also this Court's decision in *Mithu* (supra) and *Bachan Singh* (supra) were considered by the Privy Council. In paragraph 52, the Board held:-

"……It follows that the decision as to the appropriate penalty to impose in the case of murder should be taken by the judge after hearing submissions and, where

appropriate, evidence on the matter. In reaching and articulating such decisions, the judges will enunciate the relevant factors to be considered and the weight to be given to them, having regard to the situation in Saint Lucia. The burden thus laid on the shoulders of the judiciary is undoubtedly heavy but it is one that has been carried by judges in other systems. Their Lordships are confident that the judges of Saint Lucia will discharge this new responsibility with all due care and skill."

63. Therefore, the constitutionality of Section 178 of the statute was not affirmed and instead matter was left to the discretion of the judges.

64. The question again came up before the Privy Council in the case of *Fox vs. The Queen* (2002 (2) AC 284).

65. In that case the defendant was convicted by the High Court of Saint Chrisopher and Nevis on two counts of murder and he was sentenced to death on each count pursuant to Section 2 of the Offences against the Person Act, 1873, which prescribed a mandatory death sentence for murder. His appeal against conviction and sentence was dismissed by the Eastern Caribbean Court of Appeal (Saint Christopher and Nevis). Then the Judicial Committee of the Privy Council granted him special leave to appeal against both conviction and sentence. Ultimately appeal was dismissed against conviction, but on the question of sentence the Privy Council held that Section 2 of the offences against the Person Act, 1873 was inconsistent with section 7 of the Constitution and accordingly sentence of death was quashed and the matter was remitted to the High Court to determine the appropriate sentence having regard to all the circumstances of the case and in the light of the evidence relevant to the choice of sentences. In doing so the Privy Council applied its ratio in the case of *Reyes* (supra) and also the ratio in *Regina* (supra).

66. The Privy Council again had to consider the same

question in Bowe & Anr. vs. The Queen -(2006) 1 WLR 1623. In that case also both he appellants were convicted for murder and sentenced to death in terms of the Section 312 of the Penal Code of The Bahamas and their appeals against conviction did not succeed.

67. Section 312 of the Code was challenged to the extent that it provides that persons other than pregnant women charged for murder under Section 312 of the Code must be punished by death sentence.

68. In that case the Court of Appeal held by a majority that any challenge to the constitutionality of the Code providing for mandatory sentence must be made to the Supreme Court.

69. Allowing the appeal, the Privy Council held that the Court of appeal erred in construing Article 28 of the Constitution as precluding it from entertaining a challenge to the constitutionality of a sentencing provision.

70. In paragraph 29 of the judgment, the Privy Council formulated the principles which are relevant for consideration in a case of mandatory death sentence. The said principles are set out below:

(I) It is a fundamental principle of just sentencing that the punishment imposed on a convicted defendant should be proportionate to the gravity of the crime of which he has been convicted.

(II) The criminal culpability of those convicted of murder varies very widely.

(III) Not all those convicted of murder deserve to die.

(IV) Principles (I), (II) and (III) are recognised in the law or practice of all, or almost all, states which impose the capital penalty for murder.

(V) Under an entrenched and codified Constitution on the Westminster model, consistently with the rule of law, any discretionary judgment on the measure of punishment which a convicted defendant should suffer must be made by the judiciary and not by the executive.

71. The Privy Council answered the question in paragraphs 30, 31, 32, 34 and 35 of the judgment.

72. In para 43 the conclusion of the Board was as follows:

"The Board will accordingly advise Her Majesty that section 312 should be construed as imposing a discretionary and not a mandatory sentence of death. So construed, it was continued under the 1973 Constitution. These appeals should be allowed, the death sentences quashed and the cases remitted to the Supreme Court for consideration of the appropriate sentences. Should the Supreme court, on remission, consider sentence of death to be merited in either case, questions will arise on the lawfulness of implementing such a sentence, but they are not questions for the Board on these appeals."

73. In the unreported judgment of the Privy Council in *Bernard Coard and Others vs. The Attorney General* (Criminal Appeal No. 10/2006) the same principle has been upheld. In that appeal from the Court of Appeal of Grenada, the Judicial Committee of Privy Council consisted of Lord Bingham of Cornhill, Lord Hoffmann, Lord Phillips of Worth Matravers, Lord Carswell and Lord Brown of Eaton-under-Heywood. The facts were that in Grenada, a revolutionary outfit was split into two factions, one of which was led by the appellant Bernard Coard. In a violent incident Maurice Bishop, the then Prime Minister of Grenada and others were executed by Coard's supporters. Over that incident, the appellants were mandatorily sentenced to death for murder. However the Governor General commuted the death sentence to life imprisonment, and a pardon was

granted on the condition that the appellants be kept in custody with hard labour for the remainder of their lives. The appellant challenged the sentence.

74. The Board, while rejecting the other contention by the appellant, allowed the appeal on the ground that the mandatory death sentence was unconstitutional. The Board relied on its previous decision in *Regina* (supra). In paragraph 32 of the judgment, the Board inclined in favour of accepting the principle of determination of a sentence by the judiciary rather than accepting the statutory mandate of a death sentence. The judgment by Lord Hoffmann laid down the following principles:

"32. Fifthly, and perhaps most important, is the highly unusual circumstance that, for obvious reasons, the question of appellants' fate is so politically charged that it is hardly reasonable to expect any Government of Grenada, even 23 years after the tragic events of October 1983, to take an objective view of the matter. In their Lordships opinion that makes it all the more important that the determination of the appropriate sentence for the appellants, taking into account such progress as they have made in prison, should be the subject of a judicial determination."

75. Similar principles were followed in the High Court of Malawi in the case of *Francis Kafantayeni and Others vs. Attorney General* (Constitutional Case No.12 of 2005 [2007] M.W.H.C.1). Facts therein were that the accused was convicted of murder and sentenced to mandatory death penalty. The challenge to the constitutionality of death penalty was on four grounds, all based on the Malawi Constitution. The first ground related to depravation of right to life under Section 16, the second related to inhuman and degrading treatment under Section 19, the third related to right to a fair trial under Section 42 (2) (f) and finally the fourth challenge was that it violated principles of separation of powers of State.

76. The Court, after analyzing the relevant provisions of the Constitution and the Penal Code, and the leading authority or *Reyes* (supra), struck down mandatory death penalty holding that such penalty was degrading and inhuman, and denied the right to a fair trial. The Court expressed its opinion in the following words:

> "We agree with counsel that the effect of the mandatory death sentence under section 210 of the Malawi Penal Code for the crime of murder is to deny the accused as a convicted person the right to have his or her sentence reviewed by a higher court than the court that imposed the sentence; and we hold that this is a violation of the right to a fair trial which in our judgment extends to sentencing."

77. In the concluding portion of the judgment, the court, by exercising a degree of caution, observed as follows:

> "Pursuant to Section 5 of the Constitution, we declare section 210 of the Penal Code to be invalid to the extent of the mandatory requirement of the death sentence for the offence of murder. For the removal of doubt, we state that our declaration does not outlaw the death penalty for the offence of murder, but only the mandatory requirement of the death penalty for that offence. The effect of our decision is to bring judicial discretion into sentencing for the offence of murder, so that the offender shall be liable to be sentenced to death only as the maximum punishment."

78. The Supreme Court of Uganda, at Mengo, struck a similar note in the case of *Attorney General vs. Susan Kigula and 417 others* (Constitution Appeal No.03/2006). Out of the various issues urged before the Court, one of them was, that the laws of Uganda, which provide for mandatory death sentence were unconstitutional and that the carrying out of a death sentence after a long delay is a cruel, inhuman and degrading treatment. Equally degrading is the legal mode of carrying out a death sentence by hanging. The majority of the

judges by relying upon *Mithu* (supra) and *Reyes* (supra), *James Tyrone Woodson* (supra) held that imposition of mandatory death sentence for certain offences was unconstitutional. A most pertinent ruling has been given in the following words:

> "In our view if there is one situation where the framers of the Constitution expected an inquiry, it is the one involving a death penalty. The report of the Judge is considered so important that it forms a basis for advising the President on the exercise of the prerogative of mercy. Why should it not have informed the Judge in passing sentence in the first place."

79. Furthermore, the administration of justice was considered a function of the Judiciary under Article 126 of the Constitution. The entire process of trial from the arraignment of an accused person to his/her sentencing was what constitutes administration of justice. By providing mandatory death penalty Parliament removed the power to determine sentence from the Court's power and that, the Court is to be inconsistent with Article 126 of the Constitution.

The Court further held:

> "We do not agree with learned counsel for the Attorney General that because Parliament has the powers to pass laws for the good governance of Uganda, it can pass such laws as those providing for a mandatory death sentence. In any case, the Laws passed by Parliament must be consistent with the Constitution as provided for in article 2 (2) of the Constitution."

It also held:

> "Furthermore, the Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Any law passed by Parliament which has the

effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution. We also agree with Professor Sempebwa, for the respondents, that the power given to the court under article 22 (1) does not stop at confirmation of conviction. The Court has power to confirm both conviction and sentence. This implies a power NOT to confirm, implying that court has been given discretion in the matter. Any law that fetters that discretion is inconsistent with this clear provision of the Constitution."

80. In a still more recent decision in the case of *Godfrey Ngotho Mutiso vs. Republic* (Criminal Appeal No.17/2008), the Kenyan Court of Appeal pronounced its judgment in a criminal appeal arising from the judgment of the High Court of Kenya. The three-judge Bench delivering the verdict, considered the matter as an issue of singular historical moment in the country in dealing with the offence of murder and penalty of death.

81. The Court formulated the following proposition:

"In its judgment, the Court of Appeal clarified the various issues, particularly, the fact that the appellant did not challenge the conviction for the offence of murder nor the constitutionality of the death penalty itself. The Court then framed the issue for determination and listed out the various authorities relied upon by the counsel. The submissions made by the counsel for the appellants were summarized by the Court as follows:

"The imposition of the mandatory death penalty for particular offences is neither authorized nor prohibited in the Constitution. As the Constitution is silent, it is for the courts to give a valid constitutional interpretation on the mandatory nature of sentence.

Mandatory death sentence is antithetical to fundamental human rights and there is no constitutional

justification for it. A convicted person ought to be given an opportunity to show why the death sentence should not be passed against him.

The imposition of a mandatory death sentence is arbitrary because the offence of murder covers a broad spectrum. Making the sentence mandatory would therefore be an affront to the human rights of the accused.

Section 204 of the Penal Code is unconstitutional and ought to be declared a nullity. Alternatively the word "shall" ought to be construed as "may".

There is a denial to (sic of) a fair hearing when no opportunity is given to an accused person to offer mitigating circumstances before sentence, which is the normal procedure in all other trials for non-capital offences. Sentencing was part of the trial and mitigation was an element of fair trial.

Sentencing is a matter of law and part of the administration of justice which is the preserve of the Judiciary. Parliament should therefore only prescribe the maximum sentence and leave the courts to administer justice by sentencing the offenders according to the gravity and circumstances of the case."

82. By formulating the aforesaid propositions, the Court held that Section 204 of the Penal Code which provided for mandatory death penalty was unconstitutional.

83. However, a discordant note was struck by the Privy Council in one of its old judgments in the case of *Ong Ah Chuan vs. Public Prosecutor and Another,* (1981) A.C. 648. The judgment was rendered by Lord Diplock, in a Bench consisting of Lord Diplock, Lord Keith of Kinkel, Lord Scarman and Lord Roskill. The Board heard the appeal from the Court of Criminal Appeal from Singapore, against a conviction for the offence of drug trafficking of heroine in Singapore. As the

amount of heroine was more than 15 grams in each case, a sentence of death was imposed on each of the defendants. Even though, before the Court of Appeal, the constitutionality of the provisions of the Drug Act was not challenged, leave was sought before the Board on those issues. Especially the constitutional issue was that the provision in Section 29 in Schedule II for mandatory death penalty for trafficking in controlled drugs, in excess of the prescribed quantities, was unconstitutional.

84. The Board permitted the questions to be raised. Ultimately, the Board came to the following findings:

> "The social object of the Drugs Act is to prevent the growth of drug addition in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine. The social evil caused by trafficking which the Drugs Act seeks to prevent is broadly proportional to the quantity of addictive drugs brought on to the illicit market. There is nothing unreasonable in the legislature's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid requires a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid. It is for the legislature to determine in the light of information that is available to it about the structure of the illicit drug trade in Singapore, and the way in which it is carried on, where the appropriate quantitative boundary lies between these two classes of dealers. No plausible reason has been advanced for suggesting that fixing a boundary at transactions which involve 15 grams of heroin or more is so low as to be purely arbitrary.
>
> The Court also held:
>
> "Wherever a criminal law provides for a mandatory

> sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated with equal punitive treatment for similar legal guilt." (Page 674 of the report)

85. In their Lordships' view there is nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantities of heroin and morphine. Their Lordships held that the quantity that attracts death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good hearted Samaritan out of the kindness of his heart as was suggested in the course of argument. But if by any chance it were to happen, the prerogative of mercy is available to mitigate the rigidity of the law which the long established constitutional way of doing is the same in Singapore as in England. (674 of the report)

86. However the aforesaid opinion of Lord Diplock, was subsequently noticed by the Privy Council in *Bowe* (supra) at page 1644, wherein the decision in *Ong Ah Chuan* (supra) was explained inter alia, on the ground that the Constitution of Singapore does not have a comparable provision like the Eighth Amendment of the American Constitution relating to cruel and unusual punishment.

87. It is clear from the discussion hereinabove that mandatory death penalty has been found to be constitutionally invalid in various jurisdictions where there is an independent judiciary and the rights of the citizens are protected in a Constitution.

88. It has already been noted hereinabove that in our

Constitution the concept of 'due process' was incorporated in view of the judgment of this Court in *Maneka Gandhi* (supra). The principles of Eighth Amendment have also been incorporated in our laws. This has been acknowledged by the Constitution Bench of this Court in *Sunil Batra* (supra). In para 52 at page 518 of the report, Justice Krishna Iyer speaking for the Bench held as follows:

> "52. True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after Cooper and Maneka Gandhi the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21."

89. Almost on identical principles mandatory death penalty provided under Section 303 of the Indian Penal Code has been held ultra vires by the Constitution Bench of this Court in *Mithu* (supra). Apart from that it appears that in Section 27(3) of the Act the provision of mandatory death penalty is more unreasonable inasmuch it provides whoever uses any prohibited arms or prohibited ammunition or acts in contravention of Section 7 and if such use or act results in the death of any other person then that person guilty of such use or acting in contravention of Section 7 shall be punishable with death. The word 'use' has not been defined in the Act. Therefore, the word 'use' has to be viewed in its common meaning. In view of such very wide meaning of the word 'use' even an unintentional or an accidental use resulting in death of any other person shall subject the person so using to a death penalty. Both the words 'use' and 'result' are very wide. Such a law is neither just, reasonable nor is it fair and falls out of the 'due process' test.

90. A law which is not consistent with notions of fairness while it imposes an irreversible penalty like death penalty is

repugnant to the concept of right and reason.

91. In *Dr. Bonham* case - (1610) 8 Co Rep 114a : 77ER 646, Lord Coke explained this concept several centuries ago. The classical formulation by Lord Coke is:-

> "It appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."

92. The principle of 'due process' is an emanation from the Magna Carta doctrine. This was accepted in American jurisprudence [See *Munn vs. Illinois,* 24 L Ed. 77 : 94 US 113, 142 (1876)].

93. Again this was acknowledged in *Planned Parenthood of Southeastern Pennsylvania vs. Casey,* 120 L ED 2d 674, wherein the American Supreme Court observed as follows:

> "The guarantees of due process, though having their roots in Magna Carta's 'per legem terrae' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation'."

94. All these concepts of 'due process' and the concept of a just, fair and reasonable law has been read by this Court into the guarantee under Articles 14 and 21 of the Constitution. Therefore, the provision of Section 27(3) of the Act is violative of Article 14 and 21 of the Constitution.

95. Apart from that the said Section 27 (3) is a post Constitutional law and has to obey the injunction of Article 13 which is clear and explicit. Article 13(2) is as follows:

> "13(2) The State shall not make any law which takes away

or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

96. In view of the aforesaid mandate of Article 13 of the Constitution which is an Article within Part-III of our Constitution, Section 27(3) having been enacted in clear contravention of Part-III rights, Section 27(3) of the Act is repugnant to Articles 14 and 21 and is void.

97. Section 27(3) of the Act also deprives the judiciary from discharging its Constitutional duties of judicial review whereby it has the power of using discretion in the sentencing procedure.

98. This power has been acknowledged in Section 302 of the Indian Penal Code and in *Bachan Singh* (supra) case it has been held that the sentencing power has to be exercised in accordance with the statutory sentencing structure under Section 235(2) and also under Section 354(3) of the Code of Criminal Procedure.

99. Section 27(3) of the said Act while purporting to impose mandatory death penalty seeks to nullify those salutary provisions in the Code. This is contrary to the law laid down in *Bachan Singh* (supra).

100. In fact the challenge to the constitutional validity of death penalty under Section 302 of Indian Penal Code has been negatived in *Bachan Singh* (supra) in view of the sentencing structure in Sections 235(2) and 354 (3) of the Criminal Procedure Code. By imposing mandatory death penalty, Section 27(3) of the Act runs contrary to those statutory safeguards which give judiciary the discretion in the matter imposing death penalty. Section 27(3) of the Act is thus ultra vires the concept of judicial review which is one of the basic features of our Constitution.

101. It has also been discussed hereinabove that the ratio in both *Bachan Singh* (supra) and *Mithu* (supra) has been

universally acknowledged in several jurisdictions across the world and has been accepted as correct articulation of Article 21 guarantee. Therefore, the ratio in *Mithu* (supra) and *Bachan Singh* (supra) represents the concept of Jus cogens meaning thereby the peremptory non derogable norm in international law for protection of life and liberty.

102. That is why it has been provided by the 44th Amendment Act of 1978 of the Constitution, that Article 21 cannot be suspended even during proclamation of emergency under Article 359(vide Article 359(1)(a) of the Constitution.

103. This Court therefore holds that Section 27(3) of the Arms Act is against the fundamental tenets of our Constitutional law as developed by this Court.

104. This Court declares that Section 27(3) of Arms Act, 1959 is ultra vires the Constitution and is declared void. The appeal is thus dismissed on merits and the High Court judgment acquitting the respondent is affirmed.

B.B.B. Appeal dismissed.

MARKIO TADO
v.
TAKAM SORANG & ORS.
(Civil Appeal No. 1539 of 2012)

FEBRUARY 02, 2012

[DEEPAK VERMA AND H.L. GOKHALE, JJ.]

Representation of the People Act, 1951 - ss. 100(1)(d), 123(8) and 135A - Conduct of Election Rules, 1961 - r.93 - Allegation of double voting - Prayer for production and inspection of election papers - Legislative Assembly elections - Appellant declared elected defeating his nearest rival the first respondent - First respondent filed election petition challenging election of appellant on the ground of corrupt practice of booth capturing - Single Judge of High Court framed necessary issues - Evidence of first respondent recorded - Subsequently, first respondent filed application making allegation that double voting was effected on behalf of appellant, and therefore it was necessary to get the record of the voters' counterfoils from the polling stations - Application allowed by Single Judge and order passed calling for record of registers of voters' counterfoils - On appeal, held: The election petition filed by first respondent made the grievance of booth capturing - Ground of impersonation or double voting was not pleaded in the petition, nor was any issue framed thereon for the trial - Statement of first respondent that the appellant had appointed fake polling agents for the first respondent was a clear after thought, since if it was so, he would have pleaded the same in the election petition itself - He did not mention names of the persons allegedly involved in booth capturing - Even with respect to impersonation, the only instance pointed out was that of one person, but it was not stated in the petition or in evidence as to who voted in his place - Having failed to place any material

with respect to either booth capturing or impersonation, the first respondent was trying to make fishing and roving inquiry to improve his case by calling for the record of the voters register, in support of his grievance of double voting - In absence of any evidence with respect to the persons who at the instance of the appellant allegedly captured the booths or made double voting or impersonation, no such inference could have been drawn against the appellant - The Single Judge, therefore, was clearly in error in allowing the application made by the first respondent - Besides, the ground of improper reception requires a candidate to show as to how the election in so far as it concerns the returned candidate was materially affected - In facts and circumstances of the case, the application of first respondent could not have been entertained even on the ground of improper reception in the absence of prima facie case that the result of the election had been materially affected -Inspection of ballot papers and counterfoils should be allowed very sparingly, and only when it is absolutely essential to determine the issue - Discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void - Order passed by Single Judge of High Court accordingly quashed.

Representation of the People Act, 1951 - ss.123(8), 135A and 100(1)(d) - Elections - Corrupt practices - Booth capturing as against impersonation or double voting - Held: The main element of booth capturing is use of force or intimidation - As against that impersonation or double voting involves cheating or deception - Thus, these two grounds deal with two different aspects of corrupt practices.

Elections - Election petition - Pleadings - Held: In an election petition, one has to plead the material facts at the outset, and the failure to plead the same is fatal to the election petition - Besides, no evidence can be led on a plea which is

not raised in the pleadings and no amount of evidence can cure the defect in the pleadings.

The appellant and the first respondent contested the election to the Arunachal Pradesh Legislative Assembly from 20-Tali (ST) Assembly Constituency, wherein the appellant was declared elected, defeating his nearest rival the first respondent, by 2713 votes. The first respondent filed Election Petition challenging the election of appellant on the ground of corrupt practice of booth capturing. A Single Judge of the High Court framed the necessary issues and the evidence of the first respondent was recorded. Thereafter, the first respondent filed application viz. Mis Case No. 05 (AP) of 2010 alleging that some of the voters of 8 polling stations had double entries in different 38 polling stations of 13 Itanagar (ST) Assembly Constituency; that 30% of voters of Tali Constituency from those 8 polling stations had cast their votes in Itanagar and not in Tali, and in their place double voting was effected on behalf of the appellant, and therefore it was necessary to get the record of the voters' counterfoils (in Form 17A) from the 38 polling stations under 13-(ST) Itanagar Assembly Constituency. The Single Judge held that the allegation made by the first respondent came under the purview of booth capturing because votes by impersonation is one of the modus operandi adopted towards accomplishment of securing votes by use of illegal method or illegal resource and that the official record would be the most reliable evidence where there was impersonation, and thereafter passed order calling for the record of registers of voters counterfoils in form 17A of 38 polling stations of 13-(ST) Itanagar Assembly Constituency.

In the instant appeal, the appellant submitted that the High Court erred in allowing the application filed by the first respondent inter alia for the reasons 1) that the ground of impersonation and double voting was not

raised in the election petition at all; 2) that impersonation or double voting would come in the category of 'improper reception of votes' and for invoking this ground one has to plead that the election was materially affected by such improper reception of votes which the first respondent had not done; 3) that 'improper reception' is different from 'booth capturing' which is a separate corrupt practice and 4) that the first respondent had filed the election petition only on the ground of booth capturing and not on the basis of improper reception of votes and he cannot be permitted to improve upon it from stage to stage.

Allowing the appeal, the Court

HELD:1.1. In an election petition, one has to plead the material facts at the outset, and the failure to plead the same is fatal to the election petition. Besides, no evidence can be led on a plea which is not raised in the pleadings and no amount of evidence can cure the defect in the pleadings. [Para 16] [676-B, C]

1.2. In the present case, the election petition filed by the first respondent made the grievance of booth capturing which is a corrupt practice covered under Section 123 (8) of the Representation of the People Act, 1951. Committing a corrupt practice is a ground to declare an election void under Section 100 (1) (d) of the Act. Booth capturing is also made an offence under Section 135 A of the Act, and the term 'booth capturing' is spelt out in the explanation to that section. As far as impersonation or double voting is concerned, such actions would amount to improper reception of votes which is a separate ground for declaring an election to be void under Section 100 (1) (d) (iii) of the said Act. This ground was not pleaded in the petition, nor was any issue framed thereon for the trial. As can be seen from the explanation to Section 135A, the main element of booth capturing is use of force or intimidation. As against

that impersonation or double voting involves cheating or deception. Thus, these two grounds deal with two different aspects of corrupt practices. [Paras 17, 18] [676-D-E; 677-G-H;678-A]

1.3. The statement of the first respondent that the appellant had appointed fake polling agents for the first respondent was a clear after thought, since if it was so, he would have pleaded the same in the election petition itself. He has not mentioned the names of the persons allegedly involved in booth capturing. Even with respect to impersonation, the only instance pointed out was that of one person, but it was not stated in the petition or in evidence as to who voted in his place. It is thus obvious that having failed to place any material with respect to either booth capturing or impersonation, the first respondent was trying to make fishing and roving inquiry to improve his case by calling for the record of the voters register from Itanagar Constituency, in support of his grievance of double voting. In the absence of any evidence with respect to the persons who at the instance of the appellant allegedly captured the booths or made double voting or impersonation in Tali Constituency, no such inference could have been drawn against the appellant. The Single Judge, therefore, was clearly in error in allowing the application made by the first respondent. [Para 19] [678-D-H]

1.4. Besides, the ground of improper reception requires a candidate to show as to how the election in so far as it concerns the returned candidate was materially affected, in view of the requirement of Section 100 (1) (d) of the Act of 1951. First respondent has stated that there were some 1304 double entries of voters. The allegation of the first respondent on evidence was only with respect to Roing and Ruhi polling station. The votes received by the appellant in both these polling stations

put together come to 1873. The appellant has won with a margin of 2713 votes. That being so the application could not have been entertained even on that ground in the absence of prima facie case that the result of the election had been materially affected. [Para 20] [649-A-C]

1.5. The inspection of ballot papers and counterfoils should be allowed very sparingly, and only when it is absolutely essential to determine the issue. The discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void. [Para 23] [682-C, D]

1.6. The order passed by the High Court is illegal and unsustainable. The judgment and order passed by the Single Judge of High Court in Misc. Case (E.P.) No.05(AP)/2010 in the Election Petition is hereby quashed and set-aside. The Misc. Case (E.P.) No.05(AP)/2010 is hereby dismissed. [Paras 25, 26] [682-H; 683-A, B]

Hari Shanker Jain v. Sonia Gandhi **2001 (8) SCC 233 : 2001 (3) Suppl. SCR 38;** *Ravinder Singh v. Janmeja Singh* **2000 (8) SCC 191 : 2000 (3) Suppl. SCR 331;** *Ram Sewak v. H.K. Kidwai* **AIR 1964 SC 1249 : 1964 SCR 235 and** *Bhabhi v. Sheo Govind* **AIR 1975 SC 2117 - relied on.**

Hari Ram v. Hira Singh **AIR 1984 SC 396 : 1984 (1) SCR 932 and** *Fulena Singh v. Vijoy Kr. Sinha* **2009(5) SCC 290 : 2009 (1) SCR 748 - referred to.**

Case Law Reference:

1984 (1) SCR 932	**referred to**	**Para 11**
2009 (1) SCR 748	**referred to**	**Para 11**
2001 (3) Suppl. SCR 38	**relied on**	**Para 16**
2000 (3) Suppl. SCR 331	**relied on**	**Para 16**

1964 SCR 235	**relied on**	**Para 23**
AIR 1975 SC 2117	**relied on**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1539 of 2012.

From the Judgment & Order dated 14.09.2010 of the Gauhati High Court in Miscellaneous Case No. 5 (AP) of 2010 in Election Petition No. 01 (AP) of 2009.

V. Giri, Manish Goswami, Mohd. Sadique T.A. (for Map & Co.) for the Appellant.

Rakesh Dwivedi, Azim H. Laskar, Bikash Kar Gupta, Abhijit Sengupta for the Respondents.

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 14.9.2010 passed by a Learned Single Judge of Gauhati High Court in Misc. Case (E.P.) No. 05(AP)/2010 in Election Petition No. 01(AP)/2009 whereby the High Court has allowed the Interlocutory application filed by the first respondent herein, and directed the District Returning Officer, Distt. Papum Pare, Arunachal Pradesh to produce the record of Register of voters' counterfoils (in Form 17A) of 38 polling stations of 13-Itanagar (ST) Assembly Constituency in that State.

Brief facts leading to this appeal are as follows:-

3. The appellant and the respondent No. 1 herein contested the election to the Arunachal Pradesh Legislative Assembly from 20-Tali (ST) Assembly Constituency held in October 2009, wherein the appellant was declared elected, defeating his nearest rival respondent No. 1, by 2713 votes. Respondent No. 1 filed Election Petition No. 01/2009 to challenge the election of the appellant on the ground of corrupt

practice of booth capturing. This 20-Tali (ST) Assembly Constituency consists of two circles viz. (i) Tali, and (ii) Pipsorang. Each of the circles was having 10 polling stations. The voting had taken place on 13.10.2009. It was alleged that on two polling stations viz. (i) 7-Roing and (ii) 2-Ruhi from circle Tali, boxes (containing EVMs) were illegally removed by the party workers of the appellant, and votes in favour of the appellant were cast by a single hand. The common voters were not allowed to exercise their voting rights as they were threatened for their lives by the miscreants of the appellant. It was claimed that polling agents of the first respondent at these two polling stations jointly reported about the happenings in these polling stations on 15.10.2009 to the Assistant Returning Officer. It was alleged that such incidents also took place on 6 more polling stations. In para 9 of the petition, it was stated that, it was necessary to bring the EVMs and counter foils of Form 17A (register of voters) of these 8-polling stations (mentioned in para-7 of the petition) for forensic test and other examination etc. before the Hon'ble Court for proper adjudication of the case. It was stated that the votes received by the appellant in these 8 polling stations were 3763, and if they were deleted from the votes of appellant, the first respondent would be declared as elected. It was prayed that the records of (i) register of voters counterfoils (Form 17-A) of these 8 polling stations described in paragraph 7 of the petition, (ii) EVMs of these 8 polling stations, and (iii) records relating to 20 Tali (ST) Assembly Constituency be called, and appellant be directed to show cause as to why those votes cast by booth capturing in 8 polling stations in favour of the appellant should not be declared as illegal, and the election order dated 22.10.2009 be not declared as void, and why the respondent No. 1 should not be declared as elected candidate.

4. The appellant contested this petition by filing a Written Statement. He submitted that no unfair means were employed by him, or by his agents, and stated that the allegation of illegal practice adopted in 8 polling stations is completely false. He

submitted that the election was conducted peacefully with free and fair means. The polling stations were guarded by police personnel who carried arms and ammunitions. There was no booth capturing or criminal intimidation at all. EVMs and voters' counterfoils were duly verified at the Receiving Centre, and there was no need to call for any of these documents, nor was there any question to declare the election void.

5. The learned Judge framed the necessary issues on 8th March, 2010 including as to whether the EVMs were illegally removed, whether any election offence of booth capturing and criminal intimidation was committed, whether the election was liable to be declared void under Section 100 of the Representation of the People Act, 1951 ("Act of 1951" or the said Act for short) and whether the first respondent was entitled to be declared as duly elected?

6. Before the evidence could start, the first respondent filed Interlocutory Application No. 6/2010 in the said Election Petition on 29th March, 2010. In para 1 thereof he submitted as follows:-

> "1. That your applicants beg to state and submit that some thousand of voters of those 8 polling stations viz. (i) Giba, (ii) Tungmar, (iii) 15-Richik, (iv) 7-Roing, (v) 10-Yarda, (vi) 5-Guchi, (vii) 8-Dotte, (viii) 2-Ruhi of 20 Tali (ST) Assembly Constituency have double entry in different 38 polling stations of 13-(ST) Itanagar Assembly Constituency. So far your applicant knowledge is concerned about 80% of the voters of 20-(ST) Tali Assembly Constituency from those 8 polling stations viz. (i) 6-Giba, (ii) 4-Tugnmar, (iii) 15-Richik, (iv) 7-Roing, (v) 10-Yarda, (vi) 5-Guchi, (vii) 8-Dotte, (viii) 2-Ruhi have cast their votes at 13-(ST) Itanagar Assembly Constituency and not at 20-(ST) Tali Constituency."

Thereafter, he gave the list of 38 polling stations of Itanagar constituency. He claimed that the total number of such voters who had their names in those 38 polling stations was 1304. He,

therefore, prayed that the record of register of voters counterfoils (Form 17-A) of the above 38 polling stations of 13-(ST) Itanagar Assembly Constituency from the District Returning Officer, Distt. Papum Pare be called.

7. The appellant opposed this application. The learned Single Judge noted the submissions on behalf of the respondent No. 1. He also noted the submissions on behalf of the appellant that there was no allegation of double enrollment, and no issue had been framed in this respect in the election petition, and therefore the application was liable to be dismissed. Having noted the submissions, the learned Single Judge rejected the said application by his order dated 31.03.2010 observing "I am of the considered view that calling of records as sought for by the applicant is not justified at this stage."

8. Thereafter, the evidence was recorded. The first respondent went into the witness box on 4th April, 2010 and in his examination in chief, he stated that he had sent a fax message to the Returning Officer of 20-Tali (ST) Assembly Constituency on 15.10.2009 alleging the booth capturing of 2-Ruhi and 7-Roing polling stations. He stated that he had complained about the booth capturing in 6 more polling stations and produced copies of complaints. He stated that there was single handed voting in favour of the appellant, and respondent's voters were threatened and not allowed to cast their votes. He further stated that a large number of voters had double entries in the electoral roll of 20 Tali (ST) as well as Itanagar (ST) Assembly Constituency. They had actually cast their votes at 38 different polling stations of 13-(ST) Itanagar Assembly Constituency, and in their place votes were cast in Tali Constituency by the miscreants of the appellant. The electoral rolls of the two constituencies were to be exhibited. He further pointed out that a vote was cast against a dead person by name Markio Tama from 2-Ruhi polling station and the death certificate of the person concerned was produced.

9. In his cross examination on 9th June, 2010, the first respondent accepted that he had not made any averments in the election petition regarding double enrollment of the voters in the two Assembly Constituencies. He accepted that he was aware that the final electoral rolls were published by the authorities concerned before the election was held, prior to which the draft roll was published for information of the voters concerned, and that he did not lodge any complaint before the authorities concerned about the double enrollment in the two constituencies. He explained it by stating that he did not know that such double enrollment had taken place. He could not say who actually cast the vote for Markio Tama, who had already expired. He accepted that he had appointed his polling agents for all the polling stations. He knew about the duties of the polling agents which included raising objection in case of detection of any impersonation during the polling time, before the Presiding Officer concerned by filling up a prescribed form alongwith a fee of Rs. 2/-. He stated that his polling agents were not allowed to enter into the polling booths and the candidates appointed by the appellant acted as fake polling agents for the first respondent. He however, accepted that he has not stated in election petition that the candidates appointed by the opposite party had acted as fake polling agents for him. He further accepted that his complaint to the Returning Officer did not mention all the 8 polling stations. It mentioned only about 2 polling stations. He also accepted that he did not mention the names of persons involved in booth capturing. The first respondent had alleged that in two polling stations viz. Ruhi and Roing, booth capturing had taken place which was on the basis that in Ruhi the first respondent got only 3 votes as against appellant getting 697 votes and in Roing he got only one vote as against the appellant getting 1196 votes. On this aspect it was put to him that there were two circles in this constituency viz. Tali and Pipsorang. The above two polling stations were in Tali Circle. The first respondent accepted that the returned candidate secured no vote in 11-Vovia polling station. He also accepted that the returned candidate secured only 7 votes in

13-Zara polling station, both falling in Pipsorang circle. Thereafter, he accepted that

> "It may be correct that securing less vote by a candidate may be due to his less attachment to the people of a particular area and it may also be the one of the reasons for losing the election."

The first respondent also accepted that Micro Observers were appointed in all the polling stations and they were provided with digital camera for their use as and when required during election for all the purposes.

10. It was at that stage that the first respondent moved another application viz. Mis Case No. 05(AP) of 2010 on 29th June, 2010. In that application he repeated that some of the voters of the 8 polling stations mentioned earlier, had double entries in different 38 polling stations of 13 Itanagar (ST) Assembly Constituency. In para 2 he stated that 30% of voters of Tali Constituency from those 8 polling stations had cast their votes in Itanagar and not in Tali, and in their place the double voting was effected on behalf of the appellant, and therefore it was necessary to get the record of the voters' counterfoils (in Form 17A) from the 38 polling stations under 13-(ST) Itanagar Assembly Constituency. The appellant opposed this application. The counsel for the appellant submitted that this was a fishing inquiry to improve the case. The learned Single Judge however observed:

> "This allegation sounds to be new one, but when it is closely examined, it also comes under the purview of booth capturing because votes by impersonation is one of the modus operandi adopted towards accomplishment of securing votes by use of illegal method or illegal resource".

11. The learned Judge referred to a judgment of this Court in *Hari Ram Vs. Hira Singh* reported in AIR 1984 SC 396, that

electoral rolls and counter foils should be called sparingly and only when sufficient material is placed before the Court. He also referred to a judgment of this Court in *Fulena Singh Vs. Vijoy Kr. Sinha* reported in 2009(5) SCC 290 wherein it was held that inspection of register of voters in Form 17-A would be permissible where a clear case is made out. The learned Single Judge held that the official record would be the most reliable evidence where there was impersonation, and thereafter passed the impugned order calling for the record of registers of voters counterfoils in form 17A of 38 polling stations of 13-(ST) Itanagar Assembly Constituency which order is challenged in the present appeal.

Submissions on behalf of the rival parties

12. Mr. Giri, learned senior counsel appearing for the appellant submitted that the learned Judge of the High Court clearly erred in allowing the second application filed by the first respondent for the simple reason that he was making a roving and fishing inquiry. Mr. Giri submitted firstly that if the respondent No.1 was concerned with the alleged double entries of the voters in the two constituencies, he ought to have challenged the double enrollment when the draft rolls were published. Secondly, this ground of impersonation and double voting was not raised in the election petition at all. Then there were no particulars provided as to whether anybody had seen the real voters not voting, and somebody else voting in their place. Thirdly, he submitted that the application made by respondent No.1 earlier having been rejected, there could not be a second application for that very purpose. Besides, impersonation or double voting would come in the category of 'improper reception of votes' which is a separate category of corrupt practice falling under Section 100 (1) (d) (iii) of the Act of 1951. For invoking this ground one has to plead that the election was materially affected by such improper reception of votes which the first respondent had not done. 'Improper reception' is different from 'booth capturing' which is a separate

corrupt practice under Section 123 (8) read with Section 135 A of the Act of 1951. The first respondent had filed the election petition only on the ground of booth capturing and not on the basis of improper reception of votes and he cannot be permitted to improve upon it from stage to stage. The sanctity and secrecy of the electoral process was important and the same could not be permitted to be violated.

13. Mr. Rakesh Dwivedi, learned senior counsel appearing for the first respondent on the other hand submitted that the first respondent had filed the election petition on the ground of booth capturing, and double voting or impersonation could be considered as facets of booth capturing. The learned Judge could not be faulted for his order since impersonation is a link between the booth capturing and improper reception. If purity of the election process is to be maintained, and if the true result of the election is to be found out, the order which is impugned in the petition was a necessary order.

Consideration of the rival submission

14. The order impugned in the present appeal has been passed on the second application in this behalf which was Misc. Case No. 05(AP)/2010 filed on 29th June, 2010 after the recording of the evidence of the first respondent. It is material to note that in his evidence the first respondent did not dispute that he had not made any averment in the election petition regarding double enrollment of some voters of the two constituencies. He also accepted that one has to object to such double entries when that draft electoral roll is published, but he explained his inaction in this behalf by stating that he did not know that such double enrollment had taken place. With respect to impersonation, he cited the instance of only one person, namely Markio Tama who had expired, but he could not state as to who voted in his place. He accepted that the polling agents have to object when such impersonation takes place, but explained inaction of his polling agents by saying that his polling agents were not allowed to enter into the polling booths

and the candidates appointed by the opposite party acted as fake polling agents for him. He however, accepted that such plea was not taken in the election petition. He also accepted that his complaint about double voting was only about 2 polling stations, and that he did not mention all the 8 polling stations in his complaint. He had to accept that he did not mention the names of persons involved in the booth capturing. The first respondent had emphasized the fact that in Ruhi he got only 3 votes as against appellant getting 697 votes. In Roing he got only one vote as against appellant getting 1196 votes. He further had to accept that there were two circles in Tali constituency, namely, Tali and Pipsorang. Ruhi and Roing were falling in Tali circle where appellant did get most of the votes. As against that in Pipsorang circle the respondent No.1 got most of the votes. Thus in Vovia polling station, the appellant got no vote at all and if we see the pleadings we find that the first respondent got 365 votes. In Zara polling station, the appellant got only 7 votes as against 335 votes of the first respondent. There are two more noteworthy polling stations. Thus, in Keba polling station the first respondent got 346 votes as against the appellant's one vote, and in Tedung polling station the first respondent got 361 votes as against only 5 votes of appellant. The first respondent had to accept that the securing of less votes may be due to the less attachment of the candidate to the people of a particular area, and may be one of the reasons to loose the election. He has also accepted that there were micro observers in all the polling stations with digital cameras.

15. In this Misc. Case No.05(AP)/2010 the first respondent once again prayed for calling for the voters counterfoils in Form 17-A from 38 polling stations of Itanagar Assembly Constituency. In para 2 of this application he now stated that 30% of the voters' of Tali Constituency from 8 polling stations had cast their votes in Itanagar, and in their place double voting was effected. Thus, in this second application, the first respondent's grievance of such double voting came down from

80% to 30%. The question is as to whether the learned Judge was right in allowing this second application for getting this additional record on the background of the material that had then come on the record.

16. To begin with, one must note that in an election petition, one has to plead the material facts at the outset, and the failure to plead the same is fatal to the election petition. For reference one may see the judgment of a bench of three judges of this Court in *Hari Shanker Jain Vs. Sonia Gandhi* reported in [2001 (8) SCC 233]. Besides, no evidence can be led on a plea which is not raised in the pleadings and no amount of evidence can cure the defect in the pleadings as held in para 7 of *Ravinder Singh Vs. Janmeja Singh* reported in [2000 (8) SCC 191].

17. (i) In the present case the election petition filed by the first respondent made the grievance of booth capturing which is a corrupt practice covered under Section 123 (8) of the Act of 1951. Committing a corrupt practice is a ground to declare an election void under Section 100 (1) (d) of the Act. Booth capturing is also made an offence under Section 135 A of the Act, and the term 'booth capturing' is spelt out in the explanation to that section.

(ii) Section 135 A alongwith the Explanation reads as follows:

135A. Offence of booth capturing - [(1)] Whoever commits an offence of booth capturing shall be punishable with imprisonment for a term which [shall not be less than one year but which may extend to three years and with fine, and where such offence is committed by a person in the service of the Government, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine.

Explanation - For the purpose of [this sub-section

and section 20B], "booth capturing" includes, among other things, all or any of the following activities, namely:-

(a) seizure of a polling station or a place fixed for the poll by any person or persons making polling authorities surrender the ballot papers or voting machines and doing of any other act which affects the orderly conduct of elections;

(b) taking possession of a polling station or a place fixed for the poll by any person or persons and allowing only his or their own supporters to exercise their right to vote and [prevent others from free exercise of their right to vote];

(c) [coercing or intimidating or threatening directly or indirectly] any elector and preventing him from going to the polling station or a place fixed for the poll to cast his vote;

(d) seizure of a place for counting of votes by any person of persons, making the counting authorities surrender the ballot papers or voting machines and the doing of anything which affects the orderly counting of votes;

(e) doing by any person in the service of Government, of all or any of the aforesaid activities or aiding or conniving at, any such activity in the furtherance of the prospects of the election of a candidate.

(2) An offence punishable under sub-section (1) shall be cognizable.

18. As far as impersonation or double voting is concerned, such actions would amount to improper reception of votes which is a separate ground for declaring an election to be void under Section 100 (1) (d) (iii) of the said Act. This ground was not pleaded in the petition, nor was any issue framed thereon

for the trial. As can be seen from the explanation to Section 135 A, the main element of booth capturing is use of force or intimidation. As against that impersonation or double voting involves cheating or deception. Thus, these two grounds deal with two different aspects of corrupt practices. That being the position, the question is as to whether the respondent No.1 could have been permitted to lead any evidence in this behalf without raising the ground in this election petition. This is particularly on the background that the earlier application I.A. No.6/2010 calling for the register of voters' counterfoils (Form 17-A) from the 38 polling stations of Itanagar had not been entertained at that stage under the order dated 31.03.2010 which was prior to recording of evidence.

19. The evidence which had come on record clearly showed that the first respondent received overwhelming votes in some polling stations, whereas the appellant received similarly overwhelming votes in other polling stations. The statement of the first respondent that the appellant had appointed fake polling agents for the first respondent was a clear after thought, since if it was so, he would pleaded the same in the election petition itself. He has not mentioned the names of the persons allegedly involved in booth capturing. Even with respect to impersonation, the only instance pointed out was that of one Markio Tama, but it was not stated in the petition or in evidence as to who voted in his place. It is thus obvious that having failed to place any material with respect to either booth capturing or impersonation, the first respondent was trying to make fishing and roving inquiry to improve his case by calling for the record of the voters register from Itanagar Constituency, in support of his grievance of double voting. In the absence of any evidence with respect to the persons who at the instance of the appellant allegedly captured the booths or made double voting or impersonation in Tali Constituency, no such inference could have been drawn against the appellant. The learned Single Judge, therefore, was clearly in error in allowing the second application made by the first respondent.

20. Besides, the ground of improper reception requires a candidate to show as to how the election in so far as it concerns the returned candidate was materially affected, in view of the requirement of Section 100 (1) (d) of the Act of 1951. First respondent has stated that there were some 1304 double entries of voters. The allegation of respondent No.1 on evidence was only with respect to Roing and Ruhi polling station. The votes received by the appellant in both these polling stations put together come to 1873. The appellant has won with a margin of 2713 votes. That being so the second application could not have been entertained even on that ground in the absence of prima facie case that the result of the election had been materially affected.

21. The learned Judge has referred to and relied upon the judgments of this Court in *Hari Ram Vs. Heera Singh* (supra) and *Fulena Singh Vs. Vijoy Kr. Sinha* (also supra) to hold that in a rare case an order of production of such record concerning the voters register could be passed. Learned Judge however made no attempt to apply the principles laid down in those cases to the facts of the present one, as can be seen from the narration above. In Hari Ram, (which is a decision of three judges) the situation was almost similar. The High Court had passed an interlocutory order directing the Returning Officer to produce the marked electoral rolls for inspection, which was on the background that the first respondent had won that election by a very small margin of 238 votes. In para 3 of the judgment, this Court accepted the contention on behalf of the appellant as well founded that the High Court erred in allowing the prayers at an interlocutory stage without examining whether proper foundation was laid for inspection which would otherwise result in adversely affecting the secrecy and sacrosanct nature of electoral process. In para 6 of *Hari Ram,* this Court observed as follows:-

> "6. To begin with, the High Court seems to have been under the impression that the Court had ample powers to direct production of any document Under Section 165 of the Indian Evidence Act. In doing so with due deference, the High Court overlooked that the Representation of People Act was a special Act and provisions of the Evidence Act or the CPC would only apply where they are not excluded. Thus, at the very outset, with due respect, the approach of the High Court was legally incorrect……."

In *Hari Ram* also there was a grievance that there were a number of dead persons for whom votes were cast. No details and particulars were given that votes were actually cast for dead persons. This Court held that it was nothing but a fishing inquiry and it clearly violated the sanctity and secrecy of the electoral process.

22. (i) Rule 93 of the Conduct of Election Rules, 1961 governs the production and inspection of election papers. Sub-rule 1 thereof is relevant for our purpose and it reads as follows:-

> "93. Production and inspection of election papers - (1) While in the custody of the district election officer or, as the case may be, the returning officer -
>
> (a) the packets of unused ballot papers with counterfoils attached thereto;
>
> (b) the packets of used ballot papers whether valid, tendered or rejected;
>
> (c) the packets of the counterfoils of used ballot papers;
>
> (d) the packets of the marked copy of the electoral roll or, as the case may be, the list maintained under sub-section (1) or sub-section (2) of section 152; and
>
> [(dd) the packets containing registers of voters in form 17-A;]

(e) the packets of the declaration by electors and the attestation of their signatures;

shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court."

(ii) Sub-rule (dd) above has been added in this rule by notification dated 24.3.1992. Form 17-A mentioned therein is related to Rule 49 (L) which is concerning the procedure about the voting by voting machines. Sub-rule 1 (a) of Rule 49 (L) requires the polling officer to record the electoral roll number of the elector as entered in the marked copy of the electoral roll in a register of voters which is maintained in Form 17-A.

23. This rule (as it then stood) came to be construed by a Constitution Bench of this Court in *Ram Sewak Vs. H.K. Kidwai* reported in AIR 1964 SC 1249. This Court held in para 7 as follows:-

"7. An order for inspection may not be granted as a matter of course : having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled :

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) the Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set

out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a more allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."

The judgment in *Ram Sewak* has been followed all through out, and the proposition with respect to inspection have been repeated in a catena of decisions of this Court, namely that inspection of ballot papers and counterfoils should be allowed very sparingly, and only when it is absolutely essential to determine the issue. As held by this Court in *Bhabhi Vs. Sheo Govind* reported in AIR 1975 SC 2117, discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void.

24. The impugned judgment has relied upon the judgment of this Court in *Fulena Singh* (supra). In that matter also there was an allegation of double voting, and the inspection of register of voters in Form 17-A was sought. In para 13 of the judgment the Court noted the submission on behalf of the respondent that the registers of voters in Form 17-A do not enjoy the same immunity as that of the other papers mentioned in clauses (a) to (d) and (e) of Rule 93 (1). This Court did not accept that submission, and held that inspection of election papers mentioned in detail in the entire Rule 93 (1) is not a matter of course unless a clear case is made out. The Court, therefore, disallowed the inspection of register of voters in Form 17-A. Thus, the reliance on *Fulena Singh* (supra) in the impugned judgment was also wholly erroneous

25. This being the position, in our view the order passed by the learned Single Judge is illegal and unsustainable. We are, therefore, required to set-aside the same.

26. Accordingly, we pass the following order:-

(i) The appeal is allowed. The judgment and order dated 14.09.2010 passed by the learned Single Judge of Gauhati High Court in Misc. Case (E.P.) No.05(AP)/2010 in Election Petition No.01(AP)/ 2009 is hereby quashed and set-aside.

(ii) The Misc. Case (E.P.) No.05(AP)/2010 is hereby dismissed.

(iii) Parties will bear their own costs.

B.B.B. Appeal allowed.

M/S TOPMAN EXPORTS

v.

COMMISSIONER OF INCOME TAX, MUMBAI

(Civil Appeal No. 1699 of 2012)

FEBRUARY 08, 2012

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

Income Tax Act, 1961 - ss. 28(iiib) & (iiid) and s.80HHC - Assessment Year 2002-2003 - Whether the entire amount received by an assessee on sale of Duty Entitlement Pass Book ('DEPB') represents profit on transfer of DEPB u/s.28(iiid) for purpose of computation of deduction in respect of profits retained for export business u/s.80HHC - Held: DEPB is "cash assistance" receivable by a person against exports under the scheme of the Government of India and falls under clause (iiib) of s.28 and is chargeable to income tax under the head "Profits and Gains of Business or Profession" even before it is transferred by the assessee - Under clause(iiid) of s.28, any profit on transfer of DEPB is chargeable to income tax under the head "Profits and Gains of Business or Profession" as an item separate from cash assistance under clause (iiib) - As DEPB has direct nexus with the cost of imports for manufacturing an export product, any amount realized by the assessees over and above the DEPB on transfer of the DEPB would represent profit on the transfer of DEPB - While the face value of the DEPB will fall under clause (iiib) of s.28, the difference between the sale value and the face value of the DEPB will fall under clause (iiid) of s.28 - High Court not right in taking the view that the entire sale proceeds of the DEPB realized on transfer of the DEPB and not just the difference between the sale value and the face value of the DEPB represent profit on transfer of the DEPB - High Court also not right in coming to the conclusion

that as the assessee did have the export turnover exceeding Rs.10 crores and as the assessee did not fulfill the conditions set out in the third proviso to s.80HHC(iii), it was not entitled to a deduction u/s.80HHC on the amount received on transfer of DEPB and with a view to get over this difficulty the assessee was contending that the profits on transfer of DEPB u/s.28(iiid) would not include the face value of the DEPB - Where an assessee has an export turnover exceeding Rs.10 crores and has made profits on transfer of DEPB under clause (d) of s.28, he would not get the benefit of addition to export profits under third or fourth proviso to sub-section (3) of s.80HHC, but he would get the benefit of exclusion of a smaller figure from "profits of the business" under explanation (baa) to s.80HHC and there is nothing in explanation (baa) to s.80HHC to show that this benefit of exclusion of a smaller figure from "profits of the business" will not be available to an assessee having an export turnover exceeding Rs.10 crores - Well-settled principle of statutory interpretation of a taxing statute that a subject will be liable to tax and will be entitled to exemption from tax according to the strict language of the taxing statute and if as per the words used in explanation (baa) to s.80HHC read with the words used in clauses (iiid) and (iiie) of s.28, the assessee was entitled to a deduction u/s.80HHC on export profits, the benefit of such deduction cannot be denied to the assessee - Interpretation of Statutes - Exemption provision.

Customs - DEPB scheme - Nature and objective of - Held: The objective of DEPB scheme is to neutralize the incidence of customs duty on the import content of the export products - Hence, it has direct nexus with the cost of the imports made by an exporter for manufacturing the export products - The neutralization of the cost of customs duty under the DEPB scheme, however, is by granting a duty credit against the export product and this credit can be utilized for paying customs duty on any item which is freely importable - DEPB is issued against the exports to the exporter and is transferable by the exporter - Hand Book on DEPB issued by

the Government of India - Paragraphs 4.37 and 4.42 - Export and Import Policy, 1997-2002 as notified by the Central Government in the Notification No.1(RE-99)/ 1997-2202 dated 31st March, 2000 - Paragraphs 7.14, 7.15, 7.16 and 7.38.

Words and Phrases - "Profit" - Meaning of - Held: The word "profit" means the gross proceeds of a business transaction less the costs of the transaction - 'Profits' imply a comparison of the value of an asset when the asset is acquired with the value of the asset when the asset is transferred and the difference between the two values is the amount of profit or gain made by a person.

The instant appeals were filed against the judgment of the High Court holding that the entire amount received by an assessee on sale of the Duty Entitlement Pass Book ('DEPB') represents profit on transfer of DEPB under Section 28(iiid) of the Income Tax Act, 1961 for the purpose of computation of deduction in respect of profits retained for export business under Section 80HHC of the Act.

The appellants submitted that DEPB was cash assistance receivable by a person against exports and was covered under clause (iiib) of Section 28 of the Act and it has a direct relation with the costs of the inputs imported by an exporter from manufacturer of the export product, hence, the DEPB cannot form part of the profits on transfer of DEPB under Section 28(iiid) of the Act; that as and when DEPB is transferred and the sale value realized on such transfer of DEPB is more than the face value of the DEPB, the difference between the sale value and face value of the DEPB will constitute profit on transfer of DEPB and would be covered under clause (iiid) of Section 28 of the Act; and that if the entire sale proceeds of the DEPB is treated as profits arising on transfer of DEPB for the purpose of clause (iiid) of Section 28 as contended by the Revenue, then the

assessee will be taxed twice for the same income, once as cash assistance under clause (iiib) of Section 28 equivalent to the face value of the DEPB and for the second time as profit on transfer of DEPB under clause (iiid) of Section 28, the face value of the DEPB being part of the sale proceeds of the DEPB on transfer and that as the legislature could not have intended such double taxation of the same income, the interpretation suggested by the Revenue should not be accepted by the Court.

Disposing of the appeals, the Court

HELD: 1. For appreciating the nature of the DEPB, paragraphs 4.37 and 4.42 of the Hand Book on DEPB issued by the Government of India and paragraphs 7.14, 7.15, 7.16 and 7.38 of the Export and Import Policy, 1997-2002 as notified by the Central Government in the Notification No.1(RE-99)/ 1997-2202 dated 31st March, 2000 are relevant. On a reading of the aforesaid paragraphs of the Hand Book on DEPB and the Export and Import Policy of the Government of India, 1997-2002, it is clear that the objective of DEPB scheme is to neutralize the incidence of customs duty on the import content of the export products. Hence, it has direct nexus with the cost of the imports made by an exporter for manufacturing the export products. The neutralization of the cost of customs duty under the DEPB scheme, however, is by granting a duty credit against the export product and this credit can be utilized for paying customs duty on any item which is freely importable. DEPB is issued against the exports to the exporter and is transferable by the exporter. [Para 10] [703-D; 705-E-F]

IPCA Laboratories Ltd. v. Deputy C.I.T. **(2004) 266 ITR 521 (SC) and** *Commissioner of the Income Tax vs. Kalpataru Colours and Chemicals,* **[ITA (L) 2887 of 2009] - referred to.**

2.1. It is clear from the provisions of Section 28 that

under clause (iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India is by itself income chargeable to income tax under the head "Profits and Gains of Business or Profession". DEPB is a kind of assistance given by the Government of India to an exporter to pay customs duty on its imports and it is receivable once exports are made and an application is made by the exporter for DEPB. Therefore, DEPB is "cash assistance" receivable by a person against exports under the scheme of the Government of India and falls under clause (iiib) of Section 28 and is chargeable to income tax under the head "Profits and Gains of Business or Profession" even before it is transferred by the assessee. [Paras 11, 12] [706-F-H; 707-A]

2.2. Under clause (iiid) of Section 28, any profit on transfer of DEPB is chargeable to income tax under the head "Profits and Gains of Business or Profession" as an item separate from cash assistance under clause (iiib). The word "profit" means the gross proceeds of a business transaction less the costs of the transaction. 'Profits', therefore, imply a comparison of the value of an asset when the asset is acquired with the value of the asset when the asset is transferred and the difference between the two values is the amount of profit or gain made by a person. As DEPB has direct nexus with the cost of imports for manufacturing an export product, any amount realized by the assessees over and above the DEPB on transfer of the DEPB would represent profit on the transfer of DEPB. [Para 13] [707-B, G-H; 708-A]

2.3. While the face value of the DEPB will fall under clause (iiib) of Section 28 of the Act, the difference between the sale value and the face value of the DEPB will fall under clause (iiid) of Section 28 of the Act and the High Court was not right in taking the view in the impugned judgment that the entire sale proceeds of the

DEPB realized on transfer of the DEPB and not just the difference between the sale value and the face value of the DEPB represent profit on transfer of the DEPB. [Para 14] [708-B-C]

E.D. Sassoon & Company Ltd. and Others v. Commissioner of Income-Tax, Bombay City **(1954) 26 ITR 27 (SC) - relied on.**

The Spanish Prospecting Company Limited **(1911) I Ch. 92 - referred to.**

Black's Law Dictionary (Fifth Edition) - referred to.

3.1. The first reason given by the High Court is that clause (iiia) of Section 28 treats profits on the sale of an import license as income chargeable to tax and when the license is sold, the entire amount is treated as profits of business under clause (iiia) of Section 28 and thus there is no justification to treat the amount which is received by an exporter on the transfer of the DEPB any differently than the profits which are made on the sale of an import license under clause (iiia) of Section 28 of the Act. In taking the view that when the import license is sold the entire amount is treated as profits of business, the High Court has visualized a situation where the cost of acquiring the import license is nil. The cost of acquiring DEPB, on the other hand, is not nil because the person acquires it by paying customs duty on the import content of the export product and the DEPB which accrues to a person against exports has a cost element in it. Accordingly, when DEPB is sold by a person, his profit on transfer of DEPB would be the sale value of the DEPB less the face value of DEPB which represents the cost of the DEPB. [Para 15] [708-D-G]

3.2. The second reason given by the High Court in the impugned judgment is that under the DEPB scheme,

DEPB is given at a percentage of the FOB value of the exports so as to neutralize the incidence of customs duty on the import content of the export products, but the exporter may not himself utilize the DEPB for paying customs duty but may transfer it to someone else and therefore the entire sum received on transfer of DEPB would be covered under clause (iiid) of Section 28. The High Court has failed to appreciate that DEPB represents part of the cost incurred by a person for manufacture of the export product and hence even where the DEPB is not utilized by the exporter but is transferred to another person, the DEPB continues to remain as a cost to the exporter. When, therefore, DEPB is transferred by a person, the entire sum received by him on such transfer does not become his profits. It is only the amount that he receives in excess of the DEPB which represents his profits on transfer of the DEPB. [Para 15] [708-G, H; 709-A, B]

3.3. The High Court has sought to meet the argument of double taxation made on behalf of the assessees by holding that where the face value of the DEPB was offered to tax in the year in which the credit accrued to the assessee as business profits, then any further profit arising on transfer of DEPB would be taxed as profits of business under Section 28(iiid) in the year in which the transfer of DEPB took place. This view of the High Court is contrary to the language of Section 28 of the Act under which "cash assistance" received or receivable by any person against exports such as the DEPB and "profit on transfer of the DEPB" are treated as two separate items of income under clauses (iiib) and (iiid) of Section 28. If accrual of DEPB and profit on transfer of DEPB are treated as two separate items of income chargeable to tax under clauses (iiib) and (iiid) of Section 28 of the Act, then DEPB will be chargeable as income under clause (iiib) of Section 28 in the year in which the person applies for

DEPB credit against the exports and the profit on transfer of the DEPB by that person will be chargeable as income under clause (iiid) of Section 28 in his hands in the year in which he makes the transfer. Accordingly, if in the same previous year the DEPB accrues to a person and he also earns profit on transfer of the DEPB, the DEPB will be business profits under clause (iiib) and the difference between the sale value and the DEPB (face value) would be the profits on the transfer of DEPB under clause (iiid) for the same assessment year. Where, however, the DEPB accrues to a person in one previous year and the transfer of DEPB takes place in a subsequent previous year, then the DEPB will be chargeable as income of the person for the first assessment year chargeable under clause (iiib) of Section 28 and the difference between the DEPB credit and the sale value of the DEPB credit would be income in his hands for the subsequent assessment year chargeable under clause (iiid) of Section 28. The interpretation suggested by this Court, therefore, does not lead to double taxation of the same income, which the legislature must be presumed to have avoided. [Para 16] [709-C-H; 710-A-C]

3.4. The High Court has held that as the assessees had an export turnover exceeding Rs.10 crores and did not fulfill the conditions set out in the third proviso to Section 80HHC(3) of the Act, the assessees were not entitled to a deduction under Section 80HHC on the amount received on transfer of DEPB and to get over this difficulty the assessees have contended that the profits on transfer of DEPB in Section 28(iiid) would not include the face value of the DEPB so that the assessees get a deduction under Section 80HHC on the face value of the DEPB. This finding of the High Court is not based on an accurate understanding of the scheme of Section 80HHC of the Act. [Para 17] [710-D, E]

4.1. Sub-section (1) of Section 80HHC makes it clear that an assessee engaged in the business of export out of India of any goods or merchandise to which this Section applies shall be allowed, in computing his total income, a deduction to the extent of profits referred to in sub-section (1B), derived by him from the export of such goods or merchandise. Sub-section (1B) of Section 80HHC gives the percentages of deduction of the profits allowable for the different assessment years from the assessment years 2001-2002 to 2004-2005. Sub-section (3)(a) of Section 80HHC provides that where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such exports shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee. In the case of K. Ravindranathan Nair, the formula in sub-section (3)(a) of Section 80HHC was stated by this Court to be as follows:

Profits derived = Profits of the business x Export Turnoverfrom exports Total Turnover [Para 19] [714-B-F]

4.2. Explanation (baa) under Section 80HHC states that "profits of the business" in the aforesaid formula means the profits of the business as computed under the head "Profits and Gains of Business or Profession" as reduced by (1) ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of Section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of similar nature including any such receipts and (2) the profits of any branch, office, warehouse or any other establishment of the assessee situated outside India. Thus, ninety per cent of the DEPB which is "cash assistance" against exports and is covered under clause (iiib) of Section 28 will get

excluded from the "profits of the business" of the assessee if such DEPB has accrued to the assessee during the previous year. Similarly, if during the same previous year, the assessee has transferred the DEPB and the sale value of such DEPB is more than the face value of the DEPB, the difference between the sale value of the DEPB and the face value of the DEPB will represent the profit on transfer of DEPB covered under clause (iiid) of Section 28 and ninety per cent of such profit on transfer of DEPB certificate will get excluded from "profits of the business". But, where the DEPB accrues to the assessee in the first previous year and the assessee transfers the DEPB certificate in the second previous year, as appears to have happened in the present batch of cases, only ninety per cent of the profits on transfer of DEPB covered under clause (iiid) and not ninety per cent of the entire sale value including the face value of the DEPB will get excluded from the "profits of the business". Thus, where the ninety per cent of the face value of the DEPB does not get excluded from "profits of the business" under explanation (baa) and only ninety per cent of the difference between the face value of the DEPB and the sale value of the DEPB gets excluded from "profits of the business", the assessee gets a bigger figure of "profits of the business" and this is possible when the DEPB accrues to the assessee in one previous year and transfer of the DEPB takes place in the subsequent previous year. The result in such case is that a higher figure of "profits of the business'" becomes the multiplier in the aforesaid formula under sub-section (3)(a) of Section 80HHC for arriving at the figure of profits derived from exports. [Para 20] [714-F-H; 715-A-F]

4.3. To the figure of profits derived from exports worked out as per the aforesaid formula under sub-section (3)(a) of Section 80HHC, the additions as mentioned in first, second, third and fourth proviso under

sub-section (3) are made to profits derived from exports. Under the first proviso, ninety per cent of the sum referred to in clauses (iiia), (iiib) and (iiic) of Section 28 are added in the same proportion as export turnover bears to the total turnover of the business carried on by the assessee. In this first proviso, there is no addition of any sum referred to in clause (iiid) or clause (iiie). Hence, profit on transfer of DEPB or DFRC are not to be added under the first proviso. Where therefore in the previous year no DEPB or DFRC accrues to the assessee, he would not be entitled to the benefit of the first proviso to sub-section (3) of Section 80HHC because he would not have any sum referred to in clause (iiib) of Section 28 of the Act. The second proviso to sub-section (3) of Section 80HHC states that in case of an assessee having export turnover not exceeding Rs.10 crores during the previous year, after giving effect to the first proviso, the export profits are to be increased further by the amount which bears to ninety per cent of any sum referred to in clauses (iiid) and (iiie) of Section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee. The third proviso to sub-section (3) states that in case of an assessee having export turnover exceeding Rs.10 crores, similar addition of ninety per cent of the sums referred to in clause (iiid) of Section 28 only if the assessee has the necessary and sufficient evidence to prove that (a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and (b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme. Therefore, if the assessee having export turnover of more than Rs.10 crores does not satisfy these two conditions, he will not be entitled to the addition of profit on transfer of DEPB under the

third proviso to sub-section (3) of Section 80HHC. [Para 21] [715-G, H; 716-A-F]

4.4. Where an assessee has an export turnover exceeding Rs.10 crores and has made profits on transfer of DEPB under clause (d) of Section 28, he would not get the benefit of addition to export profits under third or fourth proviso to sub-section (3) of Section 80HHC, but he would get the benefit of exclusion of a smaller figure from "profits of the business" under explanation (baa) to Section 80HHC of the Act and there is nothing in explanation (baa) to Section 80HHC to show that this benefit of exclusion of a smaller figure from "profits of the business" will not be available to an assessee having an export turnover exceeding Rs.10 crores. In other words, where the export turnover of an assessee exceeds Rs.10 crores, he does not get the benefit of addition of ninety per cent of export incentive under clause (iiid) of Section 28 to his export profits, but he gets a higher figure of profits of the business, which ultimately results in computation of a bigger export profit. The High Court, therefore, was not right in coming to the conclusion that as the assessee did have the export turnover exceeding Rs.10 crores and as the assessee did not fulfill the conditions set out in the third proviso to Section 80HHC (iii), the assessee was not entitled to a deduction under Section 80HHC on the amount received on transfer of DEPB and with a view to get over this difficulty the assessee was contending that the profits on transfer of DEPB under Section 28 (iiid) would not include the face value of the DEPB. It is a well-settled principle of statutory interpretation of a taxing statute that a subject will be liable to tax and will be entitled to exemption from tax according to the strict language of the taxing statute and if as per the words used in explanation (baa) to Section 80HHC read with the words used in clauses (iiid) and (iiie) of Section 28, the assessee was entitled to a deduction

under Section 80HHC on export profits, the benefit of such deduction cannot be denied to the assessee. [Para 22] [716-G-H; 717-A-F]

Commissioner of Income-Tax v. K. Ravindranathan Nair (2007) 295 ITR 228 (SC) - referred to.

5. The Assessing Officer is directed to compute the deduction under Section 80HHC in the case of the appellants in accordance with this judgment. [Para 23] [717-G]

Case Law Reference:

(2004) 266 ITR 521 (SC)	**referred to**	**Para 3**
ITA (L) 2887 of 2009	**referred to**	**Para 5**
(1954) 26 ITR 27 (SC)	**relied on**	**Para 13**
(2007) 295 ITR 228 (SC)	**referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1699 of 2012 etc.

From the Judgment & Order dated 29.06.2010 of the High Court of Judicature at Bombay in Income Tax Appeal No. (L) 3019 of 2009.

WITH

Civil Appeal Nos. 1700, 1701, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723-1724, 1725, 1726-1727, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1754, 1755, 1756, 1757, 1758-1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796-1799, 1800, 1801, 1802, 1803,

1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1850, 1851, 1852, 1853, 1854, 1855-1856, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871-1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880-1881, 1882-1883 1884-1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913 of 2012.

S. Ganesh, Shyam Divan, R.P. Bhatt, V. Shakhar, Porus Kaka, Kavin Gulati, R.N. Karanjawala, Ruby Singh Ahuja, Ronak Dhillon, Deepti Sarin, Akhileshwar Sharma, Manik Karanjawala (for Karanjawala & Co.), S.C. Tiwari, Jatin Zaveri, Gaurav Aggarwal, Nikhil Nayyar, T.V.S. Raghavendra Sreyas, Rajendra Singhvi, Maitreyi Singhvi, K.K.L. Gautam, Brij Bhushan, M.P. Shorawala, Jyoti Saxena, Sashi Kiran, Atulbhai K. Jasani, Rashmikumar Manilal Vithlani, Aditi Singh, S. Ravi Shankar, Vibha Datta Makhijia, Rustom, B. Hathikhanawala, Dr. P. Daniel, Bharat L. Gandhi, Vijay Kumar, Jay Savla, Renuka Sahu, Ragvesh Singh, P.S. Sudheer, Rishi Maheswari, V. Lakshmikumaran, Tarun Jain, M.P. Devanath, Vandana Sehgal, Rohal Thawani, Hardeep Singh Anand, Ankur Saigal, Abhay A. Jena, Bina Gupta, Gaurav Singh, N.D.B. Raju, Akhileshwar Sharma, Bharathi Raju, N. Ganpathy, A.R. Thadani, Ashwani Kumar, Arijit Prasad, D.D. Kamat, Aman Ahluwalia Kunal Bahri, Fuzail A. Ayyubi Abhigya, Jatin Rajput, Deepakshi Jain, Vishal Saxena, B.V. Balaram Das for the appearing parties.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. Delay condoned. Leave granted in Special Leave Petitions.

2. These are appeals by way of special leave under Article 136 of the Constitution against the judgment and orders of the

Bombay High Court holding that the entire amount received by an assessee on sale of the Duty Entitlement Pass Book (for short 'the DEPB') represents profit on transfer of DEPB under Section 28(iiid) of the Income Tax Act, 1961 (for short 'the Act') for the purpose of the computation of deduction in respect of profits retained for export business under Section 80HHC of the Act.

3. For appreciating the controversy between the parties, we will state the facts of only the lead case of M/s Topman Exports (hereinafter referred to as 'the assessee'). The assessee is a manufacturer and exporter of fabrics and garments. During the previous year relevant to the assessment year 2002-2003, the assessee sold the DEPB and DFRC (Duty Free Replenishment Certificate) which had accrued to the assessee on export of its products. The assessee filed a return for the assessment year 2002-2003 claiming a deduction of Rs.83,69,303/- under Section 80HHC of the Act. The Assessing Officer held that if the profit on transfer of the export incentives was deducted from the profits of the assessee, the figure would be a loss and there will be no positive income of the assessee from its export business and the assessee will not be entitled to any deduction under Section 80HHC of the Act as has been held by this Court in *IPCA Laboratories Ltd. v. Deputy C.I.T.* (2004) 266 ITR 521 (SC). Aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) and contended that the profits on the transfer of DEPB and DFRC were not the sale proceeds of DEPB and DFRC amounting to Rs.2,06,84,841/- and Rs.1,65,616/- respectively, but the difference between the sale value and face value of DEPB and DFRC amounting to Rs.14,35,097/- and Rs.19,902/- respectively and if these figures of profits on transfer of DEPB and DFRC are taken, the income of assessee would be positive and the assessee would be entitled to the deduction under Section 80HHC of the Act. The Commissioner of Income Tax (Appeals) rejected this contention of the assessee and held that the assessee had received an

amount of Rs.2,06,84,841/- on sale of DEPB and an amount of Rs.1,65,612/- on sale of DFRC and the costs of acquisition of the DEPB and DFRC are to be taken as nil and hence the entire sale proceeds of DEPB and DFRC realized by the assessee are to be treated as profits on transfer of DEPB and DFRC for working out the deduction under section 80HHC of the Act and directed the Assessing Officer to work out the deduction under Section 80HHC of the Act accordingly.

4. Aggrieved, the assessee filed an appeal before the Income Tax Appellate Tribunal (for short 'the Tribunal'). A Special Bench of the Tribunal heard the appeal and held that there was a direct relation between the entitlement under the DEPB Scheme and the custom duty component in the cost of imports used in the manufacture of the export product. The Tribunal further held that DEPB accrues to the exporter soon after export is made and application is filed for DEPB and DEPB is a "cash assistance" receivable by the assessee and is covered under clause (iiib) of Section 28 of the Act, whereas profit on the transfer of DEPB takes place on a subsequent date when the DEPB is sold by the assessee and is covered under clause (iiid) of Section 28 of the Act. The Tribunal compared the language of Section 28(iiib) of the Act in which the expression "cash assistance" is used, with the language of Section 28(iiia), (iiid) and (iiie) of the Act in which the expression "profit" is used and held that the words "profit on transfer" in Section 28 (iiid) and (iiie) of the Act would not represent the entire sale value of DEPB but the sale value of DEPB less the face value of the DEPB. With these reasons, the Tribunal set aside the orders of the Assessing Officer and the Commissioner of Income Tax (Appeals) and directed the Assessing Officer to compute the deduction under Section 80HHC of the Act accordingly.

5. This judgment of the Special Bench of the Tribunal was followed by the Tribunal in all the cases in appeal before us. Against the judgment and orders of the Tribunal, the

Commissioner of Income Tax, Mumbai filed appeals in all the cases under Section 260A of the Act before the High Court and by the impugned orders the High Court disposed of the appeals in terms of the judgment delivered in Commissioner of the Income Tax vs. Kalpataru Colours and Chemicals (ITA(L) 2887 of 2009). In *Commissioner of the Income Tax vs. Kalpataru Colours and Chemicals* (supra), the High Court formulated the following two substantial questions of law:

> "(a) Whether the Tribunal is justified in holding that the entire amount received on the sale of the Duty Entitlement Passbook does not represent profits chargeable under Section 28(iiid) of the Income Tax Act, 1961 and that the face value of the Duty Entitlement Passbook shall be deducted from the sale proceeds;
>
> (b) Whether the Tribunal is justified in holding that the face value of the Duty Entitlement Passbook is chargeable to tax under Section 28(iiib) at the time of accrual of income i.e. when the application for Duty Entitlement Passbook is filed with the competent authority pursuant to the exports made and that the profits on the sale of Duty Entitlement Passbook representing the excess of the sale proceeds over the face value is liable to be considered under Section 28(iiid) at the time of sale."

In its judgment, on the first question of law formulated under (a), the High Court held that the Tribunal was not justified in holding that the entire amount received on the sale of the DEPB does not represent profits chargeable under Section 28(iiid) of the Act and in holding that the face value of the DEPB shall be deducted from the sale proceeds of the DEPB. On the second question of law formulated under (b), the High Court in its judgment did not agree with the Tribunal that the face value of DEPB is chargeable to tax as income of the assessee under Section 28(iiib) of the Act and instead held that the entirety of sale consideration for transfer of DEPB would fall within the purview of Section 28(iiid) of the Act. In some of the cases, the

appellants filed review petitions before the High Court, but the High Court dismissed the review petitions.

6. Learned counsel for the appellants submitted, relying on the provisions of the DEPB Scheme, that the Tribunal was right in coming to the conclusion that DEPB was cash assistance receivable by a person against exports and accrued to the exporter as soon as he files an application for DEPB. They submitted that DEPB was therefore chargeable to income tax under the head "Profits and Gains of Business or Profession" under clause (iiib) of Section 28 of the Act. They submitted that the contention of the Revenue that DEPB would be income chargeable to tax only on transfer and would be covered under clause (iiid) of Section 28 of the Act is not correct. They submitted that it will be clear from different provisions of the DEPB Scheme that the object of granting DEPB to an exporter is to neutralize the incidence of custom duties which has been incurred on the import component of the export product and this neutralization is achieved by grant of duty credit of the amount specified in the DEPB Scheme. They submitted that the Tribunal, therefore, was right in coming to the conclusion that there was a direct relation between the DEPB and the cost of inputs imported for manufacture of the export product.

7. Learned counsel for the appellants submitted that since DEPB was cash assistance receivable by a person against exports and was covered under clause (iiib) of Section 28 of the Act and it has a direct relation with the costs of the inputs imported by an exporter from manufacturer of the export product, the DEPB cannot form part of the profits on transfer of DEPB under Section 28(iiid) of the Act. They argued that as and when DEPB is transferred and the sale value realized on such transfer of DEPB is more than the face value of the DEPB, the difference between the sale value and face value of the DEPB will constitute profit on transfer of DEPB and would be covered under clause (iiid) of Section 28 of the Act. They argued that if the intention of the legislature was to cover the entire sale

proceeds arising on transfer of DEPB under clause (iiid) of Section 28 of the Act then they would have used the expression "sale proceeds" instead of profit on transfer of DEPB in clause (iiid) of Section 28 of the Act.

8. Learned counsel for the appellants argued that if the entire sale proceeds of the DEPB is treated as profits arising on transfer of DEPB for the purpose of clause (iiid) of Section 28 as contended by the Revenue, then the assessee will be taxed twice for the same income, once as cash assistance under clause (iiib) of Section 28 equivalent to the face value of the DEPB and for the second time as profit on transfer of DEPB under clause (iiid) of Section 28, the face value of the DEPB being part of the sale proceeds of the DEPB on transfer. They submitted that as the legislature could not have intended such double taxation of the same income, the interpretation suggested by the Revenue should not be accepted by the Court. They submitted that in the present batch of cases, DEPB accrued to the assessees in the first year when the assessees made the export and applied for DEPB and the assessee sold the DEPB in subsequent year and the Revenue has taken a stand that in the subsequent year, the entire sale proceeds comprising both the face value of the DEPB and the profits on transfer of DEPB are covered under Section 28(iiid) of the Act and this stand of the Revenue has been accepted by the High Court in the impugned orders on an incorrect interpretation of the DEPB scheme and the provisions of Section 28 of the Act and 80HHC of the Act.

9. Learned counsel for the Revenue, on the other hand, supported the impugned judgment and orders of the High Court and submitted that profit on transfer of DEPB would represent the entire sale value realized by the assessee on transfer of the DEPB. He submitted that the High Court has rightly held that the assessee does not incur any cost in obtaining the DEPB. He argued that DEPB is an export incentive granted by the Government under DEPB Scheme and it has no direct

relation with the cost of purchases made by the assessee and therefore the assessee is not entitled to deduct the face value of the DEPB from the sale proceeds for determining the profit arising on transfer of DEPB and the entire sale proceeds of the DEPB represent the profits earned by the assessee on transfer of the DEPB. He argued that the findings of the Tribunal that there is a direct relation between DEPB and the costs incurred by the assessee for importing inputs for manufacture of export products is, therefore, not correct and the High Court was right in setting aside the findings of the Tribunal and in coming to the conclusion that the entire sale proceeds of DEPB represent the profits on transfer of DEPB within the meaning of clause (iiid) of Section 28 of the Act.

10. For appreciating the nature of the DEPB, paragraphs 4.37 and 4.42 of the Hand Book on DEPB issued by the Government of India and paragraphs 7.14, 7.15, 7.16 and 7.38 of the Export and Import Policy, 1997-2002 as notified by the Central Government in the Notification No.1(RE-99)/ 1997-2202 dated 31st March, 2000 are extracted hereinbelow:

Hand Book on DEPB

"4.37 Duty Entitlement Passbook Scheme (DEPB)

The Policy relating to Duty Entitlement Passbook (DEPB) Scheme is given in Chapter-4 of the Policy. The duty credit under the scheme shall be calculated by taking into account the deemed import content of the said export product as per SION and the basic custom duty payable on such deemed imports. The value addition achieved by export of such product shall also be taken into account while determining the rate of duty credit under the scheme.

4.42 Utilization of DEPB credit.

The credit under DEPB shall be utilized for payment of customs duty on any item which is freely importable.

Export and Import Policy, 1997-2002

7.14 For exporters not desirous of going through the licensing route, an optional facility is given under DEPB. The objective of Duty Entitlement Passbook Scheme is to neutralize the incidence of Customs duty on the import content of the export product. The neutralization shall be provided by way of grant of duty credit against the export product.

Under the Duty Entitlement Passbook Scheme (DEPB), an exporter may supply for credit, as a specified percentage of FOB value of exports, made in freely convertible currency. The credit shall be available against such export products and at such rates as may be specified by the Director General of Foreign Trade by way of public notice issued in this behalf, for import of raw materials, intermediates, components, parts packing material etc.

The holder of Duty Entitlement Passbook Scheme (DEPB) shall have the option to pay additional customs duty, if any, in cash as well.

Validity 7.15. The DEPB shall be valid for a period of 12 months from the date of issue.

7.16 The DEPB and/or the items imported against it are freely transferable. The transfer of DEPB shall however be for import at the port specified in the DEPB which shall be the port from where exports have been made. However, imports from a port other than the port of export shall be allowed under TRA facility as per the terms and conditions of the notification issued by Department of Revenue.

7.38 (i) An application for grant of credit under DEPB may be made to the licensing authority concerned in the form given in Appendix-11C alongwith the documents prescribed therein. The provisions of paragraphs 7.2 shall

be applicable for DEPB also. The FOB value in free foreign exchange shall be converted into Indian rupees as per the authorized dealer's T/T buying rate, prevalent on the date of negotiation/purchase/collection of document. The DEPB rate of credit shall be applied on the FOB value so arrived. In case of advance payment, the FOB value in free foreign exchange shall be converted into Indian rupees as per the authorized dealer's T/T buying rate, prevalent on the date of receipt of advance payment.

(ii) The DEPB shall be initially issued with non transferable endorsement in such cases where realization has not taken place to enable the exporter to effect import for his own use. However, upon receipt of realization, the DEPB shall be endorsed transferable. In such cases where the applicant applies for DEPB after realization, the DEPB shall be issued with transferable endorsement."

On a reading of the aforesaid paragraphs of the Hand Book on DEPB and the Export and Import Policy of the Government of India, 1997-2002, it is clear that the objective of DEPB scheme is to neutralize the incidence of customs duty on the import content of the export products. Hence, it has direct nexus with the cost of the imports made by an exporter for manufacturing the export products. The neutralization of the cost of customs duty under the DEPB scheme, however, is by granting a duty credit against the export product and this credit can be utilized for paying customs duty on any item which is freely importable. DEPB is issued against the exports to the exporter and is transferable by the exporter.

11. We may now consider the relevant provisions of Section 28 for determining whether DEPB will fall under clause (iiib) or under clause (iiid) of Section 28. The relevant provisions of Section 28 of the Act are reproduced hereunder:

Section 28. Profits and Gains of Business or Profession.-The following income shall be chargeable to

income-tax under the head "Profits and gains of business or profession",--

.....

(iiia) profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control)Act, 1947 (18 of 1947);

(iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India;]

(iiic) .....

(iiid) any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992)

(iiie) any profit on the transfer of the Duty Free Replenishment Certificate, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992)."

12. It will be clear from the aforesaid provisions of Section 28 that under clause (iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India is by itself income chargeable to income tax under the head "Profits and Gains of Business or Profession". DEPB is a kind of assistance given by the Government of India to an exporter to pay customs duty on its imports and it is receivable once exports are made and an application is made by the exporter for DEPB. We have, therefore, no doubt that DEPB is "cash assistance" receivable by a person against exports under the scheme of the Government of India and falls under clause (iiib) of Section 28

and is chargeable to income tax under the head "Profits and Gains of Business or Profession" even before it is transferred by the assessee.

13. Under clause (iiid) of Section 28, any profit on transfer of DEPB is chargeable to income tax under the head "Profits and Gains of Business or Profession" as an item separate from cash assistance under clause (iiib). The word "profit" means the gross proceeds of a business transaction less the costs of the transaction. To quote from Black's Law Dictionary (Fifth Edition):

> "**Profit.** Most commonly, the gross proceeds of a business transaction less the costs of the transaction, i.e. net proceeds. Excess of revenues over expenses for a transaction; sometimes used synonymously with net income for the period. Gain realized from business or investment over and above expenditures."

This Court in *E.D. Sassoon & Company Ltd. and Others v. Commissioner of Income-Tax, Bombay City* (1954) 26 ITR 27 (SC) has quoted the following observations of Lord Justice Fletcher Moulton in The Spanish Prospecting Company Limited [(1911) I Ch. 92] on the meaning of the word "profits":

> "…. 'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates."

'Profits', therefore, imply a comparison of the value of an asset when the asset is acquired with the value of the asset when the asset is transferred and the difference between the two values is the amount of profit or gain made by a person. As DEPB has direct nexus with the cost of imports for manufacturing an export product, any amount realized by the assessees over and

above the DEPB on transfer of the DEPB would represent profit on the transfer of DEPB.

14. We are, thus, of the considered opinion that while the face value of the DEPB will fall under clause (iiib) of Section 28 of the Act, the difference between the sale value and the face value of the DEPB will fall under clause (iiid) of Section 28 of the Act and the High Court was not right in taking the view in the impugned judgment that the entire sale proceeds of the DEPB realized on transfer of the DEPB and not just the difference between the sale value and the face value of the DEPB represent profit on transfer of the DEPB.

15. We may now point out the errors in the impugned judgment of the High Court. The first reason given by the High Court is that clause (iiia) of Section 28 treats profits on the sale of an import license as income chargeable to tax and when the license is sold, the entire amount is treated as profits of business under clause (iiia) of Section 28 and thus there is no justification to treat the amount which is received by an exporter on the transfer of the DEPB any differently than the profits which are made on the sale of an import license under clause (iiia) of Section 28 of the Act. In taking the view that when the import license is sold the entire amount is treated as profits of business, the High Court has visualized a situation where the cost of acquiring the import license is nil. The cost of acquiring DEPB, on the other hand, is not nil because the person acquires it by paying customs duty on the import content of the export product and the DEPB which accrues to a person against exports has a cost element in it. Accordingly, when DEPB is sold by a person, his profit on transfer of DEPB would be the sale value of the DEPB less the face value of DEPB which represents the cost of the DEPB. The second reason given by the High Court in the impugned judgment is that under the DEPB scheme, DEPB is given at a percentage of the FOB value of the exports so as to neutralize the incidence of customs duty on the import content of the export products, but the exporter may not himself utilize the DEPB for paying customs

duty but may transfer it to someone else and therefore the entire sum received on transfer of DEPB would be covered under clause (iiid) of Section 28. The High Court has failed to appreciate that DEPB represents part of the cost incurred by a person for manufacture of the export product and hence even where the DEPB is not utilized by the exporter but is transferred to another person, the DEPB continues to remain as a cost to the exporter. When, therefore, DEPB is transferred by a person, the entire sum received by him on such transfer does not become his profits. It is only the amount that he receives in excess of the DEPB which represents his profits on transfer of the DEPB.

16. The High Court has sought to meet the argument of double taxation made on behalf of the assessees by holding that where the face value of the DEPB was offered to tax in the year in which the credit accrued to the assessee as business profits, then any further profit arising on transfer of DEPB would be taxed as profits of business under Section 28(iiid) in the year in which the transfer of DEPB took place. This view of the High Court, in our considered opinion, is contrary to the language of Section 28 of the Act under which "cash assistance" received or receivable by any person against exports such as the DEPB and "profit on transfer of the DEPB" are treated as two separate items of income under clauses (iiib) and (iiid) of Section 28. If accrual of DEPB and profit on transfer of DEPB are treated as two separate items of income chargeable to tax under clauses (iiib) and (iiid) of Section 28 of the Act, then DEPB will be chargeable as income under clause (iiib) of Section 28 in the year in which the person applies for DEPB credit against the exports and the profit on transfer of the DEPB by that person will be chargeable as income under clause (iiid) of Section 28 in his hands in the year in which he makes the transfer. Accordingly, if in the same previous year the DEPB accrues to a person and he also earns profit on transfer of the DEPB, the DEPB will be business profits under clause (iiib) and the difference between the sale

value and the DEPB (face value) would be the profits on the transfer of DEPB under clause (iiid) for the same assessment year. Where, however, the DEPB accrues to a person in one previous year and the transfer of DEPB takes place in a subsequent previous year, then the DEPB will be chargeable as income of the person for the first assessment year chargeable under clause (iiib) of Section 28 and the difference between the DEPB credit and the sale value of the DEPB credit would be income in his hands for the subsequent assessment year chargeable under clause (iiid) of Section 28. The interpretation suggested by us, therefore, does not lead to double taxation of the same income, which the legislature must be presumed to have avoided.

17. The High Court has held that as the assessees had an export turnover exceeding Rs.10 crores and did not fulfill the conditions set out in the third proviso to Section 80HHC(3) of the Act, the assessees were not entitled to a deduction under Section 80HHC on the amount received on transfer of DEPB and to get over this difficulty the assessees have contended that the profits on transfer of DEPB in Section 28(iiid) would not include the face value of the DEPB so that the assessees get a deduction under Section 80HHC on the face value of the DEPB. This finding of the High Court is not based on an accurate understanding of the scheme of Section 80HHC of the Act.

18. The relevant provisions of Section 80HHC are quoted hereinbelow:

> **"Section 80HHC- Deduction in respect of profits retained for export business.**-- [(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, [a deduction

to the extent of profits, referred to in sub-section (1B),] derived by the assessee from the export of such goods or merchandise:

.....

(1B) For the purposes of sub-sections (1) and (1A), the extent of deduction of the profits shall be an amount equal to-

(i) eighty per cent thereof for an assessment year beginning on the 1st day of April, 2001;

(ii) seventy per cent thereof for an assessment year beginning on the 1st day of April, 2002;

(iii) fifty per cent thereof for an assessment year beginning on the 1st day of April, 2003;

(iv) thirty per cent thereof for an assessment year beginning on the 1st day of April, 2004,]

and no deduction shall be allowed in respect of the assessment year beginning on the 1st day of April, 2005 and any subsequent assessment year.]

.....

(3) For the purposes of sub-section (1),-

(a) where the export out of India is of goods or merchandise manufactured [or processed] by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;

.....

Provided that the profits computed under clause (a) or

clause (b) or clause (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiia) (not being profits on sale of a licence acquired from any other person), and clauses (iiib) and (iiic) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :

Provided further that in the case of an asseesee having export turnover not exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee;

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,-

(a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book

Scheme, being the Duty Remission Scheme.

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiie) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that-

(a) he had an option to choose either the duty drawback or the Duty Free Replenishment Certificate, being the Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme.

Explanation.-For the purposes of this clause, 'rate of credit allowable' means the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme calculated in the manner as may be notified by the Central Government:]

.....

Explanation:- For the purposes of this section,-

(baa) 'profits of the business' means the profits of the business as computed under the head 'Profits and gains of business or profession' as reduced by-

(1) ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of Section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such

profits; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India"

19. Sub-section (1) of Section 80HHC quoted above makes it clear that an assessee engaged in the business of export out of India of any goods or merchandise to which this Section applies shall be allowed, in computing his total income, a deduction to the extent of profits referred to in sub-section (1B), derived by him from the export of such goods or merchandise. Sub-section (1B) of Section 80HHC gives the percentages of deduction of the profits allowable for the different assessment years from the assessment years 2001-2002 to 2004-2005. Sub-section (3)(a) of Section 80HHC provides that where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such exports shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee. In *Commissioner of Income-Tax v. K. Ravindranathan Nair* (2007) 295 ITR 228 (SC), the formula in sub-section (3)(a) of Section 80HHC was stated by this Court to be as follows:

$$\text{Profits derived from exports} = \frac{\text{Profits of the business} \times \text{Export Turnover}}{\text{Total Turnover}}$$

20. Explanation (baa) under Section 80HHC states that "profits of the business" in the aforesaid formula means the profits of the business as computed under the head "Profits and Gains of Business or Profession" as reduced by (1) ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of Section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of similar nature including any such receipts and (2) the profits of any branch, office, warehouse or any other establishment of the assessee situated outside India. Thus, ninety per cent of the

DEPB which is "cash assistance" against exports and is covered under clause (iiib) of Section 28 will get excluded from the "profits of the business" of the assessee if such DEPB has accrued to the assessee during the previous year. Similarly, if during the same previous year, the assessee has transferred the DEPB and the sale value of such DEPB is more than the face value of the DEPB, the difference between the sale value of the DEPB and the face value of the DEPB will represent the profit on transfer of DEPB covered under clause (iiid) of Section 28 and ninety per cent of such profit on transfer of DEPB certificate will get excluded from "profits of the business". But, where the DEPB accrues to the assessee in the first previous year and the assessee transfers the DEPB certificate in the second previous year, as appears to have happened in the present batch of cases, only ninety per cent of the profits on transfer of DEPB covered under clause (iiid) and not ninety per cent of the entire sale value including the face value of the DEPB will get excluded from the "profits of the business". Thus, where the ninety per cent of the face value of the DEPB does not get excluded from "profits of the business" under explanation (baa) and only ninety per cent of the difference between the face value of the DEPB and the sale value of the DEPB gets excluded from "profits of the business", the assessee gets a bigger figure of "profits of the business" and this is possible when the DEPB accrues to the assessee in one previous year and transfer of the DEPB takes place in the subsequent previous year. The result in such case is that a higher figure of "profits of the business"' becomes the multiplier in the aforesaid formula under sub-section (3)(a) of Section 80HHC for arriving at the figure of profits derived from exports.

21. To the figure of profits derived from exports worked out as per the aforesaid formula under sub-section (3)(a) of Section 80HHC, the additions as mentioned in first, second, third and fourth proviso under sub-section (3) are made to profits derived from exports. Under the first proviso, ninety per cent of the sum referred to in clauses (iiia), (iiib) and (iiic) of Section 28 are

added in the same proportion as export turnover bears to the total turnover of the business carried on by the assessee. In this first proviso, there is no addition of any sum referred to in clause (iiid) or clause (iiie). Hence, profit on transfer of DEPB or DFRC are not to be added under the first proviso. Where therefore in the previous year no DEPB or DFRC accrues to the assessee, he would not be entitled to the benefit of the first proviso to sub-section (3) of Section 80HHC because he would not have any sum referred to in clause (iiib) of Section 28 of the Act. The second proviso to sub-section (3) of Section 80HHC states that in case of an assessee having export turnover not exceeding Rs.10 crores during the previous year, after giving effect to the first proviso, the export profits are to be increased further by the amount which bears to ninety per cent of any sum referred to in clauses (iiid) and (iiie) of Section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee. The third proviso to sub-section (3) states that in case of an assessee having export turnover exceeding Rs.10 crores, similar addition of ninety per cent of the sums referred to in clause (iiid) of Section 28 only if the assessee has the necessary and sufficient evidence to prove that (a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and (b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme. Therefore, if the assessee having export turnover of more than Rs.10 crores does not satisfy these two conditions, he will not be entitled to the addition of profit on transfer of DEPB under the third proviso to sub-section (3) of Section 80HHC.

22. The aforesaid discussion would show that where an assessee has an export turnover exceeding Rs.10 crores and has made profits on transfer of DEPB under clause (d) of Section 28, he would not get the benefit of addition to export profits under third or fourth proviso to sub-section (3) of Section

80HHC, but he would get the benefit of exclusion of a smaller figure from "profits of the business" under explanation (baa) to Section 80HHC of the Act and there is nothing in explanation (baa) to Section 80HHC to show that this benefit of exclusion of a smaller figure from "profits of the business" will not be available to an assessee having an export turnover exceeding Rs.10 crores. In other words, where the export turnover of an assessee exceeds Rs.10 crores, he does not get the benefit of addition of ninety per cent of export incentive under clause (iiid) of Section 28 to his export profits, but he gets a higher figure of profits of the business, which ultimately results in computation of a bigger export profit. The High Court, therefore, was not right in coming to the conclusion that as the assessee did have the export turnover exceeding Rs.10 crores and as the assessee did not fulfill the conditions set out in the third proviso to Section 80HHC (iii), the assessee was not entitled to a deduction under Section 80HHC on the amount received on transfer of DEPB and with a view to get over this difficulty the assessee was contending that the profits on transfer of DEPB under Section 28 (iiid) would not include the face value of the DEPB. It is a well-settled principle of statutory interpretation of a taxing statute that a subject will be liable to tax and will be entitled to exemption from tax according to the strict language of the taxing statute and if as per the words used in explanation (baa) to Section 80HHC read with the words used in clauses (iiid) and (iiie) of Section 28, the assessee was entitled to a deduction under Section 80HHC on export profits, the benefit of such deduction cannot be denied to the assessee.

23. The impugned judgment and orders of the Bombay High Court are accordingly set-aside. The appeals are allowed to the extent indicated in this judgment. The Assessing Officer is directed to compute the deduction under Section 80HHC in the case of the appellants in accordance with this judgment. There shall be no order as to costs.

B.B.B. Appeals disposed of.

RAJVIR SINGH

v.

SECRETARY, MINISTRY OF DEFENCE & OTHERS

(Civil Appeal No. 2107 of 2012)

FEBRUARY 15, 2012

[AFTAB ALAM AND CHANDRAMAULI KR. PRASAD, JJ.]

Army Act, 1950 - ss. 122 and 52(f) - Court martial - Trial if barred by limitation - Allegation that appellant, an Officiating Commandant at Central Ordnance Depot, caused wrongful loss to the Government to the tune of Rs.60.18 lakhs in the process of procurement of stores through local purchase by committing procedural irregularities/illegalities - Direction for the General Court Martial to re-assemble for his trial - Challenge to - Plea that trial was barred by time as provided under s.122 - Held: The General Officer Commanding-in-Chief, Central Command [GOC-in-C, CC] was in knowledge of the offence and the identity of the appellant as one of the alleged offenders on May 7, 2007 - Reckoning from that date, the order passed by the General Officer Commanding, Madhya Bharat Area [GOC, MB Area], to convene the General Court Martial on August 23/26, 2010 was clearly beyond the period of three years and hence, barred in terms of s.122 - GOC-in-C, CC had come to know about the offence and the offender being the appellant on May 7, 2007 - It took one year from that date for him to pass the order for initiating disciplinary action against him on May 12, 2008 - There were still two years in hand, which is no little time but that too was spent in having more than one rounds of hearing of the charges in terms of rule 22 with the result that by the time the order came to be passed to convene General Court Martial, more than three years had lapsed from the date of the knowledge of the competent authority - Direction by the GOC,

MB Area, for reassembly of the General Court Martial accordingly quashed.

Appellant, an Officiating Commandant at Central Ordnance Depot, allegedly caused wrongful loss to the Government to the tune of Rs.60.18 lakhs in the process of procurement of stores through local purchase by committing procedural irregularities/ illegalities. The Armed Forces Tribunal dismissed Original Application filed by the appellant and rejected his challenge to the direction for the General Court Martial to re-assemble for his trial contending that his trial was barred by time as provided under section 122 of the Army Act, 1950.

In the instant appeal, it was contended on behalf of the appellant that the period of limitation for his trial before the Court Martial commenced when on the basis of the report of the Court of Inquiry, the General Officer Commanding, Madhya Bharat Area [GOC, MB Area] sent his recommendation to the General Officer Commanding-in-Chief, Central Command [GOC-in-C, CC] indicting the appellant; that the GOC, MB Area, who passed the order dated August 23/26, 2010 convening the General Court Martial, directed the Commanding Officer to take further summary of evidence in the hearing of the charges under rule 22 and finally passed the order directing the Court Martial to reassemble for the appellant's trial; that the GOC, MB Area was the competent authority to take action against the appellant and it was the date of his knowledge of the commission of the alleged offence and the identity of the appellant as the alleged offender that is relevant under section 122; that in any event the GOC-in-C, CC was undeniably the competent authority to initiate action against the appellant; that on May 7, 2007, the alleged offence and the identity of the appellant as the alleged offender was fully within his knowledge on the basis of the recommendation of GOC, MB Area and the report of

the Court of Inquiry ordered by him; that his knowledge is evident from his recommendation to Integrated HQ, wherein, he stated that the culpability of the appellant was established and that the period of limitation must, therefore, commence from a date not later than May 7, 2007 and reckoning from that date, the period of three years came to end on May 6, 2010; that, however, the order for convening the General Court Martial was finally passed by the GOC, MB Area on August 23/26, 2010, that is, clearly beyond the period of limitation and hence the appellant's trial before the General Court Martial was clearly hit by section 122 and was barred by limitation.

The respondents, on the other hand, contended that the period of limitation in this case could only commence from May 12, 2008 when the GOC-in-C, CC directed that disciplinary action be initiated against the appellant and that later date must be deemed to be the date when the competent authority had the knowledge within the meaning of section 122 of the Act. This argument was adopted both in the order passed by the GOC, MB Area and the decision of the Tribunal upholding that order.

Allowing the appeal, the Court

HELD: 1. Both the GOC, MB Area and the Tribunal, base their orders on the decisions of this Court in. V.N. Singh and J.S. Sekhon. The decisions of the GOC, MB Area and the Tribunal appear to be based on a complete misinterpretation of the two decisions of the Court. In both, V.N. Singh and J.S. Sekhon, the real issue before the Court was who was the competent authority to initiate action against the delinquent officer and whose knowledge would be relevant for the purpose of section 122 of the Act. In both cases, it was contended, on behalf of the delinquent officers, that the knowledge of "the person aggrieved" long preceded the knowledge of the competent authority and reckoning from the date of

knowledge of "the aggrieved person", the order convening the General Court Martial was barred by limitation. In both cases, the Court held that that part of section 122 that referred to the knowledge of the person aggrieved had no application to the facts of the case and the relevant date for computing the period of limitation was the date of knowledge of the competent authority to initiate action against the delinquent officer. In both the cases, the authority competent to initiate action against the delinquent officer had passed the direction for taking action against the delinquent officer on the same day it came to know about the commission of the offence and the identity of the offender. Hence, in both cases, at some places, the date of knowledge and date of the direction to initiate action against the delinquent officer are used interchangeably and that is the reason for the Tribunal to misinterpret the decision to mean that the period of limitation would commence from the date of direction to initiate action against the delinquent officer. [Paras 19, 20 and 21] [732-D-F-H; 733-A; 735-C, D]

Union of India and others v. V.N. Singh **(2010) 5 SCC 579 : 2010 (4) SCR 454 and** *J.S. Sekhon v. Union of India and another* **(2010) 11 SCC 586 : 2010 (9) SCR 1025 - referred to.**

2. The Tribunal is also incorrect in observing that on May 7, 2007, GOC-in-C, CC had formed only a tentative opinion about the appellant because on that date he made the recommendation to the Integrated HQ for investigation into the act of omission/commission in respect of a Major General and any other higher authority, including the appellant. The recommendation of the GOC-in-C, CC to the Integrated HQ was only in regard to the said Major General. So far as the culpability of the appellant is concerned, he had already formed the opinion on the basis of the report of the Court of Inquiry

and the recommendation of the GOC, MB Area. Moreover, when the Integrated HQ vide its letter of February 19, 2008 pointed out that the appellant was indicted by the Court of Inquiry ordered by him and in his case it was for him to "append directions", there was no further material before the GOC-in-C, CC in connection with the appellant. The order that the GOC-in-C, CC passed on May 12, 2008 for taking disciplinary action against the appellant is almost in identical words as the one passed on May 7, 2007. There is, therefore, no escape from the fact that the GOC-in-C, CC was in knowledge of the offence and the identity of the appellant as one of the alleged offenders on May 7, 2007. Reckoning from that date, the order passed by the GOC, MB Area, to convene the General Court Martial on August 23/26, 2010 is clearly beyond the period of three years and hence, barred in terms of section 122. [Paras 22, 23] [735-E-H;736-A; 737-D, E]

3. One feels sorry to see a trial on such serious charges being aborted on grounds of limitation but that is the mandate of the law. It is seen that GOC-in-C, CC had come to know about the offence and the offender being the appellant on May 7, 2007. It took one year from that date for him to pass the order for initiating disciplinary action against him on May 12, 2008. There were still two years in hand, which is no little time but that too was spent in having more than one rounds of hearing of the charges in terms of rule 22 with the result that by the time the order came to be passed to convene General Court Martial, more than three years had lapsed from the date of the knowledge of the competent authority. [Para 24] [737-F-H; 738-A]

4. The judgment and order passed by the Tribunal is set aside and the direction by the GOC, MB Area, for reassembly of the General Court Martial is quashed. [Para 26] [738-E]

Case Law Reference:

2010 (4) SCR 454	**referred to**	**Para 3**
2010 (9) SCR 1025	**referred to**	**Para 3**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2107 of 2012.

From the Judgment & Order dated 19.08.2011 of the The Armed Forces Tribunal, Regional Bench, Lucknow in Original Application No. 116 of 2011.

R. Venkataramani, Piyush Sharma, Rajiv Manglik, Virendeer, Aljo K. Josepth for the Appellant.

Rajiv Dutta, Ashok Shrivastava, Madhurim Tatia, B.V. Balramdas, Anil Katiyar for the Respondents

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated August 19, 2011 passed by the Armed Forces Tribunal, Regional Bench, Lucknow, by which it dismissed Original Application No.116 of 2011 filed by the appellant and rejected his challenge to the direction for the General Court Martial to re-assemble for his trial contending that his trial was barred by time as provided under section 122 of the Army Act, 1950 (for the sake of brevity "the Act").

3. A General Court Martial was directed to be convened by order dated August 23/26, 2010 passed by the General Officer Commanding, Madhya Bharat Area, ("GOC, MB Area" for short) to try the appellant on different charges relating to gross financial irregularities punishable under Section 52(f) of the Act. The appellant challenged the order before the Armed Forces Tribunal (in Original Application No. 216 of 2010) on the plea that his trial by the General Court Martial was barred

by limitation under section 122 of the Act. At that stage, the Tribunal did not go into the merits of the appellant's challenge and dismissed the Original Application leaving it open for the appellant to raise his objections before the Court Martial. In pursuance of the liberty given by the Tribunal, the appellant raised the objection before the Court Martial that his trial before it was barred by limitation. The Court Martial upheld the appellant's objection and by order dated February 17, 2011, allowed the "plea in bar" raised by the defence. However, the Confirming Authority, i.e., the (Officiating) GOC, MB Area, refused to confirm the order of the General Court Martial and by order dated March 29, 2011, which is in some detail, found and held that reckoning from the date on which the commission of the offence and the identity of the appellant as one of the offenders came within the knowledge of the competent authority, the order giving direction for convening the General Court Martial was passed within a period of three years and, therefore, the bar of limitation did not come in the way of the trial of the appellant before the General Court Martial. Having, thus, arrived at the finding, he directed the GCM to proceed with the trial of the appellant as if the "plea in bar" was found not proved. The appellant challenged the order of the Confirming Authority once again before the Tribunal in Original Application no. 116 of 2011. But the Tribunal, mainly relying upon the decisions of this Court in *Union of India and others v. V.N. Singh* (2010) 5 SCC 579 and *J.S. Sekhon v. Union of India and another* (2010) 11 SCC 586, held that the General Court Martial was convened within the period of limitation. It, accordingly, rejected the application and upheld the order passed by the Confirming Authority.

4. The charges against the appellant pertain to the periods 2005-2006 and 2006-2007 when he was posted as officiating Commandant, Central Ordnance Depot, Chheoki. According to the charges, in procurement of stores he violated and flouted the relevant rules and in making purchases worth about Rs.2.2

crores he caused wrongful loss of Rs.60.18 lakhs to the Government.

5. In this regard, first a pseudonymous complaint dated October 27, 2006 came making allegations of gross irregularities committed by the appellant in purchase of stores for the Central Ordnance Depot. The complaint was seen by the General Officer Commanding-in-Chief, Central Command ("GOC-in-C, CC" in short) on November 15, 2006. The complaint was followed by a report by the Central Command Liaison Unit which also highlighted the irregularities committed in procurement of stores at the Central Ordnance Depot, Chheoki. This report was seen by the GOC-in-C on December 6, 2006. On December 9, 2006, an order was issued on behalf of the GOC-in-C, for convening a Court of Inquiry to investigate the alleged irregularities/misdemeanors in the Central Ordnance Depot during the financial years 2005-2006 and 2006-2007. The irregularities/misdemeanors that were required to be inquired into were listed under the headings (a) upgradations of demand and (b) local purchase. The Court of Inquiry submitted its report on January 24, 2007 in which, apart from some other officers, the appellant was clearly indicted. It appears that the report of the Inquiry Committee was first placed before the GOC, MB Area, who on February 20, 2007 made a recommendation in light of the report. In his recommendations the GOC, MB Area, observed that the Court of Inquiry had examined only a small fraction of the local purchase and had the Court gone into greater details more irregularities would have come to light. However, on the basis of the materials coming before the Court of Inquiry, the GOC, MB Area, found that there was adequate evidence regarding cognizable acts of omission/commission committed by several officers, including the present appellant in regard to whom he observed that he was to be blamed for causing wrongful loss to the government to the tune of Rs.60.18 lakhs in the process of procurements of stores worth Rs.2.2 crores by committing a number of procedural irregularities/illegalities.

6. The report of the Court of Inquiry along with the recommendations of the GOC, MB Area was forwarded to the GOC-in-C, CC on April 26, 2007. On May 7, 2007, the GOC-in-C, CC wrote a note in the form of recommendations on the report of the Court of Inquiry convened on his direction. He started by saying that he had perused the proceedings of the Court of Inquiry and he partially agreed with the findings and opinion of the Court. He observed that there was cogent and adequate material evidence regarding the cognizable acts of omission/commission committed by various officers of the Central Ordnance Depot, Chheoki. In regard to the appellant the GOC-in-C made the following observations in paragraph 6 of his recommendation:

> "6. The culpability of IC-42501F Col Rajvir Singh, Offg Commandant, COD Chheoki, is established for causing wrongful loss to the Govt to the tune of Rs.60.18 lakhs in the process of procurement of stores through local purchase in the years 2005-2006 and 2006-2007 by committing the following procedural irregularities/ illegalities:-"

(The above quoted passage was followed by a list of different irregularities/illegalities allegedly committed by the appellant).

> 7. It, however, appears that on the basis of the materials before him the GOC-in-C, CC was also unhappy and dissatisfied with the role of one Major General S.P. Sinha, who, at the material time, was the ADGOS (CN & A) in the Central Command and who at the time the GOC-in-C was making his recommendation was posted as MGAOC, HQ-Western Command. Hence, in paragraph 7 of his recommendations he stated as follows:-
>
> "7. I recommend that a (sic.) appropriate (sic.) constituted C of I be ordered by integrated HQ of MoD (Army), MGO's Branch for investigation into the acts of omission/ commission in respect of Maj. Gen. SP Sinha, ADGOS

(CN & A) and any other higher auth, Col Rajvir Singh, Offg Commandant and offrs of the COD Chheoki as opined by the Court in the process of procurement of stores by the COD, Chheoki during the pd 2005-06 and 2006-07."

8. It is significant to note that insofar as the appellant is concerned, the GOC-in-C, CC, was undeniably the competent authority to initiate proceeding against him and to convene a General Court Martial to try him. Further, on the basis of the Court of Inquiry report and the recommendation of the GOC, MB Area, the GOC-in-C, CC, had clearly formed the opinion that the culpability of the appellant was established and there was cogent and adequate material evidence regarding the cognizable acts of omission/commission committed by him. Nonetheless, on May 7, 2007, the GOC-in-C, CC did not direct for initiating proceeding against the appellant and to convene the General Court Martial for his trial but clubbed his case with Major General S.P. Sinha in whose case the integrated headquarter of MoD Army was the competent authority and sent his recommendation to the integrated HQ to hold a Court of Inquiry to examine the role of the Major General in the irregularities committed at the Central Ordnance Depot, Chheoki, during his tenure there.

9. On the basis of the recommendation made by the GOC-in-C, CC, by his letter dated February 19, 2008, the integrated headquarters of MoD directed the HQ, Western Command (where Major General S.P. Sinha was at that time posted) to convene a Court of Inquiry to investigate the acts of omission/ commission on the part of the Major General the then ADGOS (CN & A), detailing the issues into which the investigation was required to be made. A copy of the letter was sent to the GOC-in-C, CC for information and further advising him to issue appropriate directions in respect of the appellant who was indicted by the Court of Inquiry that was held on his direction.

10. It was only then that the GOC-in-C, CC gave direction for initiation of disciplinary action against the appellant (and

some other officers) vide order dated May 12, 2008, for the misdemeanors as stated in paragraphs 4 to 12 of the order insofar as the appellant is concerned (and in paragraphs 13 to 16 in regard to some other officers).

11. Following the order of the GOC-in-C, CC, a tentative charge-sheet containing 18 charges was given to the appellant on August 20, 2008. The hearing of charges was then held as required under rule 22 of the Army Rules, 1954 and at the end of the hearing, the Commanding Officer found that none of the charges were proved and there was no sufficient evidence to proceed further with the charges. The Confirming Authority, however, did not accept the view taken by the Commanding Officer and by order dated September 7, 2009, directed for taking additional summary of evidence. As directed by the Confirming Authority, additional summary was taken but once again the Commanding Officer by his order dated March 9, 2010, found that none of the charges were proved. The Confirming Authority i.e. the GOC, MB Area, once again did not accept the order of the Commanding Officer. He framed four charges under section 52(f) of the Act relating to financial irregularities in procurement of store for the Central Ordnance Depot and directed the appellant to be tried by Court Martial. It was pursuant to this order that the General Court Martial came to be constituted which was challenged by the appellant as barred by limitation, as noted above.

12. Having narrated the relevant facts we may now take a look at the provision relating to limitation. Section 122 of the Act provides as follows:-

> **"122. Period of limitation for trial.** - (1) Except as provided by sub-section (2), no trial by court-martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years [and such period shall commence. -
>
> (a) on the date of the offence; or

(b) where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or

(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate action, whichever is earlier.]

(2) The provisions of sub-section (1) shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in section 37.

(3) In the computation of the period of time mentioned in sub-section (1), any time spent by such person as a prisoner of war, or in enemy territory, or in evading arrest after the commission of the offence, shall be excluded.

(4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army."

13. On behalf of the appellant it is contended that the period of limitation for his trial before the Court Martial would commence from February 20, 2007, when on the basis of the report of the Court of Inquiry, the GOC, MB Area, sent his recommendation to the GOC-in-C, CC indicting the appellant. It is pointed out that it was the GOC, MB Area, who passed the order dated August 23/26, 2010 convening the General Court Martial, directed the Commanding Officer to take further summary of evidence in the hearing of the charges under rule

22 and finally passed the order directing the Court Martial to reassemble for the appellant's trial. It is, thus, the GOC, MB Area who is the competent authority to take action against the appellant and it is the date of his knowledge of the commission of the alleged offence and the identity of the appellant as the alleged offender that is relevant under section 122.

14. It is further submitted that in any event the GOC-in-C, CC was undeniably the competent authority to initiate action against the appellant. On May 7, 2007, the alleged offence and the identity of the appellant as the alleged offender was fully within his knowledge on the basis of the recommendation of GOC, MB Area and the report of the Court of Inquiry ordered by him. His knowledge is evident from his recommendation to Integrated HQ, wherein, he stated that the culpability of the appellant was established. The period of limitation must, therefore, commence from a date not later than May 7, 2007 and reckoning from that date, the period of three years came to end on May 6, 2010. But the order for convening the General Court Martial was finally passed by the GOC, MB Area on August 23/26, 2010, that is, clearly beyond the period of limitation. Hence, the appellant's trial before the General Court Martial was clearly hit by section 122 and was barred by limitation.

15. On behalf of the respondents, on the other hand, it is argued that the period of limitation in this case can only commence from May 12, 2008 when the GOC-in-C, CC directed that disciplinary action be initiated against the appellant and that later date must be deemed to be the date when the competent authority had the knowledge within the meaning of section 122 of the Act.

16. This is the argument adopted both in the order passed by the GOC, MB Area and the decision of the Tribunal upholding that order.

17. In the order, dated March 29, 2011 passed by the

GOC, MB Area, in paragraph 34, it is observed as under: -

"If the law laid down by the Hon'ble Supreme Court had been followed, the only question which the Court was to decide was, (sic.) which was the date on which the authority competent to initiate action issued its direction to initiate disciplinary action. However, the reasons given by the Court show that the Court was squarely guided by the issues framed by the learned Judge Advocate, which ran absolutely contrary to the law laid down by the Hon'ble Supreme Court (as also the policy in vogue referred to by the learned Advocate Judge)".

(emphasis added)

18. Affirming the view taken by the GOC, MB Area, the Tribunal in paragraph 12 of its judgment held and observed as follows -

"In the case at hand on 7/5/2007, the date on which the applicant alleges the competent authority to have acquired knowledge, perusal of the said document which is Annexure No. A-6 to the Original Application reveals that the respondent No. 3 is not able to form an opinion as to whether or not any offence has been established and furthermore he is not able to form a definite opinion regarding culpability of the applicant therefore he recommends for constitution of an appropriately constituted Court of Inquiry by Integrated HQ of the Mod (Army), MGO's Branch for investigation into the acts of omission/commission in respect of ADGOS (CN & A), the applicant and the officers of the Central Ordnance Depot, Chheoki. Thus it cannot be conclusively established regarding knowledge of the offence by respondent No. 3 at this stage. However, pursuant to recommendations of 7/5/2007 HQ Central Command approached Integrated HQ of the Mod (Army) for further inquiry in respect of officers for their involvement in the allegations. On 12/5/

2008 the respondent No. 3 perused the proceedings of the Court of Inquiry held to investigate the allegations of various irregularities in Central Ordnance Depot, Chheoki and agreed with the recommendations of General Officer Commanding Madhya Bharat Area. The culpability of applicant, according to respondent No. 3 was established for causing wrongful loss to the Government. Upon being so satisfied regarding establishment of culpability the respondent No. 3 on 12/5/2008 he directed disciplinary action against the applicant. It is that date which would be counted as starting point towards computation of limitation for the purposes of Section 122(l) (b) of the Act."

(emphasis added)

19. As noted above, both the GOC, MB Area and the Tribunal, base their orders on the decisions of this Court in. *V.N. Singh* (supra) and *J.S. Sekhon* (supra). The decisions of the GOC, MB Area and the Tribunal appear to be based on a complete misinterpretation of the two decisions of the Court. In both, V.N. Singh and J.S. Sekhon, the real issue before the Court was who was the competent authority to initiate action against the delinquent officer and whose knowledge would be relevant for the purpose of section 122 of the Act. In both cases, it was contended, on behalf of the delinquent officers, that the knowledge of "the person aggrieved" long preceded the knowledge of the competent authority and reckoning from the date of knowledge of "the aggrieved person", the order convening the General Court Martial was barred by limitation. In *V.N. Singh,* it was submitted on behalf of the officer that one Brigadier K.S. Bharucha was the aggrieved person and in *J.S. Sekhon,* it was submitted that the Commander Works Engineer was the person aggrieved and if the period of limitation was computed from the date of their knowledge then the order convening the General Court Martial was barred by limitation. In both cases, the Court held that that part of section 122 that referred to the knowledge of the person aggrieved had

no application to the facts of the case and the relevant date for computing the period of limitation was the date of knowledge of the competent authority to initiate action against the delinquent officer. In paragraphs 32 and 34 of the decision in *V.N. Singh,* the Court observed as follows: -

> "32. The term "the person aggrieved by the offence" would be attracted to natural persons i.e. human beings who are victims of an offence complained of, such as offences relating to a person or property and not to juristic persons like an organisation as in the present case. The plain and dictionary meaning of the term "aggrieved" means hurt, angry, upset, wronged, maltreated, persecuted, victimised etc. It is only the natural persons who can be hurt, angry, upset or wronged or maltreated etc. If a Government organisation is treated to be an aggrieved person then the second part of Section 122(1) (b) i.e. "when it comes to the knowledge of the competent authority to initiate action" will never come into play as the commission of offence will always be in the knowledge of the authority who is a part of the organisation and who may not be the authority competent to initiate the action. A meaningful reading of the provisions of Section 122(1)(b) makes it absolutely clear that in the case of government organisation, it will be the date of knowledge of the authority competent to initiate the action, which will determine the question of limitation. Therefore, the finding of the High Court that Brigadier K.S. Bharucha was an aggrieved person is legally and factually incorrect and unsustainable.
>
> 34. The facts of the present case establish that the Technical Court of Inquiry was convened by DDST, Headquarter Delhi Area on 8-1-1994 which recommended examination of certain essential witnesses for bringing into light the correct details and the persons responsible for the irregularities by a Staff Court of Inquiry and accordingly the Staff Court of Inquiry was ordered on 7-5-1994 by GOC-

> in-C Western Command which concluded in its report dated 31-8-1994, mentioning for the first time the involvement of the respondent in the offence. The GOC, Delhi Area i.e. the next Authority in chain of command to the respondent recommended on 19-10-1994 initiation of disciplinary action against the respondent whereas the GOC-in-C, Western Command gave directions on 3-12-1994, to initiate disciplinary action against the respondent. Therefore, the date of commencement of the period of limitation for the purpose of GCM of the respondent, commenced on 3-12-1994 when direction was given by GOC-in-C, Western Command to initiate disciplinary action against the respondent. The plea that the date of submission of the report by Technical Court of Inquiry should be treated as the date from which period of limitation shall commence has no substance. It is relevant to notice that no definite conclusion about the correct details and the persons responsible for the irregularities was mentioned in the report of Technical Court of Inquiry. On the facts and in the circumstances of the case, this Court is of the view that the High Court wrongly concluded that the period of limitation expired on 4-3-1996."

20. Similarly, in paragraphs 16 and 19 of the decision in *J.S. Sekhon,* it was held as follows -

> "16. According to the counsel appearing for the appellant, when the vigilance check report was submitted, Commander Works Engineer who is the person aggrieved came to know that there was a commission of an offence and therefore period of limitation as envisaged under Section 122 of the Act would commence from that date and when limitation is computed from the said date, convening of the General Court Martial on 9-3-1998 was barred by time, as it was beyond the period of three years as contemplated under Section 122 of the Army Act.
>
> 19. In our considered opinion, the expression "person

aggrieved by the offence" is irrelevant in the facts and circumstances of the present case and what is relevant is the "knowledge of the authority competent to initiate action". The aforesaid acts were committed against the Government and not a natural person. In the facts of the present case no single person can be said to be aggrieved person individually due to the act of defrauding the Army. What is applicable to the facts of the case is the expression when it comes to the knowledge of the competent authority to initiate action."

21. In both the cases, the authority competent to initiate action against the delinquent officer had passed the direction for taking action against the delinquent officer on the same day it came to know about the commission of the offence and the identity of the offender. Hence, in both cases, at some places, the date of knowledge and date of the direction to initiate action against the delinquent officer are used interchangeably and that is the reason for the Tribunal to misinterpret the decision to mean that the period of limitation would commence from the date of direction to initiate action against the delinquent officer.

22. The Tribunal is also incorrect in observing that on May 7, 2007, GOC-in-C, CC had formed only a tentative opinion about the appellant because on that date he made the recommendation to the Integrated HQ for investigation into the act of omission/commission in respect of Major General S.P. Sinha and any other higher authority, including the appellant. It is noted above that the recommendation of the GOC-in-C, CC to the Integrated HQ was only in regard to Major General S.P. Sinha. So far as the culpability of the appellant is concerned, he had already formed the opinion on the basis of the report of the Court of Inquiry and the recommendation of the GOC, MB Area. Moreover, when the Integrated HQ vide its letter of February 19, 2008 pointed out that the appellant was indicted by the Court of Inquiry ordered by him and in his case it was for him to "append directions", there was no further material

before the GOC-in-C, CC in connection with the appellant. The order that the GOC-in-C, CC passed on May 12, 2008 for taking disciplinary action against the appellant reads as follows: -

"1. I have perused the proceedings of the Court of Inquiry held to investigate the allegations of various irregularities in Central Ordnance Depot, Chheoki vide Headquarters Central Command, convening order Number 174091/57/C/A(PC), dated 09 December 06 and generally agree with the recommendations of the General Officer Commanding, Madhya Bharat Area.

2. The Court of Inquiry proceedings reveal that there is cogent and adequate evidence on record to establish various acts of omission/commissions on part of certain officers of Central Ordnance Depot, Chheoki as mentioned in the succeeding paragraphs.

IC-42501F Colonel Rajvir Singh

4. The culpability of IC-42501F Colonel Rajvir Singh, Officiating Commandant, Central Ordnance Depot Chheoki, is established for causing wrongful loss to the Government to the tune of Rs. 60.18 Lakhs (Rupees Sixty Lakh eighteen thousand only) in the process of procurement of stores through local purchase in the year 2005-06 and 2006-07, by committing the following illegalities:-

(a) xxx

(b) xxx

(c) xxx

5. xxx

6. xxx

7. xxx

8. xxx

9. xxx

10. xxx

11. xxx

12. xxx

13. to 16. xxxxxxx

17. Apropos above, I direct that disciplinary action against the above mentioned officers be initiated for the misdemeanors as mentioned against each of them in Para 4 to 16 above."

23. It is, thus, to be seen that the order dated May 12, 2008 is almost in identical words as the one passed on May 7, 2007. There is, therefore, no escape from the fact that the GOC-in-C, CC was in knowledge of the offence and the identity of the appellant as one of the alleged offenders on May 7, 2007. Reckoning from that date, the order passed by the GOC, MB Area, to convene the General Court Martial on August 23/26, 2010 is clearly beyond the period of three years and hence, barred in terms of section 122.

24. One feels sorry to see a trial on such serious charges being aborted on grounds of limitation but that is the mandate of the law. It is seen above that GOC-in-C, CC had come to know about the offence and the offender being the appellant on May 7, 2007. It took one year from that date for him to pass the order for initiating disciplinary action against him on May 12, 2008. There were still two years in hand, which is no little time but that too was spent in having more than one rounds of hearing of the charges in terms of rule 22 with the result that by the time the order came to be passed to convene General

Court Martial, more than three years had lapsed from the date of the knowledge of the competent authority.

25. Before concluding, we may also note that other officers who were allegedly involved in irregular purchases for the Central Ordnance Depot, Chheoki, also seem to have got away with very light, if at all, any punishment. Major General S.P. Sinha was subjected to an administrative action in which an order was passed on August 6, 2010 expressing severe displeasure (non-recordable) against him. Lt. Col. Neeraj Gaur was finally acquitted by the General Court Martial. Lt. Col. Aloke Ghose was given severe displeasure (non-recordable) after the Commanding Officer found charges against him not proved. Major (now Lt. Col.) M.K. Bawa was similarly given severe displeasure (non-recordable) after the Commanding Officer found charges against him not proved. Against Lt. Col. Uma Shankar no further action was taken after charges against him were not proved in SoE.

26. In light of the discussions made above, the appeal must succeed. The judgment and order passed by the Tribunal is set aside and the direction by the GOC, MB Area, for reassembly of the General Court Martial is quashed.

27. The appeal is allowed. There will be no order as to costs.

B.B.B. Appeal allowed.

CATHOLIC SYRIAN BANK LTD.
v.
COMMISSIONER OF INCOME TAX, THRISSUR
(Civil Appeal No. 1143 of 2011)

FEBRUARY 17, 2012

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

Income Tax Act, 1961:

ss. 36(1)(vii) and 36(1)(viia) read with s.36(2) - Interpretation of - Scope and ambit of the proviso to clause (vii) of sub-section (1) of s.36 - Discussed - Held: The provisions of s.36(1)(vii) and s.36(1)(viia) are distinct and independent items of deduction and operate in their respective fields - Scheduled commercial banks would get the full benefit of the write off of the irrecoverable debt(s) under s.36(1)(vii) in addition to the benefit of deduction for the provision made for bad and doubtful debt(s) under s.36(1)(viia).

s.119 - Circulars issued by Central Board of Direct Taxes (CBDT) - Effect of - Discussed.

Questions of law relating to interpretation of Sections 36(1)(vii) and 36(1)(viia) read with Section 36(2) of the Income Tax Act, 1961 and the scope and ambit of the proviso to clause (vii) of sub-section (1) of Section 36 of the Act arose for consideration in the present appeal.

The assessee-bank (appellant) contended that the deduction allowable under Section 36(1)(vii) of the Act is independent of deduction under Section 36(1)(viia) of the Act; that distinct and different items of account are maintained by the bank in the normal course of its business and it is not permissible to interchange these

items in accordance with the settled standards of accountancy or even in law; and further that as similar claims had been decided in favour of the banks for earlier assessment years, by Special Bench of the ITAT, which had not been challenged by the Department, as such, the issue had attained finality and could not be disturbed in the subsequent years.

The Revenue on the other hand contended that it would amount to allowing a double deduction if the provisions of Sections 36(1)(vii) and 36(1)(viia) are permitted to operate independently and that the proviso to Section 36(1)(vii) was introduced with the intention to prevent this mischief.

Allowing the appeals filed by the assessees and dismissing the appeals filed by the Revenue, the Court

Per Swatanter Kumar, J. [for himself and Patnaik, J.]

HELD: 1. Merely because the orders of the Special Bench of the ITAT were not assailed in appeal by the Department itself, this would not take away the right of the Revenue to question the correctness of the orders of assessment, particularly when a question of law is involved. [Para 13] [759-E]

2.1. It is a settled canon of interpretation of fiscal statutes that they need to be construed strictly and on their plain reading. Sections 36(1)(vii) and 36(1)(viia) provide for such deductions, which are to be permitted, in accordance with the language of these provisions. A bare reading of these provisions show that Sections 36(1)(vii) and 36(1)(viia) are separate items of deduction. These are independent provisions and, therefore, cannot be intermingled or read into each other. [Para 16] [763-D, E]

2.2. The provisions of Section 36(1)(vii) would come

into play in the grant of deductions, subject to the limitation contained in Section 36(2) of the Act. Any bad debt or part thereof, which is written off as irrecoverable in the accounts of the assessee for the previous year is the deduction which the assessee would be entitled to get, provided he satisfies the requirements of Section 36(2) of the Act. Allowing of deduction of bad debts is controlled by the provisions of Section 36(2). As regards the argument advanced on behalf of the Revenue that it would amount to allowing a double deduction if the provisions of Sections 36(1)(vii) and 36(1)(viia) are permitted to operate independently, there is no doubt that a statute is normally not construed to provide for a double benefit unless it is specifically so stipulated or is clear from the scheme of the Act. As far as the question of double benefit is concerned, the Legislature in its wisdom introduced Section 36(2)(v) by the Finance Act, 1985 with effect from 01.04.1985. Section 36(2)(v) concerns itself as a check for claim of any double deduction and has to be read in conjunction with Section 36(1)(viia) of the Act. It requires the assessee to debit the amount of such debt or part thereof in the previous year to the provision made for that purpose. [Para 17] [763-F-H; 764-A, B]

3.1. Circulars can be issued by the Central Board of Direct Taxes to explain or tone down the rigours of law and to ensure fair enforcement of its provisions. These circulars have the force of law and are binding on the income tax authorities, though they cannot be enforced adversely against the assessee. Normally, these circulars cannot be ignored. A circular may not override or detract from the provisions of the Act but it can seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specified circumstances. So long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the

Act. [Para 18] [764-D, F]

3.2. In the present case, after introduction of Section 36(1)(viia) by the Finance Act, 1979, [(1981) 131 ITR (St.) 88], with effect from 1st April, 1980, Circular No. 258 dated 14th June, 1979 was issued by the Board to clarify the application of the new provisions. The Circular found it relevant to mention that the provisions of new clause (viia) of Section 36(1), relating to the deduction on account of provisions for bad and doubtful debts, is distinct and independent of the provisions of Section 36(1)(vii) relating to allowance of deduction of the bad debts. In other words, the scheduled commercial banks would continue to get the benefit of the write-off of the irrecoverable debts under Section 36(1)(vii) in addition to the benefit of deduction of the provision for bad and doubtful debts under Section 36(1)(viia). [Para 19] [764-F, G; 765-B, C]

3.3. A Circular No.421 dated 12th June, 1985 [(1985) 156 ITR (St.) 130] attempted to explain the amendments made to Section 36 and also explained the provisions of clause (viia) of Section 36(1). Still another circular being Circular No.464, dated 18th July, 1986 [(1986) 161 ITR(St.) 66] was issued with the intention to explain the amendments made by the Income Tax (Amendment) Act, 1986. [Para 21, 22] [765-E; 767-A]

3.4. Clear legislative intent of the relevant provisions and unambiguous language of the circulars with reference to the amendments to Section 36 of the Act demonstrate that the deduction on account of provisions for bad and doubtful debts under Section 36(1)(viia) is distinct and independent of the provisions of Section 36(1)(vii) relating to allowance of the bad debts. The legislative intent was to encourage rural advances and the making of provisions for bad debts in relation to such rural branches. Another material aspect of the

functioning of such banks is that their rural branches were practically treated as a distinct business, though ultimately these advances would form part of the books of accounts of the principal or head office branch. Thus, this Court would be more inclined to give an interpretation to these provisions which would serve the legislative object and intent, rather than to subvert the same. The Circulars in question show a trend of encouraging rural business and for providing greater deductions. The purpose of granting such deductions would stand frustrated if these deductions are implicitly neutralized against other independent deductions specifically provided under the provisions of the Act. To put it simply, the deductions permissible under Section 36(1)(vii) should not be negated by reading into this provision, limitations of Section 36(1)(viia) on the reasoning that it will form a check against double deduction. Such approach would be erroneous and not applicable on the facts of the case in hand. [Para 24] [768-D-H; 769-A]

4.1. The language of Section 36(1)(vii) of the Act is unambiguous and does not admit of two interpretations. It applies to all banks, commercial or rural, scheduled or unscheduled. It gives a benefit to the assessee to claim a deduction on any bad debt or part thereof, which is written off as irrecoverable in the accounts of the assessee for the previous year. This benefit is subject only to Section 36(2) of the Act. It is obligatory upon the assessee to prove to the assessing officer that the case satisfies the ingredients of Section 36(1)(vii) on the one hand and that it satisfies the requirements stated in Section 36(2) of the Act on the other. The proviso to Section 36(1)(vii) does not, in absolute terms, control the application of this provision as it comes into operation only when the case of the assessee is one which falls squarely under Section 36(1)(viia) of the Act. Also the

explanation to Section 36(1)(vii), introduced by the Finance Act, 2001, has to be examined in conjunction with the principal section. The explanation specifically excluded any provision for bad and doubtful debts made in the account of the assessee from the ambit and scope of 'any bad debt, or part thereof, written off as irrecoverable in the accounts of the assessee'. Thus, the concept of making a provision for bad and doubtful debts will fall outside the scope of Section 36(1)(vii) simplicitor. The proviso will have to be read with the provisions of Section 36(1)(viia) of the Act. Once the bad debt is actually written off as irrecoverable and the requirements of Section 36(2) satisfied, then, it will not be permissible to deny such deduction on the apprehension of double deduction under the provisions of Section 36(1)(viia) and proviso to Section 36(1)(vii). This does not appear to be the intention of the framers of law. The scheduled and non-scheduled commercial banks would continue to get the full benefit of write off of the irrecoverable debts under Section 36(1)(vii) in addition to the benefit of deduction of bad and doubtful debts under Section 36(1)(viia). Mere provision for bad and doubtful debts may not be allowable, but in the case of a rural advance, the same, in terms of Section 36(1)(viia)(a), may be allowable without insisting on an actual write off. [Para 25] [769-B-H; 770-A-B]

4.2. The Special Bench of the ITAT had rejected the contention of the Revenue that proviso to Section 36(1)(vii) applies to all banks and with reference to the circulars issued by the Board, held that a bank would be entitled to both deductions, one under clause (vii) of Section 36(1) of the Act on the basis of actual write off and the other on the basis of clause (viia) of Section 36(1) of the Act on the mere making of provision for bad debts. This, according to the Revenue, would lead to double deduction and the proviso to Section 36(1)(vii) was

introduced with the intention to prevent this mischief. The contention of the Revenue was rightly rejected by the Special Bench of the ITAT and it correctly held that the Board itself had recognized the position that a bank would be entitled to both the deductions. Further, it concluded that the proviso had been introduced to protect the Revenue, but it would be meaningless to invoke the same where there was no threat of double deduction. [Para 26] [770-C-E]

4.3. As per this proviso to clause (vii), the deduction on account of the actual write off of bad debts would be limited to excess of the amount written off over the amount of the provision which had already been allowed under clause (viia). The proviso by and large protects the interests of the Revenue. In case of rural advances which are covered by clause (viia), there would be no such double deduction. The proviso, in its terms, limits its application to the case of a bank to which clause (viia) applies. Indisputably, clause (viia)(a) applies only to rural advances. [Para 27] [770-G-H; 771-A]

4.4. As far as foreign banks are concerned, under Section 36(1)(viia)(b) and as far as public financial institutions or State financial corporations or State industrial investment corporations are concerned, under Section 36(1)(viia)(c), they do not have rural branches. Thus, it can safely be inferred that the proviso is self indicative that its application is to bad debts arising out of rural advances. [Para 28] [771-B]

4.5. The scope of the proviso to clause (vii) of Section 36(1) has to be ascertained from a cumulative reading of the provisions of clauses (vii), (viia) of Section 36(1) and clause (v) of Section 36(2) and only shows that a double benefit in respect of the same debt is not given to a scheduled bank. A scheduled bank may have both urban and rural branches. It may give advances from both

branches with separate provision accounts for each. [Para 30] [772-G-H]

5.1. In the normal course of its business, an assessee bank is to maintain different accounts for the rural debts for non-rural/urban debts. It is obvious that the branches in the rural areas would primarily be dealing with rural debts while the urban branches would deal with commercial debts. Maintenance of such separate accounts would not only be a matter of mere convenience but would be the requirement of accounting standards. [Para 32] [773-E-F]

5.2. It is contended, and rightly so, on behalf of the assessee bank that under law, it is obliged to maintain accounts which would correctly depict its statement of affairs. This obligation arises implicitly from the requirements of the Act and certainly under the mandate of accounting standards. [Para 33] [773-G]

5.3. Inter alia, following are the reasons that would fully support the view that a bank should maintain the accounts with separate items for actual bad and irrecoverable debts as well as provision for such debts. It could, for valid reasons, have rural accounts more distinct from the urban, commercial accounts.

(a) It is obligatory upon each bank to ensure that the accounts represent the correct statement of affairs of the bank.

(b) Maintaining the common account may result in over stating the profits or the profits will shoot up which would result in accruing of liabilities not due.

(c) Accounting Standard (AS) 29, issued in 2003, which concerns treatment of 'provisions, contingent liabilities and contingent assets'

Clauses 53 and 54 under the head 'Use of Provisions' justify maintenance of distinct and different accounts. [Para 34, 35] [773-H; 774-A-C, F]

5.4. Merely because the Department has some apprehension of the possibility of double benefit to the assessee, this would not by itself be a sufficient ground for accepting its interpretation. Furthermore, the provisions of a section have to be interpreted on their plain language and could not be interpreted on the basis of apprehension of the Department. Under the accounting practice, the accounts of the rural branches have to tally with the accounts of the head office. If the repaid amount in subsequent years is not credited to the profit and loss account of the head office, which is what ultimately matters, then there would be a mismatch between the rural branch accounts and the head office accounts. Therefore, in order to prevent such mismatch and to be in conformity with the accounting practice, the banks should maintain separate accounts. Of course, all accounts would ultimately get merged into the account of the head office, which will ultimately reflect one account (balance sheet), though containing different items. [Para 36] [774-F-H; 775-A-B]

5.5. Another example that would support this view is that, a bank can write off a loan against the account of 'A' alone where it has advanced the loan to party 'A'. It cannot write off such loan against the account of 'B'. Similarly, a loan advanced under the rural schemes cannot be written off against an urban or a commercial loan by the bank in the normal course of its business. [Para 37] [775-C, D]

6.1. The Full Bench of the Kerala High Court expressed the view that the Legislature did not make any distinction between provisions created in respect of advances by rural branches and advances by other

branches of the bank. It also returned a finding while placing emphasis on the proviso to Section 36(1)(vii), read with clause (v) of Section 36(2) of the Act that the interpretation given by a Division Bench of that Court in the case of South Indian Bank was not a correct enunciation of law, inasmuch as the same would lead to double deduction. It took the view that in a claim of deduction of bad debts written off in non-rural/urban branches in the previous year, by virtue of proviso to Section 36(1)(vii), the banks are entitled to claim deduction of such bad debts only to the extent it exceeds the provision created for bad or doubtful rural advances under clause (viia) of Section 36(1) of the Act. This Court is unable to persuade itself to contribute to this reasoning and statement of law. [Para 38] [775-D-G]

6.2. The Full Bench ignored the significant expression appearing in both the proviso to Section 36(1)(vii) and clause (v) of Section 36(2), i.e., 'assessee to which clause (viia) of sub-section (1) applies'. In other words, if the case of the assessee does not fall under Section 36(1)(viia), the proviso/limitation would not come into play. [Para 39] [775-H; 776-A]

7. In the proviso to Section 36(1)(vii), the explanation to that Section, Section 36(1)(viia) and 36(2)(v), the words used are 'provision for bad and doubtful debts' while in the main part of Section 36(1)(vii), the Legislature has intentionally not used such language. The proviso to Section 36(1)(vii) and Sections 36(1)(viia) and 36(2)(v) have to be read and construed together. They form a complete scheme for deductions and prescribe the extent to which such deductions are available to a scheduled bank in relation to rural loans etc., whereas Section 36(1)(vii) deals with general deductions available to a bank and even non-banking businesses upon their showing that an account had become bad and written off

as irrecoverable in the accounts of the assessee for the previous year, satisfying the requirements contemplated in that behalf under Section 36(2). The provisions of Section 36(1)(vii) operate in their own field and are not restricted by the limitations of Section 36(1)(viia) of the Act. In addition to the reasons afore-stated, the view taken by the Special Bench of ITAT and the Division Bench of the Kerala High Court in the case of South Indian Bank are approved. [Para 40] [776-B-E]

8. The provisions of Sections 36(1)(vii) and 36(1)(viia) of the Act are distinct and independent items of deduction and operate in their respective fields. The bad debts written off in debts, other than those for which the provision is made under clause (viia), will be covered under the main part of Section 36(1)(vii), while the proviso will operate in cases under clause (viia) to limit deduction to the extent of difference between the debt or part thereof written off in the previous year and credit balance in the provision for bad and doubtful debts account made under clause (viia). The proviso to Section 36(1)(vii) will relate to cases covered under Section 36(1)(viia) and has to be read with Section 36(2)(v) of the Act. Thus, the proviso would not permit benefit of double deduction, operating with reference to rural loans while under Section 36(1)(vii), the assessee would be entitled to general deduction upon an account having become bad debt and being written off as irrecoverable in the accounts of the assessee for the previous year. This would be subject to satisfaction of the requirements contemplated under Section 36(2). [Para 41] [776-F-H; 777-A-B]

South Indian Bank Ltd. v. CIT **(2003) 262 ITR 579:** *UCO Bank, Calcutta v. Commissioner of Income Tax, W.B.* **(1999) 4 SCC 599: 1999(3)SCR 635;** *Southern Technologies Ltd. v. Joint Commissioner of Income Tax,* **Coimbatore (2010) 2**

SCC 548: 2010 (1) SCR 380 and *Vijaya Bank v. Commissioner of Income Tax and Anr.* **(2010) 5 SCC 416: 2010 (4) SCR 721 - referred to.**

Per Chief Justice of India [Concurring]

HELD: Under Section 36(1)(vii) of the Income Tax Act, 1961, the tax payer carrying on business is entitled to a deduction, in the computation of taxable profits, of the amount of any debt which is established to have become a bad debt during the previous year, subject to certain conditions. However, a mere provision for bad and doubtful debt(s) is not allowed as a deduction in the computation of taxable profits. In order to promote rural banking and in order to assist the scheduled commercial banks in making adequate provisions from their current profits to provide for risks in relation to their rural advances, the Finance Act, inserted clause (viia) in sub-section (1) of Section 36 to provide for a deduction, in the computation of taxable profits of all scheduled commercial banks, in respect of provisions made by them for bad and doubtful debt(s) relating to advances made by their rural branches. The deduction is limited to a specified percentage of the aggregate average advances made by the rural branches computed in the manner prescribed by the IT Rules, 1962. Thus, the provisions of clause (viia) of Section 36(1) relating to the deduction on account of the provision for bad and doubtful debt(s) is distinct and independent of the provisions of Section 36(1)(vii) relating to allowance of the bad debt(s). In other words, the scheduled commercial banks would continue to get the full benefit of the write off of the irrecoverable debt(s) under Section 36(1)(vii) in addition to the benefit of deduction for the provision made for bad and doubtful debt(s) under Section 36(1)(viia). A reading of the Circulars issued by CBDT indicates that normally a deduction for bad debt(s)

can be allowed only if the debt is written off in the books as bad debt(s). No deduction is allowable in respect of a mere provision for bad and doubtful debt(s). But in the case of rural advances, a deduction would be allowed even in respect of a mere provision without insisting on an actual write off. However, this may result in double allowance in the sense that in respect of same rural advance the bank may get allowance on the basis of clause (viia) and also on the basis of actual write off under clause (vii). This situation is taken care of by the proviso to clause (vii) which limits the allowance on the basis of the actual write off to the excess, if any, of the write off over the amount standing to the credit of the account created under clause (viia). However, the Revenue disputes the position that the proviso to clause (vii) refers only to rural advances. It says that there are no such words in the proviso which indicates that the proviso apply only to rural advances. There is no merit in the objection raised by the Revenue. Firstly, CBDT itself has recognized the position that a bank would be entitled to both the deduction, one under clause (vii) on the basis of actual write off and another, on the basis of clause (viia) in respect of a mere provision. Further, to prevent double deduction, the proviso to clause (vii) was inserted which says that in respect of bad debt(s) arising out of rural advances, the deduction on account of actual write off would be limited to the excess of the amount written off over the amount of the provision allowed under clause (viia). Thus, the proviso to clause (vii) stood introduced in order to protect the Revenue. It would be meaningless to invoke the said proviso where there is no threat of double deduction. In case of rural advances, which are covered by the provisions of clause (viia), there would be no such double deduction. The proviso limits its application to the case of a bank to which clause (viia) applies. Clause (viia) applies only to rural advances. This has been explained by the Circulars issued by CBDT.

Thus, the proviso indicates that it is limited in its application to bad debt(s) arising out of rural advances of a bank. It follows that if the amount of bad debt(s) actually written off in the accounts of the bank represents only debt(s) arising out of urban advances, the allowance thereof in the assessment is not affected, controlled or limited in any way by the proviso to clause (vii). [Para 2] [777-G-H; 778-A-H; 779-A-E]

Case Law Reference:

In the judgment of Swatanter Kumar, J.

(2003) 262 ITR 579	**referred to**	**Para 2**
1999 (3) SCR 635	**referred to**	**Para 18**
2010 (1) SCR 380	**referred to**	**Para 29**
2010 (4) SCR 721	**referred to**	**Para 36**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1143 of 2011 etc.

From the Judgment & Order dated 16.12.2009 of the High Court of Kerala at Ernakulam in ITA No. 1167 of 2009.

WITH

1147, 1151, 1155, 1156-1160, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190-1193, 1194, 1396 and 1397 of 2011.

G. Sarangan, S. Ganesh, Joseph Markose, R.P. Bhatt, Pratap Venugopal, Purushottam Kumar Jha, Namrata Sood, Gaurav Nair for (K.J. John, & Co.,) S. Sukumaran, Anand Sukumar, Bhupesh Kumar Pathak, Meera Mathur, Ajay K. Jain, Vikas Garg, M.P. Vinod, Arijit Prasad, Kunal Bahri, Shankar Divate, Madhusudhan Babu, B.V. Balaram Das, Sanjay Kunur, Ramesh Keswani for (Keswani & Co.,) K. Rajeev for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The assessee in C.A. No. 1143 of 2011, a Scheduled Bank, filed its return of income for the assessment year 2002-2003 on 24th October, 2002, declaring total income of Rs. 61,15,610/-. The return was processed under Section 143(1) of the Income Tax Act, 1961 (for short 'the Act') and eligible refund was issued in favour of the assessee. However, the assessing officer issued notice under Section 143(2) of the Act to the assessee, after which the assessment was completed. Inter alia, the assessing officer, while dealing, under Section 143(3) of the Act, with the claim of the assessee for bad debts of Rs. 12,65,95,770/-, noticed that the argument put forward on behalf of the assessee, that the deduction allowable under Section 36(1)(vii) of the Act is independent of deduction under Section 36(1)(viia) of the Act, could not be accepted. Consequently, he observed that the assessee having a provision of Rs. 15,01,29,990/- for bad and doubtful debts under Section 36(1)(viia) of the Act could not claim the amount of Rs. 12,65,95,770/- as deduction on account of bad debts because the bad debts did not exceed the credit balance in the provision for bad and doubtful debts account and also, the requirements of clause (v) of Sub-section (2) of Section 36 of the Act were not satisfied. Therefore, the assessee's claim for deduction of bad debts written off from the account books was disallowed. This amount was added back to the taxable income of the assessee, for which a demand notice and challan was accordingly issued. This order of the assessing officer dated 24th January, 2005, was challenged in appeal by the assessee on various grounds.

2. The Commissioner of Income Tax (Appeals) [hereafter referred to as 'the CIT(A)'], vide its order dated 7th April, 2006, partly allowed the appeal, particularly in relation to the claim of the appellant Bank for bad debts. Relying upon the judgment of a Division Bench of the Kerala High Court in the case of *South Indian Bank Ltd. v. CIT* [(2003) 262 ITR 579], the CIT(A)

held that the claim of the appellant was fully supported by the said decision and since the entire bad debts written off by the bank under Section 36(1)(vii) were pertaining to urban branches only and not to the provision made for rural branches under Section 36(1)(viia), it was entitled to the deduction of the full claimed amount of Rs. 12,65,95,770/-. Consequently, he directed deletion of the said amount.

3. For the years of assessment in question and being aggrieved from the order of the CIT(A), the Revenue as well as the assessee filed appeals before the Income Tax Appellate Tribunal, Cochin (for short, the 'ITAT'). All the appeals were heard together and vide its order dated 16th April, 2007, while relying upon the judgment of the jurisdictional High Court in the case of *South Indian Bank Ltd.* (supra), the ITAT dismissed the appeal of the Revenue on this issue and also granted certain other benefits to the assessee in relation to other items.

4. We consider it appropriate to notice at this stage the fate of the orders passed for the previous assessment years in relation to the appellant and other banks.

5. M/s. Dhanalakshmi Bank Ltd., one of the appellants before us, had also raised the same issue before the ITAT in Income Tax Appeal Nos.602-605 (Coch.) of 1994 and 190 (Coch.) of 1995, in relation to earlier assessment years. A view had been expressed that there was no distinction made by the Legislature in the proviso to Section 36(1)(vii) between rural and non-rural advances and, therefore, its application cannot be limited to rural advances. Under clause (viia) also, a bank was held to be entitled to deduction in respect of the provisions made for rural and non-rural advances, subject to limitations contained therein. Thus, the contention of the assessee in that case, for deduction of bad debts from urban branches under Section 36(1)(vii), was rejected. The earlier view taken by the Tribunal in the case of Federal Bank in ITA Nos. 505, 854(Coch.) of 1993, 376(Coch.) of 1995 and 284(Coch.) of 1995 held that the proviso to clause (vii) only bars the deduction of bad debts

arising out of rural advances, the actual right to set off bad debts in respect of non-rural and urban advances cannot be controlled or restricted by application of the proviso and the same would be allowed without making adjustment vis-a-vis the provision for bad and doubtful debts. This view was obviously favourable to the assessee. Noticing these contrary views in the cases of Dhanalakshmi Bank and Federal Bank, the matter in the case of the appellant-Bank, for assessment years 1991-92 to 1993-1994 was referred to a Special Bench of the ITAT for resolving the issue. The Special Bench, vide its judgment dated 9th August, 2002, had answered the question of law in the affirmative, holding that debts actually written off, which do not arise out of the rural advances, are not affected by the proviso to clause (vii) and that only those bad debts which arise out of rural advances are to be deducted under Section 36(1)(viia) in accordance with the proviso to clause (vii). Finally, the matter, in respect of the appellant-Bank, was ordered to be placed before the assessing officer and with respect to other banks, before the concerned benches of the ITAT. The order of the Special Bench of the ITAT was implemented by the Department and was never called in question. It may be noticed here that in relation to earlier assessments, i.e. right from 1985-1986 to 1987-1988 in a similar case, different banks came up for hearing in appeal before a Division Bench of the Kerala High Court in the case of *South Indian Bank Ltd.* (supra) wherein, as mentioned above, while discussing the scope of Section 36(1)(viia) and 36(2)(v) of the Act, the High Court set aside the order of the Tribunal in that case and held that the assessee was entitled to the deduction under clause (vii) irrespective of the difference between the credit balance in the provision account made under clause (viia) and the bad debts written off in the books of accounts in respect of bad debts relating to urban or non-rural advances. It accepted the contention of the assessee and referred the matter to the assessing officer. This judgment of the High Court is subject matter of Civil Appeal Nos. 1190-1193 of 2011 before us.

6. However, the Department of Income Tax, being dissatisfied with the order of the ITAT in assessment year 2002-2003, filed an appeal before the High Court under Section 260A of the Act.

7. The Division Bench of the High Court of Kerala at Ernakulam hearing the bunch of appeals against the order of the ITAT, expressed the view that the judgment of that Court in the case of *South Indian Bank* (supra) was not a correct exposition of law. While dissenting therefrom, the Bench directed the matter to be placed before a Full Bench of the High Court.

8. That is how the matter came up for hearing before a Full Bench of the High Court of Kerala at Ernakulam and vide its judgment dated 16th December, 2009, the Full Bench not only answered the question of law but even decided the case on merits. While setting aside the view taken by the Division Bench in *South Indian Bank* (supra) and also the concurrent view taken by the CIT(A) and the ITAT, the Full Bench of the High Court held as under:-

> "5...What is clear from the above is that provision for bad and doubtful debts normally is not an allowable deduction and what is allowable under main clause is bad debt actually written off. However, so far as Banks to which clause (viia) applies are concerned, they are entitled to claim deduction of provision under sub-clause (viia), but at the same time when bad debt written is also claimed deduction under clause (vii), the same will be allowed as a deduction only to the extent it is in excess of the provision created and allowed as a deduction under clause (viia). It is worthwhile to note that deduction under Section 36 (1)(vii) is subject to sub-section (2) of Section 36 which in clause (v) specifically states that any bad debt written off should be claimed as a deduction only after debiting it to the provision created for bad and doubtful debts. Further, in order to qualify for deduction of the bad debt written off,

the requirement of section 36 (2) (v) is that such amount should be debited to the provision created under clause (viia) of claim deduction of provision under sub-clause (viia), but at the same time when bad debt is written off is also claimed deduction under clause (vii), the same will be allowed as a deduction only to the extent it is in excess of the provision created and allowed as a deduction under clause (viia). It is worthwhile to note that deduction under section 36(1) (vii) is subject to sub section (2) of section 36 which in clause (v) specifically states that any bad debt written off should be claimed as a deduction only after debiting it to the provision created for bad and doubtful debts. What is clear from the above provisions is that though Respondent-Banks are entitled to claim deduction of provision for bad and doubtful debts in terms of clause (viia), such Banks are entitled to deduction of bad debt actually written off only to the extent it is in excess of the provision created and allowed as deduction under clause (viia). Further, in order to qualify for deduction of bad debt written off, the requirement of section 36 (2) (v) is that such amount should be debited to the provision created under clause (viia) of Section 36(1). Therefore, we are of the view that the distinction drawn by the Division Bench in SOUTH INDIAN BANK'S case between the bad debts written off in respect of advances made by Rural Branches and bad debts pertaining to advances made by other Branches does not exist and is not visualized under proviso to Section 36(1)(vii). We, therefore, hold that the said decision of this Court does not lay down the correct interpretation of the provisions of the Act. Admittedly all the Respondent-assesses have claimed and have been allowed deduction of provision in terms of clause (viia) of the Act. Therefore, when they claim deduction of bad debt written off in the previous year by virtue of the proviso to section 36(1)(vii), they are entitled to claim deduction of such bad debt only to the extent it exceeds the provision created and allowed as deduction under clause (viia) of the Act.

6. In the normal course we should answer the question referred to us by the Division Bench and send back the appeals for the Division Bench to decide the appeals consistent with the Full Bench decision. However, since this is the only issue that arises in the appeals, we feel it would be only an empty formality to send back the matter to the Division Bench for disposal of appeals consistent with our judgment. In order to Avoid unnecessary posting of appeals before the Division Bench, we allow the appeals by setting aside the orders of the Tribunal and by restoring the assessments confirmed in first Appeals."

9. Dissatisfied from the judgment of the Full Bench of the Kerala High Court, the assessee has filed the present appeal purely on question of law.

10. The basic question of some significance, that arises for consideration in the present appeals, is regarding the scope and ambit of the proviso to clause (vii) of sub-section (1) of Section 36 of the Act. According to the contention raised on behalf of the assessee, the view taken by the Full Bench of the Kerala High Court cannot be sustained in law as there are distinct and different items of account that are maintained by the bank in the normal course of its business and it is not permissible to interchange these items in accordance with the settled standards of accountancy or even in law. As such, the claim of doubtful and bad debts could not have been added back to taxable income as it was an additional liability of the bank being shown as an independent item.

11. To put it more precisely, the contentious questions of law that have been raised in the present appeals are as follows:-

"(j) Whether the Full Bench of the High Court has grossly erred in reversing the finding of the earlier Division Bench that on a correct interpretation of the Proviso to clause (vii) of Section 36(1) and clause (v) to Section 36(2) is only to deny the deduction to the extent of bad debts written off in

the books with respect to which provision was made under clause (viia) of the Income Tax Act?

(k) Whether the Full Bench was correct in reversing the findings of the earlier Division Bench that if the bad debt written off relate to debt other than for which the provision is made under clause (viia), such debts will fall squarely within the main part of clause (vii) which is entitled to be deduction and in respect of that part of the debt with reference to which a provision is made under clause (viia), the proviso will operate to limit the deduction to the extent of the difference between that part of debt written off in the previous year and the credit balance in the provision for bad and doubtful debts account made under clause (viia)?"

12. The appellant has contended that as the similar claims had been decided in favour of the banks for the assessment years 1991-1992 to 1993-1994, by Special Bench of the ITAT, which had not been challenged by the Department. As such, the issue had attained finality and could not be disturbed in the subsequent years.

13. The above contention of the appellant banks does not impress us at all. Merely because the orders of the Special Bench of the ITAT were not assailed in appeal by the Department itself, this would not take away the right of the Revenue to question the correctness of the orders of assessment, particularly when a question of law is involved. There is no doubt that the earlier order of the CIT(A) had merged into the judgment of the Special Bench of the ITAT and attained finality for that relevant year. Equally, it is true that though the Full Bench of the Kerala High Court specifically overruled the Division Bench judgment of that very Court in the case of *South Indian Bank* (supra), it did not notice any of the contentions before and principles stated by the Special Bench of the ITAT in its impugned judgment. As already noticed, the question raised in the present appeal go to the very root of the matter and are questions of law in relation to interpretation of

Sections 36(1)(vii) and 36(1)(viia) read with Section 36(2) of the Act. Thus, without any hesitation, we reject the contention of the appellant banks that the findings recorded in the earlier assessment years 1991-1992 to 1993-1994 would be binding on the Department for subsequent years as well.

14. Now, we would proceed to examine the provisions of Sections 36(1)(vii), 36(1)(viia) and 36(2) of the Act and their scope. It would be appropriate for this Court to notice the relevant provisions of the Sections at this stage itself.

"Section 36 (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28 – (i) to (vi)…..

(vii) Subject to the provisions of sub-section (2), the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year:

Provided that in the case of an assessee to which clause (viia) applies, the amount of the deduction relating to any such debt or part thereof shall be limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account made under that clause;

Explanation – For the purposes of this clause, any bad debt or part thereof written off as irrecoverable in the accounts of the assess shall not include any provision for bad and doubtful debts made in the accounts of the assessee.

(viia) In respect of any provision for bad and doubtful debts made by - (a) A scheduled bank not being a bank incorporated by or under the laws of a country outside India or a non-scheduled bank, an amount not exceeding five per cent of the total income (computed before making any

deduction under this clause and Chapter VI-A) and an amount not exceeding ten per cent of the aggregate average advances made by the rural branches of such bank computed in the prescribed manner;

Provided that a scheduled bank or a non-scheduled bank referred to in this sub-clause shall, at its option, be allowed in any of the relevant assessment years, deduction in respect of any provision made by it for any assets classified by the Reserve Bank of India as doubtful assets or loss assets in accordance with the guidelines issued by it in this behalf, for an amount not exceeding five per cent. of the amount of such assets shown in the books of account of the bank on the last day of the previous year.

Provided further that for the relevant assessment years commencing on or after the 1st day of April, 2003 and ending before the 1st day of April, 2005, the provisions of the first proviso shall have effect as if for the words “five per cent”, the words “ten per cent” had been substituted :

Provided also that a scheduled bank or a non-scheduled bank referred to in this sub-clause shall, at its option, be allowed a further deduction in excess of the limits specified in the foregoing provisions, for an amount not exceeding the income derived from redemption of securities in accordance with a scheme framed by the Central Government.

Explanation. - For the purposes of this sub-clause, "relevant assessment years" means the five consecutive assessment years commencing on or after the 1st day of April, 2000 and ending before the 1st day of April, 2005.

Section 36 (2) In making any deduction for a bad debt or part thereof, the following provisions shall apply –

(i) No such deduction shall be allowed unless such debt

or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year, or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee;

(ii) If the amount ultimately recovered on any such debt or part of debt is less than the difference between the debt or part and the amount so deducted, the deficiency shall be deductible in the previous year in which the ultimate recovery is made;

(iii) Any such debt or part of debt may be deducted if it has already been written off as irrecoverable in the accounts of an earlier previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year), but the Assessing Officer had not allowed it to be deducted on the ground that it had not been established to have become a bad debt in that year;

(iv) Where any such debt or part of debt is written off as irrecoverable in the accounts of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year) and the Assessing Officer is satisfied that such debt or part became a bad debt in any earlier previous year not falling beyond a period of four previous years immediately preceding the previous year in which such debt or part is written off, provisions of sub-section (6) of section 155 shall apply;

(v) Where such debt or part of debt relates to advances made by an assessee to which clause (viia) of sub-section (1) applies, no such deduction shall be allowed unless the assessee has debited the amount of such debt or part of debt in that previous year to the provision for bad and

doubtful debts account made under that clause."

15. The income of an assessee carrying on a business or profession has to be assessed in accordance with the scheme contained in Part 'D' of Chapter IV dealing with heads of income. Section 28 of the Act deals with the chargeability of income to tax under the head 'profits and gains of business or profession'. All 'other deductions' available to an assessee under this head of income are dealt with under Section 36 of the Act which opens with the words 'the deduction provided for in the following clauses shall be allowed in respect of matters dealt with therein, in computing the income referred to in Section 28'. In other words for the purposes of computing the income chargeable to tax, beside specific deductions, 'other deductions' postulated in different clauses of Section 36 are to be allowed by the assessing officer, in accordance with law.

16. Sections 36(1)(vii) and 36(1)(viia) provide for such deductions, which are to be permitted, in accordance with the language of these provisions. A bare reading of these provisions show that Sections 36(1)(vii) and 36(1)(viia) are separate items of deduction. These are independent provisions and, therefore, cannot be intermingled or read into each other. It is a settled canon of interpretation of fiscal statutes that they need to be construed strictly and on their plain reading.

17. The provisions of Section 36(1)(vii) would come into play in the grant of deductions, subject to the limitation contained in Section 36(2) of the Act. Any bad debt or part thereof, which is written off as irrecoverable in the accounts of the assessee for the previous year is the deduction which the assessee would be entitled to get, provided he satisfies the requirements of Section 36(2) of the Act. Allowing of deduction of bad debts is controlled by the provisions of Section 36(2). The argument advanced on behalf of the Revenue is that it would amount to allowing a double deduction if the provisions of Sections 36(1)(vii) and 36(1)(viia) are permitted to operate independently. There is no doubt that a statute is normally not

construed to provide for a double benefit unless it is specifically so stipulated or is clear from the scheme of the Act. As far as the question of double benefit is concerned, the Legislature in its wisdom introduced Section 36(2)(v) by the Finance Act, 1985 with effect from 01.04.1985. Section 36(2)(v) concerns itself as a check for claim of any double deduction and has to be read in conjunction with Section 36(1)(viia) of the Act. It requires the assessee to debit the amount of such debt or part thereof in the previous year to the provision made for that purpose.

Effect of Circulars

18. Now, we shall proceed to examine the effect of the circulars which are in force and are issued by the Central Board of Direct Taxes (for short, 'the Board') in exercise of the power vested in it under Section 119 of the Act. Circulars can be issued by the Board to explain or tone down the rigours of law and to ensure fair enforcement of its provisions. These circulars have the force of law and are binding on the income tax authorities, though they cannot be enforced adversely against the assessee. Normally, these circulars cannot be ignored. A circular may not override or detract from the provisions of the Act but it can seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specified circumstances. So long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the Act. {Refer to *UCO Bank, Calcutta v. Commissioner of Income Tax, W.B.* (1999) 4 SCC 599]}.

19. In the present case, after introduction of Section 36(1)(viia) by the Finance Act, 1979, [(1981) 131 ITR (St.) 88], with effect from 1st April, 1980, Circular No. 258 dated 14th June, 1979 was issued by the Board to clarify the application of the new provisions. The provisions were introduced in order to promote rural banking and assist the scheduled commercial banks in making adequate provision from their current profits to provide for risks in relation to their rural advances. The deductions were to be limited as specified in the Section. A

'rural branch' for the purpose of the Act had meant a branch of a scheduled bank, situated in a place with a population not exceeding 10,000, according to the last preceding census of which the relevant figures have been published. Under clause 13.3, the Circular found it relevant to mention that the provisions of new clause (viia) of Section 36(1), relating to the deduction on account of provisions for bad and doubtful debts, is distinct and independent of the provisions of Section 36(1)(vii) relating to allowance of deduction of the bad debts. In other words, the scheduled commercial banks would continue to get the benefit of the write-off of the irrecoverable debts under Section 36(1)(vii) in addition to the benefit of deduction of the provision for bad and doubtful debts under Section 36(1)(viia).

20. The Finance Act, 1985, which was given effect from 1st April, 1985, added the proviso to Section 36(1)(vii), amended Section 36(1)(viia) and also introduced clause (v) to Section 36(2) of the Act. To complete the history of amendments to these clauses, we may also notice that proviso to Section 36(1)(viia)(a) was introduced by Finance Act, 1999 with effect from 1st April, 2000 and explanation to Section 36(1)(vii) was introduced by Finance Act, 2001 with effect from 1st April, 2001.

21. A Circular No.421 dated 12th June, 1985 [(1985) 156 ITR (St.) 130] attempted to explain the amendments made to Section 36 and also explained the provisions of clause (viia) of Section 36(1). It reads as under :

> "Deduction in respect of provisions made by banking companies for bad and doubtful debts.
>
> 17.1 Section 36(1)(vii) of the Income-tax Act provides for a deduction in the computation of taxable profits of the amount of any debt or part thereof which is established to have become a bad debt in the previous year. This allowance is subject to the fulfilment of the conditions specified in sub-section (2) of section 36.

> 17.2 Section 36(1)(viia) of the Income-tax Act provides for a deduction in respect of any provision for bad and doubtful debts made by a scheduled bank or a non-scheduled bank in relation to advances made by its rural branches, of any amount not exceeding 1½ per cent of the aggregate average advances made by such branches.
>
> 17.3 Having regard to the increasing social commitments of banks, section 36(1)(viia) has been amended to provide that in respect of any provision for bad and doubtful debts made by a scheduled bank [not being a bank approved by the Central Government for the purposes of section 36(1)(viiia) or a bank incorporated by or under the laws of a country outside India] or a non-scheduled bank, an amount not exceeding ten per cent of the total income (computed before making any deduction under the proposed new provision) or two per cent of the aggregate average advances made by rural branches of such banks, whichever is higher, shall be allowed as a deduction in computing the taxable profits.
>
> 17.4 Section 36(1)(vii) of the Act has also been amended to provide that in the case of a bank to which section 36(1)(viia) applies, the amount of bad and doubtful debts shall be debited to the provision for bad and doubtful debts account and that the deduction admissible under section 36(1)(vii) shall be limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account.
>
> 17.5 Section 36(2) has been amended by insertion of a new clause (v) to provide that where a debt or a part of a debt considered bad or doubtful relates to advances made by a bank to which section 36(1)(viia) applies, no such deduction shall be allowed unless the bank has debited the amount of such debt or part of debt in that previous year to the provision for bad and doubtful debt account made under clause (viia) of section 36(1)."

22. Still another circular being Circular No.464, dated 18th July, 1986 [(1986) 161 ITR(St.) 66] was issued with the intention to explain the amendments made by the Income Tax (Amendment) Act, 1986. Clause 5 of the Circular dealt with the modifications introduced in respect of the deductions on provisions for bad and doubtful debts made by the banks and it stated as follows :

"5. Modification in respect of deduction on provisions for bad and doubtful debts made by the banks

5.1 Under the existing provisions of clause (viia) of sub-section (1) of section 36 of the Income-tax Act inserted by the Finance Act, 1979, provision for bad and doubtful debts made by scheduled or a non-scheduled Indian bank is allowed as deduction within the prescribed limits. The limit prescribed is 10% of the total income or 2% of the aggregate average advances made by the rural branches of such banks, whichever is higher. It had been represented to the Government that the foreign banks were not entitled to any deduction under this provision and to that extent, they were being discriminated against. Further, it was felt that the existing ceiling in this regard, i.e., 10% of the total income or 2% of the aggregate average advances made by the rural branches of Indian banks, whichever is higher, should be modified. Accordingly, by the Amending Act, the deduction presently available under clause (viia) of sub-section (1) of section 36 of the Income-tax Act has been split into two separate provisions. One of these limits the deduction to an amount not exceeding 2% of the aggregate average advances made by the rural branches of the banks concerned. It may be clarified that foreign banks do not have rural branches and hence this amendment will not be relevant in the case of the foreign banks. The other provisions secure that a further deduction shall be allowed in respect of the provision for bad and doubtful debts made by all banks, not just the banks incorporated in India, limited to 5% of the total income

(computed before making any deduction under this clause and Chapter VI-A). This will imply that all scheduled or non-scheduled banks having rural branches would be allowed the deduction up to 2% of the aggregate average advances made by such branches and a further deduction up to 5% of their total income in respect of provision for bad and doubtful debts."

23. Reference usefully can also be made to the Statement of Objects and Reasons for the Finance Act, 1986, wherein, inter alia, it was stated that the amendments were intended to provide a deduction on the provisions for bad debts made by all banks upto 5 per cent of their total income and an additional 2 per cent of the aggregate average advances made by the rural branches of the banks. These percentages stood altered by subsequent amendments in 1993 and 2001.

24. Clear legislative intent of the relevant provisions and unambiguous language of the circulars with reference to the amendments to Section 36 of the Act demonstrate that the deduction on account of provisions for bad and doubtful debts under Section 36(1)(viia) is distinct and independent of the provisions of Section 36(1)(vii) relating to allowance of the bad debts. The legislative intent was to encourage rural advances and the making of provisions for bad debts in relation to such rural branches. Another material aspect of the functioning of such banks is that their rural branches were practically treated as a distinct business, though ultimately these advances would form part of the books of accounts of the principal or head office branch. Thus, this Court would be more inclined to give an interpretation to these provisions which would serve the legislative object and intent, rather than to subvert the same. The Circulars in question show a trend of encouraging rural business and for providing greater deductions. The purpose of granting such deductions would stand frustrated if these deductions are implicitly neutralized against other independent deductions specifically provided under the provisions of the Act.

To put it simply, the deductions permissible under Section 36(1)(vii) should not be negated by reading into this provision, limitations of Section 36(1)(viia) on the reasoning that it will form a check against double deduction. To our mind, such approach would be erroneous and not applicable on the facts of the case in hand.

Interpretation and Construction of Relevant Sections

25. The language of Section 36(1)(vii) of the Act is unambiguous and does not admit of two interpretations. It applies to all banks, commercial or rural, scheduled or unscheduled. It gives a benefit to the assessee to claim a deduction on any bad debt or part thereof, which is written off as irrecoverable in the accounts of the assessee for the previous year. This benefit is subject only to Section 36(2) of the Act. It is obligatory upon the assessee to prove to the assessing officer that the case satisfies the ingredients of Section 36(1)(vii) on the one hand and that it satisfies the requirements stated in Section 36(2) of the Act on the other. The proviso to Section 36(1)(vii) does not, in absolute terms, control the application of this provision as it comes into operation only when the case of the assessee is one which falls squarely under Section 36(1)(viia) of the Act. We may also notice that the explanation to Section 36(1)(vii), introduced by the Finance Act, 2001, has to be examined in conjunction with the principal section. The explanation specifically excluded any provision for bad and doubtful debts made in the account of the assessee from the ambit and scope of 'any bad debt, or part thereof, written off as irrecoverable in the accounts of the assessee'. Thus, the concept of making a provision for bad and doubtful debts will fall outside the scope of Section 36(1)(vii) simplicitor. The proviso, as already noticed, will have to be read with the provisions of Section 36(1)(viia) of the Act. Once the bad debt is actually written off as irrecoverable and the requirements of Section 36(2) satisfied, then, it will not be permissible to deny such deduction on the apprehension of

double deduction under the provisions of Section 36(1)(viia) and proviso to Section 36(1)(vii). This does not appear to be the intention of the framers of law. The scheduled and non-scheduled commercial banks would continue to get the full benefit of write off of the irrecoverable debts under Section 36(1)(vii) in addition to the benefit of deduction of bad and doubtful debts under Section 36(1)(viia). Mere provision for bad and doubtful debts may not be allowable, but in the case of a rural advance, the same, in terms of Section 36(1)(viia)(a), may be allowable without insisting on an actual write off.

26. The Special Bench of the ITAT had rejected the contention of the Revenue that proviso to Section 36(1)(vii) applies to all banks and with reference to the circulars issued by the Board, held that a bank would be entitled to both deductions, one under clause (vii) of Section 36(1) of the Act on the basis of actual write off and the other on the basis of clause (viia) of Section 36(1) of the Act on the mere making of provision for bad debts. This, according to the Revenue, would lead to double deduction and the proviso to Section 36(1)(vii) was introduced with the intention to prevent this mischief. The contention of the Revenue, in our opinion, was rightly rejected by the Special Bench of the ITAT and it correctly held that the Board itself had recognized the position that a bank would be entitled to both the deductions. Further, it concluded that the proviso had been introduced to protect the Revenue, but it would be meaningless to invoke the same where there was no threat of double deduction.

27. As per this proviso to clause (vii), the deduction on account of the actual write off of bad debts would be limited to excess of the amount written off over the amount of the provision which had already been allowed under clause (viia). The proviso by and large protects the interests of the Revenue. In case of rural advances which are covered by clause (viia), there would be no such double deduction. The proviso, in its terms, limits its application to the case of a bank to which clause (viia)

applies. Indisputably, clause (viia)(a) applies only to rural advances.

28. As far as foreign banks are concerned, under Section 36(1)(viia)(b) and as far as public financial institutions or State financial corporations or State industrial investment corporations are concerned, under Section 36(1)(viia)(c), they do not have rural branches. Thus, it can safely be inferred that the proviso is self indicative that its application is to bad debts arising out of rural advances.

29. In a recent judgment of this Court, in *Southern Technologies Ltd. v. Joint Commissioner of Income Tax, Coimbatore* [(2010) 2 SCC 548] (authored by one of us, Kapadia, J., as he then was), both Sections 36(1)(vii) and 36(1)(viia) were discussed. Then, this Court went on to state how these provisions operate in the case of a Non Banking Financial Corporations (NBFC) vis-à-vis bank covered under Section 36(1)(viia). The Court held as under:

> "37. To understand the above dichotomy, one must understand "how to write off". If an assessee debits an amount of doubtful debt to the P&L account and credits the asset account like sundry debtor's account, it would constitute a write-off of an actual debt. However, if an assessee debits "provision for doubtful debt" to the P&L account and makes a corresponding credit to the "current liabilities and provisions" on the liabilities side of the balance sheet, then it would constitute a provision for doubtful debt. In the latter case, the assessee would not be entitled to deduction after 1-4-1989.
>
> XXX XXX XXX
>
> 58. Section 36(1)(vii) provides for a deduction in the computation of taxable profits for the debt established to be a bad debt. Section 36(1)(vii-a) provides for a deduction in respect of any provision for bad and doubtful

> debt made by a scheduled bank or non-scheduled bank in relation to advances made by its rural branches, of a sum not exceeding a specified percentage of the aggregate average advances by such branches.
>
> 59. Having regard to the increasing social commitment, Section 36(1)(vii-a) has been amended to provide that in respect of provision for bad and doubtful debt made by a scheduled bank or a non-scheduled bank, an amount not exceeding a specified per cent of the total income or a specified per cent of the aggregate average advances made by rural branches, whichever is higher, shall be allowed as deduction in computing the taxable profits. Even Section 36(1)(vii) has been amended to provide that in the case of a bank to which Section 36(1)(vii-a) applies, the amount of bad and doubtful debt shall be debited to the provision for bad and doubtful debt account and that the deduction shall be limited to the amount by which such debt exceeds the credit balance in the provision for bad and doubtful debt account.
>
> 60. The point to be highlighted is that in case of banks, by way of incentive, a provision for bad and doubtful debt is given the benefit of deduction, however, subject to the ceiling prescribed as stated above. Lastly, the provision for NPA created by a scheduled bank is added back and only thereafter deduction is made permissible under Section 36(1)(vii-a) as claimed."

30. The scope of the proviso to clause (vii) of Section 36(1) has to be ascertained from a cumulative reading of the provisions of clauses (vii), (viia) of Section 36(1) and clause (v) of Section 36(2) and only shows that a double benefit in respect of the same debt is not given to a scheduled bank. A scheduled bank may have both urban and rural branches. It may give advances from both branches with separate provision accounts for each.

31. It was neither in dispute earlier, nor dispute before us, that the assessee bank is maintaining two separate accounts, one being a provision for bad and doubtful debts other than provisions for bad debts in rural branches and another provision account for bad debts in rural branches for which separate accounts are maintained. This fact is evinced by the entries in the profit and loss account, balance sheet and break up details. We need not deliberate this aspect with reference to records at any greater length as this is not a matter in issue before us. It was contended on behalf of the Revenue that the Revenue is only concerned with the assessee as a single unit and not with how many separate accounts are being maintained by the assessee and under what items. The Department, therefore, would assess an assessee with reference to a single account maintained in the head office of the concerned bank. This, according to the learned counsel appearing for the Department, would further substantiate the argument of the Department that the interpretation given by the Full Bench of the High Court is the correct interpretation of Section 36(1)(vii). This argument has to be rejected, being without merit.

32. In the normal course of its business, an assessee bank is to maintain different accounts for the rural debts for non-rural/ urban debts. It is obvious that the branches in the rural areas would primarily be dealing with rural debts while the urban branches would deal with commercial debts. Maintenance of such separate accounts would not only be a matter of mere convenience but would be the requirement of accounting standards.

33. It is contended, and rightly so, on behalf of the assessee bank that under law, it is obliged to maintain accounts which would correctly depict its statement of affairs. This obligation arises implicitly from the requirements of the Act and certainly under the mandate of accounting standards.

34. Inter alia, following are the reasons that would fully support the view that a bank should maintain the accounts with

separate items for actual bad and irrecoverable debts as well as provision for such debts. It could, for valid reasons, have rural accounts more distinct from the urban, commercial accounts.

(a) It is obligatory upon each bank to ensure that the accounts represent the correct statement of affairs of the bank.

(b) Maintaining the common account may result in over stating the profits or the profits will shoot up which would result in accruing of liabilities not due.

(c) Accounting Standard (AS) 29, issued in 2003, which concerns treatment of 'provisions, contingent liabilities and contingent assets'. Under the head 'Use of Provisions', clauses 53 and 54 state as under:-

"53. A provision should be used only for expenditures for which the provision was originally recognised.

54. Only expenditures that relate to the original provision are adjusted against it. Adjusting expenditures against a provision that was originally recognised for another purpose would conceal the impact of two different events."

35. The above clauses justify maintenance of distinct and different accounts.

36. Merely because the Department has some apprehension of the possibility of double benefit to the assessee, this would not by itself be a sufficient ground for accepting its interpretation. Furthermore, the provisions of a section have to be interpreted on their plain language and could not be interpreted on the basis of apprehension of the Department. This Court, in the case of *Vijaya Bank v. Commissioner of Income Tax & Anr.* [(2010) 5 SCC 416], held that under the accounting practice, the accounts of the rural branches have to tally with the accounts of the head office. If

the repaid amount in subsequent years is not credited to the profit and loss account of the head office, which is what ultimately matters, then there would be a mismatch between the rural branch accounts and the head office accounts. Therefore, in order to prevent such mismatch and to be in conformity with the accounting practice, the banks should maintain separate accounts. Of course, all accounts would ultimately get merged into the account of the head office, which will ultimately reflect one account (balance sheet), though containing different items.

37. Another example that would support this view is that, a bank can write off a loan against the account of 'A' alone where it has advanced the loan to party 'A'. It cannot write off such loan against the account of 'B'. Similarly, a loan advanced under the rural schemes cannot be written off against an urban or a commercial loan by the bank in the normal course of its business.

38. The Full Bench of the Kerala High Court expressed the view that the Legislature did not make any distinction between provisions created in respect of advances by rural branches and advances by other branches of the bank. It also returned a finding while placing emphasis on the proviso to Section 36(1)(vii), read with clause (v) of Section 36(2) of the Act that the interpretation given by a Division Bench of that Courts in the case of *South Indian Bank* (supra) was not a correct enunciation of law, inasmuch as the same would lead to double deduction. It took the view that in a claim of deduction of bad debts written off in non-rural/urban branches in the previous year, by virtue of proviso to Section 36(1)(vii), the banks are entitled to claim deduction of such bad debts only to the extent it exceeds the provision created for bad or doubtful rural advances under clause (viia) of Section 36(1) of the Act. We are unable to persuade ourselves to contribute to this reasoning and statement of law.

39. Firstly, the Full Bench ignored the significant expression appearing in both the proviso to Section 36(1)(vii)

and clause (v) of Section 36(2), i.e., 'assessee to which clause (viia) of sub-section (1) applies'. In other words, if the case of the assessee does not fall under Section 36(1)(viia), the proviso/limitation would not come into play.

40. It is useful to notice that in the proviso to Section 36(1)(vii), the explanation to that Section, Section 36(1)(viia) and 36(2)(v), the words used are 'provision for bad and doubtful debts' while in the main part of Section 36(1)(vii), the Legislature has intentionally not used such language. The proviso to Section 36(1)(vii) and Sections 36(1)(viia) and 36(2)(v) have to be read and construed together. They form a complete scheme for deductions and prescribe the extent to which such deductions are available to a scheduled bank in relation to rural loans etc., whereas Section 36(1)(vii) deals with general deductions available to a bank and even non-banking businesses upon their showing that an account had become bad and written off as irrecoverable in the accounts of the assessee for the previous year, satisfying the requirements contemplated in that behalf under Section 36(2). The provisions of Section 36(1)(vii) operate in their own field and are not restricted by the limitations of Section 36(1)(viia) of the Act. In addition to the reasons afore-stated, we also approve the view taken by the Special Bench of ITAT and the Division Bench of the Kerala High Court in the case of *South Indian Bank* (supra).

41. To conclude, we hold that the provisions of Sections 36(1)(vii) and 36(1)(viia) of the Act are distinct and independent items of deduction and operate in their respective fields. The bad debts written off in debts, other than those for which the provision is made under clause (viia), will be covered under the main part of Section 36(1)(vii), while the proviso will operate in cases under clause (viia) to limit deduction to the extent of difference between the debt or part thereof written off in the previous year and credit balance in the provision for bad and doubtful debts account made under clause (viia). The proviso to Section 36(1)(vii) will relate to cases covered under Section

36(1)(viia) and has to be read with Section 36(2)(v) of the Act. Thus, the proviso would not permit benefit of double deduction, operating with reference to rural loans while under Section 36(1)(vii), the assessee would be entitled to general deduction upon an account having become bad debt and being written off as irrecoverable in the accounts of the assessee for the previous year. This, obviously, would be subject to satisfaction of the requirements contemplated under Section 36(2).

42. Consequently, while answering the question in favour of the assessee, we allow the appeals of the assessees and dismiss the appeals preferred by the Revenue. Further, we direct that all matters be remanded to the assessing officer for computation in accordance with law, in light of the law enunciated in this judgment.

S. H. KAPADIA, CJI. 1. I have gone through the judgment of my esteemed brother Swatanter Kumar, J. and I agree with the conclusions contained therein. However, I would like to give my own reasons.

The question for our consideration is - whether on the facts and circumstances of the case, the assessee(s) is eligible for deduction of the bad and doubtful debts actually written off in view of Section 36(1)(vii) which limits the deduction allowable under the proviso to the excess over the credit balance made under clause (viia) of Section 36(1) of Income Tax Act, 1961 ("ITA" for short)?

2. Under Section 36(1)(vii) of the ITA 1961, the tax payer carrying on business is entitled to a deduction, in the computation of taxable profits, of the amount of any debt which is established to have become a bad debt during the previous year, subject to certain conditions. However, a mere provision for bad and doubtful debt(s) is not allowed as a deduction in the computation of taxable profits. In order to promote rural banking and in order to assist the scheduled commercial banks in making adequate provisions from their current profits to

provide for risks in relation to their rural advances, the Finance Act, inserted clause (viia) in sub-section (1) of Section 36 to provide for a deduction, in the computation of taxable profits of all scheduled commercial banks, in respect of provisions made by them for bad and doubtful debt(s) relating to advances made by their rural branches. The deduction is limited to a specified percentage of the aggregate average advances made by the rural branches computed in the manner prescribed by the IT Rules, 1962. Thus, the provisions of clause (viia) of Section 36(1) relating to the deduction on account of the provision for bad and doubtful debt(s) is distinct and independent of the provisions of Section 36(1)(vii) relating to allowance of the bad debt(s). In other words, the scheduled commercial banks would continue to get the full benefit of the write off of the irrecoverable debt(s) under Section 36(1)(vii) in addition to the benefit of deduction for the provision made for bad and doubtful debt(s) under Section 36(1)(viia). A reading of the Circulars issued by CBDT indicates that normally a deduction for bad debt(s) can be allowed only if the debt is written off in the books as bad debt(s). No deduction is allowable in respect of a mere provision for bad and doubtful debt(s). But in the case of rural advances, a deduction would be allowed even in respect of a mere provision without insisting on an actual write off. However, this may result in double allowance in the sense that in respect of same rural advance the bank may get allowance on the basis of clause (viia) and also on the basis of actual write off under clause (vii). This situation is taken care of by the proviso to clause (vii) which limits the allowance on the basis of the actual write off to the excess, if any, of the write off over the amount standing to the credit of the account created under clause (viia). However, the Revenue disputes the position that the proviso to clause (vii) refers only to rural advances. It says that there are no such words in the proviso which indicates that the proviso apply only to rural advances. We find no merit in the objection raised by the Revenue. Firstly, CBDT itself has recognized the position that a bank would be entitled to both the deduction, one under

clause (vii) on the basis of actual write off and another, on the basis of clause (viia) in respect of a mere provision. Further, to prevent double deduction, the proviso to clause (vii) was inserted which says that in respect of bad debt(s) arising out of rural advances, the deduction on account of actual write off would be limited to the excess of the amount written off over the amount of the provision allowed under clause (viia). Thus, the proviso to clause (vii) stood introduced in order to protect the Revenue. It would be meaningless to invoke the said proviso where there is no threat of double deduction. In case of rural advances, which are covered by the provisions of clause (viia), there would be no such double deduction. The proviso limits its application to the case of a bank to which clause (viia) applies. Clause (viia) applies only to rural advances. This has been explained by the Circulars issued by CBDT. Thus, the proviso indicates that it is limited in its application to bad debt(s) arising out of rural advances of a bank. It follows that if the amount of bad debt(s) actually written off in the accounts of the bank represents only debt(s) arising out of urban advances, the allowance thereof in the assessment is not affected, controlled or limited in any way by the proviso to clause (vii).

3. Accordingly, the above question is answered in the affirmative, i.e., in favour of the assessee(s). For the above reasons, I agree that the appeals filed by the assessees stand allowed and the appeals filed by the Revenue stand dismissed with no order as to costs.

B.B.B. Appeal disposed of.

M/S. LADLI CONSTRUCTION CO. (P) LTD.
v.
PUNJAB POLICE HOUSING CORPN. LTD. AND ORS.
(Civil Appeal No. 947 of 2006)

FEBRUARY 23, 2012

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

Arbitration Act, 1940 - ss. 5, 11, 12 and 30 - Arbitral award - Challenge to - Allegation of bias against the arbitrator - Disputes arose out of contract between appellant-contractor and respondent-Corporation - Appellant moved the Court for appointment of arbitrator in terms of arbitration clause contained in the contract - Court ordered the Chief Engineer of respondent-corporation to act as arbitrator - Appellant did not appear before the arbitrator and instead sent a letter intimating him that his appointment as arbitrator was not acceptable to it; and that it did not expect any justice and fair play from him - Thereafter, appellant made application u/ss.5, 11 and 12 of the Act for removal of the arbitrator - Meanwhile, the arbitrator proceeded with the arbitration ex parte and passed the award - Appellant submitted objections u/s.30 alleging misconduct on the part of the arbitrator - Award, however, made rule of the court and decree passed in terms thereof - Justifiability - Held: The appellant-contractor consciously agreed for disputes between the parties to be referred for arbitration to the Chief Engineer of respondent-Corporation - Appellant moved the court for appointment of the Chief Engineer as arbitrator and then chose not to appear before him - What was the intervening event after the arbitrator was appointed at his instance that prompted him to ask the arbitrator to recuse is not stated by the appellant - The award passed by the arbitrator also does not show that he misconducted in any manner in the proceedings - He gave full opportunity to the appellant to appear and put forth its case

but the appellant failed to avail of that opportunity - Since the parties entered into a contract knowing the role, authority or power of the Chief Engineer in the affairs relating to the contract but nevertheless agreed for him to be arbitrator and named him in the agreement to adjudicate the dispute/s between the parties, they stood bound by it unless a good or valid legal ground was made out for his exclusion - Except raising vague and general objections that the arbitrator was biased and had predisposition to decide against the appellant, no materials, much less cogent materials, were placed by the appellant to show bias of the arbitrator - The test of reasonable apprehension of bias in the mind of a reasonable man was not satisfied in the factual situation - A fanciful apprehension of bias was not enough - No reason for interference under Article 136 of the Constitution - Natural Justice - Bias.

Arbitration - Arbitral award - Challenge to - Allegation of bias against the arbitrator - Plea that bias on the part of the arbitrator was also reflected from the post arbitral conduct of the arbitrator inasmuch as he contested instant appeal (against the arbitral award being made rule of the court) and filed affidavit in opposition - Held: Not tenable - What would have the arbitrator done when he has been personally impleaded as respondent in the appeal and the allegations of bias have been made against him - He was left with no choice but to rebut the allegations by filing his affidavit - The arbitrator did what any other person in his place would have done in the circumstances.

A contract was entered into between the appellant-contractor and respondent-Corporation for construction of 240 houses. The Contractor could not maintain the time schedule and consequently the Corporation rescinded the contract. Disputes arose between the parties, whereupon the Contractor moved the court of Sub Judge, First Class, for appointment of arbitrator in

terms of Clause 25A of the contract. The Sub Judge, on May 13, 1992, ordered the Chief Engineer of the Corporation to act as an arbitrator as provided under Clause 25A of the agreement. Both the parties were permitted to file claim and counter claim before the arbitrator. In pursuance of the order dated May 13, 1992, the Corporation lodged its claim against the Contractor on June 15, 1992. The arbitrator - Chief Engineer of the Corporation - called upon the Contractor to appear before him on June 25, 1992. Thereafter also the arbitrator called upon the Contractor to appear before him. The Contractor, however, did not appear before the arbitrator and instead sent a letter on June 29, 1992 intimating him that his appointment as arbitrator was not acceptable to it; it did not expect any justice and fair play from him and he must refrain from acting as an arbitrator in the case. Thereafter, on July 24, 1992, the Contractor made an application before the Sub Judge, under Sections 5, 11 and 12 of the Arbitration Act, 1940 for removal of the arbitrator. Meanwhile, as the Contractor did not appear before the arbitrator, the arbitrator proceeded with the arbitration ex parte and passed the award on August 18, 1992. The Contractor submitted objections under Section 30 of the 1940 Act alleging misconduct on the part of the arbitrator and also objected to the award being made rule of the court. The Sub Judge heard the two applications together - (i) application made by the Contractor for removal of the arbitrator and objections under Section 30, and (ii) application for making the award rule of the court - and by a common order dismissed the application made by the Contractor for removal of the arbitrator and made the award dated August 18, 1992 rule of the court and passed decree in terms thereof. The Contractor challenged the common order passed by the Sub Judge in appeal which was dismissed. The Contractor thereupon filed civil revision before the High Court which too was dismissed. Hence the present appeal.

The counsel for the Contractor contended before this Court that the Contractor had reasonable apprehension of bias on the part of the arbitrator as the action of cancellation of contract was taken by the Executive Engineer at the behest of the arbitrator as he was the Chief Engineer of the Corporation. He referred to the inspection made by the Chief Engineer along with other Engineers of the Corporation on October 26, 1990 and the opinion formed by the Chief Engineer on the basis of the inspection that the work was not being carried out by the Contractor in accord with the time schedule. He also referred to conduct of the arbitral proceedings by the arbitrator, particularly concluding the arbitration proceedings in a short span of about 49 days and that too when the Contractor's application for his removal was pending before the Court. The counsel also referred to post arbitral conduct of the arbitrator in contesting the Appeal before this Court and filing counter affidavit in opposition to the Appeal. He highlighted two aspects to indicate that the arbitrator was biased, viz., (i) the arbitration agreement was not placed before the arbitrator, yet he commenced and concluded the arbitral proceedings, and (ii) the award relating to unutilised amount of secured advance which was not claimed by the Corporation was passed.

Dismissing the appeal, the Court

HELD:1. The appellant-Contractor consciously agreed for the disputes between the parties to be referred for arbitration to the Chief Engineer of the respondent-Corporation. The Contractor, at the time of agreement, was in full knowledge of the fact that the Chief Engineer had full control and supervision of all civil engineering affairs of the Corporation, yet it agreed for resolution of disputes between the parties by him as an arbitrator. It is a fact that the Chief Engineer inspected the progress of the work given to the Contractor along with other

engineers of the Corporation on October 26, 1990. In the course of inspection, the slow progress of the work was brought to the notice of the Contractor on that date. There was nothing unusual about it and, as a matter of fact, on the contract being terminated on May 8, 1991, it was the Contractor who made an application for appointment of arbitrator in terms of Clause 25A of the agreement as it was well aware that the inspection by the arbitrator did not disqualify him to be arbitrator. In the application for appointment of arbitrator, no allegation of any bias or hostility was made against the named arbitrator, i.e., Chief Engineer of the Corporation, rather the Contractor prayed for appointment of arbitrator in terms of the arbitration Clause 25A. When the application came up for consideration before the Sub Judge on May 13, 1992, the advocate appearing for the Contractor also submitted for appointment of the arbitrator as named in the agreement. Before the Court, no allegation was made that the contract was terminated at the instance or behest of the Chief Engineer. These facts clearly show that no case of bias on the part of the Chief Engineer was pleaded or pressed by the Contractor before the court in the proceedings for appointment of the arbitrator. There is nothing to indicate that something happened after May 13, 1992 which prompted the Contractor to write to the arbitrator on June 29, 1992 that it had lost faith in him. [Para 15] [793-B-H; 794-A]

2. On May 13, 1992 while referring the disputes between the parties for arbitration as per Clause 25A of the agreement, the Contractor as well as the Corporation were permitted to file claim and counter claim before the arbitrator. The Corporation filed its claim against the Contractor on June 15, 1992. Upon receipt of the claim by the Corporation, the arbitrator called upon the Contractor to appear before him on June 25, 1992. The Contractor did not appear and instead sent a letter to the

arbitrator on June 29, 1992 intimating him that his appointment as arbitrator was not acceptable. No steps were taken by the Contractor for removal of the arbitrator immediately. The application for removal of the arbitrator was made almost after 26 days (i.e. July 24, 1992). Although the Contractor prayed before the Sub Judge for stay of the proceedings before the arbitrator but it was not successful in getting any such order on July 24, 1992, or on the subsequent dates, namely, July 30, 1992, August 3, 1992 and August 6, 1992 from the court. In the absence of any stay order from the court and non-appearance by the Contractor, the arbitrator was left with no choice but to proceed ex parte and conclude the arbitral proceedings. Merely because the award came to be passed on August 18, 1992, i.e., a day before the next date fixed before the Sub Judge, it cannot be said that the arbitrator concluded the proceedings hastily or he was biased. [Para 16] [794-B-F]

3.1. The two aspects highlighted by the counsel for the Contractor, regarding (i) non-availability of the agreement before the arbitrator, and (ii) the award of return of unutilised amount of secured advance by him, as grounds of bias have no merit at all. [Para 17] [794-G]

3.2. The order dated May 13, 1992 passed by the Sub Judge shows that photocopy of the arbitration agreement was produced before the court. AW1, who was examined by the Corporation, in his deposition before the arbitrator, has stated that photocopy of the agreement was tendered to the arbitrator. Merely because copy of the agreement was not found by the District Judge in the record of the arbitral proceedings, it cannot be assumed that copy of the agreement between the parties was not placed for consideration before the arbitrator. [Para 18] [794-H; 795-A-B]

3.3. The arbitrator in his award awarded interest in

the sum of Rs. 1,40,150/- upto December 31, 1991 on the amount of secured advance paid to the Contractor for the period the amount remained unutilised although the Corporation had claimed the interest on that count in the sum of Rs. 1,69,878/-. In appeal preferred by the Contractor, the District Judge had held that the appellant was not been able to point out that the calculation of this amount as Rs. 1,40,150/- upto 31.12.1991 was wrong or incorrect and therefore, it would be naïve to contend that the award was vague, evasive or non-committal. The above finding of the District Judge, Chandigarh, was not challenged by the Contractor before the High Court. Thus, there is no merit, at all, in the submission of the counsel for the Contractor that the arbitrator awarded unutilised secured advance for which there was no claim. In any case, this hardly leads to any inference of bias of the arbitrator. [Paras 19, 20, 21] [795-C, E; 796-A-C]

4.1. The authority empowered to decide the dispute must be one without bias towards one side or the other in the dispute. There can hardly be any doubt about this fundamental principle of natural justice. In the instant case, none of the circumstances pointed out by the Contractor leads to any inference that the arbitrator had any bias, personal or otherwise. No doubt, bias may be found in variety of situations and each case, where bias of adjudicator is alleged, has to be seen in the context of its own facts but a fanciful apprehension of bias is not enough. [Para 22] [796-D-F]

4.2. A contractor is bound by the contract if he has agreed to submit the disputes to the engineer for arbitration although he has to deal with such engineer under the contract. Insofar as the facts of the present case are concerned, the Contractor moved the court for appointment of the Chief Engineer as arbitrator and then chose not to appear before him. What was the intervening event after the arbitrator was appointed at his

instance that prompted him to ask the arbitrator to recuse is not stated by the Contractor. The Contractor was not successful in getting any final or interim order in the proceedings initiated by it for removal of the arbitrator. The award passed by the arbitrator also does not show that he misconducted in any manner in the proceedings. He gave full opportunity to the Contractor to appear and put forth its case but the Contractor failed to avail of that opportunity. [Paras 24, 25] [797-F, G-H; 798-A-B]

4.3.There is no justifiable circumstance on record that enables the Contractor to escape from the bargain that it made under the contract and have the disputes resolved through the process other than agreed. Where parties enter into a contract knowing the role, authority or power of the Chief Engineer in the affairs relating to the contract but nevertheless agree for him to be arbitrator and name him in the agreement to adjudicate the dispute/s between the parties, then they stand bound by it unless a good or valid legal ground is made out for his exclusion. [Paras 26, 29] [798-C; 800-E]

4.4. Except raising the vague and general objections that the arbitrator was biased and had predisposition to decide against the Contractor, no materials, much less cogent materials, have been placed by the Contractor to show bias of the arbitrator. No sufficient reason appears on record as to why the arbitrator should not have proceeded with the arbitral proceedings. The test of reasonable apprehension of bias in the mind of a reasonable man is not satisfied in the factual situation. [Para 30] [800-F-G]

Gullapalli Nageswara Rao and Others v. Andhra Pradesh State Road Transport Corporation and Another **(1959) Supp. (1) SCR 319;** *The Secretary to the Government, Transport Deptt., Madras v. Munuswamy Mudaliar and Others* **AIR 1988 SC 2232: 1988 Suppl. SCR 673 and** *S. Rajan v. State of Kerala and another* **AIR 1992 SC 1918; 1992 (3) SCR 649 - relied on.**

Bristol Corporation v. John Aird & Co. **(1911) 13] All E.R. 1076 - referred to.**

5. The counsel for the Contractor submitted that bias on the part of the arbitrator is also reflected from the fact that he has contested the present Appeal and filed the affidavit in opposition. However, what would have the arbitrator done when he has been personally impleaded as respondent in the Appeal and the allegations of bias have been made against him. He was left with no choice but to rebut the allegations by filing his affidavit. The arbitrator did what any other person in his place would have done in the circumstances. [Para 31] [800-H; 801-A-B]

6. The view taken by the High Court does not suffer from any infirmity justifying interference under Article 136 of the Constitution. [Para 32] [801-C]

Case Law Reference:

(1959) Supp. (1) SCR 319	**relied on**	**Para 12**
(1911) 13] All E.R. 1076	**referred to**	**Para 12,23**
1988 Suppl. SCR 673	**relied on**	**Para 27**
1992 (3) SCR 649	**relied on**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 947 of 2006.

From the Judgment & Order dated 25.11.2002 of the High Court of Punjab & Haryana at Chandigarh in Civil Revision No. 474 of 1999.

Rajeev Sharma, Uddyam Mukherjee for the Appellant.

Dr. Balram Gupta, S. Janani, Suryanaryana Singh, Pragati Neekhra, Dharmendra Kumar Singh for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. This Appeal, by special leave, arises from the judgment and order dated November 25, 2002 passed by the Punjab & Haryana High Court.

2. The controversy arises in this way. A contract was entered into between the appellant - M/s Ladli Construction Co. (P) Ltd. (hereinafter referred to as 'the Contractor'), and the respondent Nos. 1 and 2, namely, Punjab Police Housing Corporation Limited and Executive Engineer (Civil), Punjab Police Housing Corporation Limited (hereinafter referred to as 'the Corporation') for construction of 240 houses Type II-A at Urban Estate, Ludhiana at an estimated cost of Rs. 273.84 Lakhs. The contract provided in Clause 2 that time was essence of the contract and the time allowed for carrying out work as entered in the tender shall be strictly observed by Contractor. The Contractor could not maintain the time schedule and the progress of the work was not observed. The Contractor was directed to push up the progress of work but that also it failed to do. The Contractor was notified that if it failed to take any action to show requisite progress by 30th of April, 1991, action against it under Clause 3 of the agreement would be taken. Still there was no requisite progress in execution of the work by the Contractor. On May 8, 1991, the Corporation resorted to action under Clause 3 of the contract, rescinded the contract and adopted further course by giving unexecuted work to another contractor. The disputes, thus, having arisen between the parties, the Contractor moved the court of Sub Judge, First Class, Chandigarh, for appointment of the arbitrator in terms of Clause 25A of the contract.

3. On the application made by the Contractor for appointment of the arbitrator, the Sub Judge, on May 13, 1992, ordered that matter in dispute may be referred for arbitration

as per Clause 25A of the agreement and, accordingly, as per the agreement and the statement of parties, the Sub Judge ordered the Chief Engineer of the Corporation to act as an arbitrator as provided under Clause 25A of the agreement. Both the parties were permitted to file claim and counter claim before the arbitrator.

4. In pursuance of the order dated May 13, 1992, the Corporation lodged its claim against the Contractor on June 15, 1992. The arbitrator - Chief Engineer of the Corporation - called upon the Contractor to appear before him on June 25, 1992. Thereafter also the arbitrator called upon the Contractor to appear before him. The Contractor, however, did not appear before the arbitrator and instead sent a letter on June 29, 1992 intimating him that his appointment as arbitrator was not acceptable to it; it did not expect any justice and fair play from him and he must refrain from acting as an arbitrator in the case.

5. Thereafter, on July 24, 1992, the Contractor made an application before the Sub Judge, Chandigarh under Sections 5, 11 and 12 of the Arbitration Act, 1940 (for short, 'the 1940 Act') for removal of the arbitrator. The Contractor did not appear before the arbitrator. Consequently, the arbitrator proceeded with the arbitration ex parte and passed the award on August 18, 1992.

6. After filing of the award, the Contractor submitted objections under Section 30 of the 1940 Act alleging misconduct on the part of the arbitrator and also objected to the award being made rule of the court.

7. The Sub Judge heard the two applications together - (i) application made by the Contractor for removal of the arbitrator and objections under Section 30, and (ii) application for making the award rule of the court - and by a common order dated May 8, 1995 dismissed the application made by the Contractor for removal of the arbitrator and made the award dated August 18, 1992 rule of the court and passed decree in

terms thereof.

8. The Contractor challenged the common order dated May 8, 1995 passed by the Sub Judge, Chandigarh in appeal before the District Judge, Chandigarh. The District Judge dismissed the appeal on September 19, 1998.

9. Against these two concurrent judgments, the Contractor filed civil revision before the High Court which too was dismissed on November 25, 2002. As noted above, it is from this order that the present Appeal, by special leave, has arisen.

10. We have heard Mr. Rajeev Sharma, learned counsel for the Contractor, and Dr. Balram Gupta, learned senior counsel for the respondent Nos. 1 and 2 - Corporation.

11. Mr. Rajeev Sharma, learned counsel for the Contractor, strenuously urged that the Contractor had reasonable apprehension of bias on the part of the arbitrator as the action of cancellation of contract was taken by the Executive Engineer at the behest of the arbitrator as he was the Chief Engineer of the Corporation. He referred to the inspection made by the Chief Engineer along with other Engineers of the Corporation on October 26, 1990 and the opinion formed by the Chief Engineer on the basis of the inspection that the work was not being carried out by the Contractor in accord with the time schedule. He also referred to conduct of the arbitral proceedings by the arbitrator, particularly concluding the arbitration proceedings in a short span of about 49 days and that too when the Contractor's application for his removal was pending before the Court. In support of his submission that the arbitrator was biased against the Contractor, the learned counsel also referred to post arbitral conduct of the arbitrator in contesting the Appeal before this Court and filing counter affidavit in opposition to the Appeal.

12. Mr. Rajeev Sharma would highlight two aspects, viz., (i) the arbitration agreement was not placed before the

arbitrator, yet he commenced and concluded the arbitral proceedings, and (ii) the award relating to unutilised amount of secured advance which was not claimed by the Corporation was passed, to indicate that the arbitrator was biased. In support of his submissions, the learned counsel relied upon a Constitution Bench judgment of this Court in *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*[1] and a judgment of the House of Lords in *Bristol Corporation Vs. John Aird & Co.*[1]

13. Dr. Balram Gupta, learned senior counsel for the Corporation, supported the judgment of the High Court. He submitted that only two submissions were made before the High Court which have been noted and considered and no other point was urged.

14. The arbitration clause in the agreement, i.e., Clause 25A, reads as follows :

> "Clause 25A. Arbitration etc. - If any question, difference or objection whatsoever shall arise in any way connected with or arising out of this instrument of the meaning of operation of any part thereof or the rights duties or liabilities of either party, then save in so far as the decision of any such matter is hereinbefore provided for and has been so decided, every such matter including whether its decision has been otherwise provided for and/or whether it has been finally decided accordingly, or whether the contract should be terminated or has been rightly terminated and as regards the rights and obligations of the parties as the results of such termination shall be referred for arbitration to the Chief Engineer of the Punjab Police Housing Corporation, Chandigarh or acting as such at the time of reference within 180 days or in six months from the payment of the final bill to the contractor or from the date

1. [1959] Supp. (1) SCR 319.
1. [1911-13] All E.R. 1076.

registered notice is sent to the contractor to the effect that his final bill is ready for payment and his decision shall be final and binding and where the matter involves a claim for or the payment or recovery or deduction of money, only the amount, if any, awarded in such arbitration shall be recoverable in respect of the matter so referred."

15. The Contractor consciously agreed for the disputes between the parties to be referred for arbitration to the Chief Engineer of the Corporation. The Contractor, at the time of agreement, was in full knowledge of the fact that the Chief Engineer is under full control and supervision of all civil engineering affairs of the Corporation, yet it agreed for resolution of disputes between the parties by him as an arbitrator. It is a fact that the Chief Engineer inspected the progress of the work given to the Contractor along with other engineers of the Corporation on October 26, 1990. In the course of inspection, the slow progress of the work was brought to the notice of the Contractor on that date. There was nothing unusual about it and, as a matter of fact, on the contract being terminated on May 8, 1991, it was the Contractor who made an application for appointment of arbitrator in terms of Clause 25A of the agreement as it was well aware that the inspection by the arbitrator did not disqualify him to be arbitrator. In the application for appointment of arbitrator, no allegation of any bias or hostility was made against the named arbitrator, i.e., Chief Engineer of the Corporation, rather the Contractor prayed for appointment of arbitrator in terms of the arbitration Clause 25A. When the application came up for consideration before the Sub Judge on May 13, 1992, the advocate appearing for the Contractor also submitted for appointment of the arbitrator as named in the agreement. Before the Court, no allegation was made that the contract was terminated at the instance or behest of the Chief Engineer. These facts clearly show that no case of bias on the part of the Chief Engineer was pleaded or pressed by the Contractor before the court in the proceedings for appointment of the arbitrator. There is nothing to indicate

that something happened after May 13, 1992 which prompted the Contractor to write to the arbitrator on June 29, 1992 that it had lost faith in him.

16. It is pertinent to notice that on May 13, 1992 while referring the disputes between the parties for arbitration as per Clause 25A of the agreement, the Contractor as well as the Corporation were permitted to file claim and counter claim before the arbitrator. The Corporation filed its claim against the Contractor on June 15, 1992. Upon receipt of the claim by the Corporation, the arbitrator called upon the Contractor to appear before him on June 25, 1992. The Contractor did not appear and instead sent a letter to the arbitrator on June 29, 1992 intimating him that his appointment as arbitrator was not acceptable. No steps were taken by the Contractor for removal of the arbitrator immediately. The application for removal of the arbitrator was made almost after 26 days. Although the Contractor prayed before the Sub Judge for stay of the proceedings before the arbitrator but it was not successful in getting any such order on July 24, 1992, or on the subsequent dates, namely, July 30, 1992, August 3, 1992 and August 6, 1992 from the court. In the absence of any stay order from the court and non-appearance by the Contractor, the arbitrator was left with no choice but to proceed ex parte and conclude the arbitral proceedings. Merely because the award came to be passed on August 18, 1992, i.e., a day before the next date fixed before the Sub Judge, it cannot be said that the arbitrator concluded the proceedings hastily or he was biased.

17. The two aspects highlighted by Mr. Rajeev Sharma, learned counsel for the Contractor, regarding (i) non-availability of the agreement before the arbitrator, and (ii) the award of return of unutilised amount of secured advance by him, as grounds of bias have no merit at all.

18. The order dated May 13, 1992 passed by the Sub Judge shows that photocopy of the arbitration agreement was produced before the court. AW-1, who was examined by the

Corporation, in his deposition before the arbitrator, has stated that photocopy of the agreement was tendered to the arbitrator. Merely because copy of the agreement was not found by the District Judge in the record of the arbitral proceedings, it cannot be assumed that copy of the agreement between the parties was not placed for consideration before the arbitrator.

19. The arbitrator in his award has awarded interest in the sum of Rs.1,40,150/- upto December 31, 1991 on the amount of secured advance paid to the Contractor for the period the amount remained unutilised although the Corporation had claimed the interest on that count in the sum of Rs. 1,69,878/-. With regard to award of unutilised amount of secured advance, the arbitrator observed in the award that the exact amount of award will depend upon the actual unutilised amount of secured advance till realisation. On ascertaining the total amount of unutilised secured advance, it was found to be Rs. 9,63,635.25/-.

20. The District Judge in the appeal preferred by the Contractor in challenging the judgment and decree held in para 21 of the judgment thus :-

> "....In it unutilised advance of Public Health items as per statement at page 243 of the arbitrator file is Rs. 5,85,423.75ps. The statement of this witness dated 14.8.1992 with statement of interest and principal of the unutilised secured advance of building component is at pages 283-289 of the arbitration file in which unutilised secured advance of building component is mentioned as Rs. 3,73,211.50ps. So the total unutilised secured advance on both the counts comes to Rs. 9,63,635.25ps. The maxim is,"Certum est quod, certum reddi potest". (certain is that which can be made certain). Now, from the perusal of the record of the total unutilised secured advance can be ascertained as Rs. 9,63,635.25ps. Similarly, from the record, the principal amount of the secured advance can also be calculated and on it, interest on the amount of the

> secured advance paid to the appellant for the period the amount remain unutilised could be calculated. The appellant has not been able to point out that the calculation of this amount as Rs. 1,40,150/- upto 31.12.1991 was wrong or incorrect. Therefore, it would be naïve to contend that the award was vague, evasive or non-committal."

21. The above finding of the District Judge, Chandigarh, was not challenged by the Contractor before the High Court as is apparent from the impugned order. Thus, there is no merit, at all, in the submission of the learned counsel for the Contractor that the arbitrator awarded unutilised secured advance for which there was no claim. In any case, this hardly leads to any inference of bias of the arbitrator.

22. In *Gullapalli Nageswara Rao and Others* (supra) this Court restated the principle of natural justice that the authority empowered to decide the dispute must be one without bias towards one side or the other in the dispute. There can hardly be any doubt about this fundamental principle of natural justice. The question is - Whether on facts, the Contractor has been able to establish that the arbitrator was biased against it ? None of the circumstances pointed out by the Contractor leads to any inference that the arbitrator had any bias, personal or otherwise. No doubt, bias may be found in variety of situations and each case, where bias of adjudicator is alleged, has to be seen in the context of its own facts but a fanciful apprehension of bias is not enough.

23. The observations of the Lord Atkinson in *Bristol Corporation* (supra), relied upon by the learned counsel for the Contractor, instead of supporting his argument, go fully against the Contractor. In *Bristol Corporation* (supra) Lord Atkinson stated thus :

> "...If a contractor chooses to enter into a contract binding him to submit any disputes which arise between him and the engineer of the persons with whom he contracts to that

engineer to arbitrate on, then he must be held to his contract; whether it be wise or unwise, prudent or the contrary, he stipulated that a person who is the servant of the persons with whom he contracted shall be the judge to decide upon matters upon which, necessarily, that engineer or arbitrator has himself formed an opinion. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the engineer, that gentleman should listen to argument, and should determine the matters submitted to him as fairly as he can, as an honest man; and if it be shown in fact that there is any reasonable prospect that he will be so biased as not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain, and to have the matters in dispute tried by one of the ordinary tribunals of the land. But he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting, or decorous, or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right of appealing to a court of law to exercise the discretion which s. 4 of the Arbitration Act vests in them...."

24. The above observations exposit the legal position that a contractor is bound by the contract if he has agreed to submit the disputes to the engineer for arbitration although he has to deal with such engineer under the contract. It needs no emphasis that once the dispute is referred to such arbitrator, the arbitrator has to act fairly and objectively and the proceedings must meet the requirements of principles of natural justice.

25. Insofar as the facts of the present case are concerned, the Contractor moved the court for appointment of the Chief Engineer as arbitrator and then chose not to appear before him. What was the intervening event after the arbitrator was appointed at his instance that prompted him to ask the

arbitrator to recuse is not stated by the Contractor. The Contractor was not successful in getting any final or interim order in the proceedings initiated by it for removal of the arbitrator. The award passed by the arbitrator also does not show that he misconducted in any manner in the proceedings. He gave full opportunity to the Contractor to appear and put forth its case but the Contractor failed to avail of that opportunity.

26. There is no justifiable circumstance on record that enables the Contractor to escape from the bargain that it made under the contract and have the disputes resolved through the process other than agreed.

27. In *The Secretary to the Government, Transport Deptt., Madras Vs. Munuswamy Mudaliar and Others*[3], this Court stated :-

"11... When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme and the fact that the Chief Engineer is superior and the Superintending Engineer is subordinate to the Chief Engineer of the particular circle. In spite of that the parties agreed and entered into arbitration and indeed submitted to the jurisdiction of the Superintending Engineer at that time to begin with, who, however, could not complete the arbitration because he was transferred and succeeded by a successor. In those circumstances on the facts stated no bias can reasonably be apprehended and made a ground for removal of a named arbitrator. In our opinion this cannot be, at all, a good or valid legal ground. Unless there is allegation against the named arbitrator either against his honesty or capacity or malafide or interest in the subject-matter or reasonable apprehension of the bias, a named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Courts

3. AIR 1988 SC 2232.

under S. 5 of the Act.

12. Reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the disputes is bias. There must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. See the observations of Mustill and Boyd, Commercial Arbitration, 1982 Edition, page 214. Halsbury's Laws of England, Fourth Edition, Volume 2, para 551, page 282 describe that the test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias.

13. This Court in *International Airport Authority of India v. K.D.Bali,* (1988) 2 JT 1 : (AIR 1988 SC 1099) held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the Government, clauses requiring the Superintending Engineer or some official of the Govt. to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal. No other ground for the alleged apprehension was indicated in the pleadings before the learned Judge or the decision of the learned Judge. There was, in our opinion, no ground for removal of the arbitrator. Mere imagination of a ground cannot be an excuse for apprehending bias in the mind of the chosen arbitrator."

28. In *S. Rajan Vs. State of Kerala and another*[4], this Court stated :-

"12....Thus, this is a case where the agreement itself specifies and names the arbitrator. It is the Superintending Engineer, Buildings and Roads Circle, Trivandrum. In such a situation, it was obligatory upon the learned Subordinate Judge, in case he was satisfied that the dispute ought to be referred to the arbitrator, to refer the dispute to the arbitrator specified in the agreement. It was not open to him to ignore the said clause of the agreement and to appoint another person as an arbitrator. Only if the arbitrator specified and named in the agreement refuses or fails to act the Court does get the jurisdiction to appoint another person or persons as the arbitrator. This is the clear purport of Sub-section (4). It says that the reference shall be to the arbitrator appointed by the parties..."

29. Where parties enter into a contract knowing the role, authority or power of the Chief Engineer in the affairs relating to the contract but nevertheless agree for him to be arbitrator and name him in the agreement to adjudicate the dispute/s between the parties, then they stand bound by it unless a good or valid legal ground is made out for his exclusion.

30. Except raising the vague and general objections that the arbitrator was biased and had predisposition to decide against the Contractor, no materials, much less cogent materials, have been placed by the Contractor to show bias of the arbitrator. No sufficient reason appears on record as to why the arbitrator should not have proceeded with the arbitral proceedings. The test of reasonable apprehension of bias in the mind of a reasonable man is not satisfied in the factual situation.

31. We may now deal with the submission of the learned counsel for the Contractor that bias on the part of the arbitrator

4. AIR 1992 SC 1918.

is also reflected from the fact that he has contested the present Appeal and filed the affidavit in opposition. What would have the arbitrator done when he has been personally impleaded as respondent in the Appeal and the allegations of bias have been made against him. He was left with no choice but to rebut the allegations by filing his affidavit. The arbitrator did what any other person in his place would have done in the circumstances.

32. The view taken by the High Court does not suffer from any infirmity justifying interference by us in our jurisdiction in appeal under Article 136 of the Constitution of India.

33. Civil Appeal is dismissed with no order as to costs.

B.B.B. Appeal dismissed.

M/S IFB INDUSTRIES LTD.

v.

STATE OF KERALA

(Civil Appeal Nos. 2516-2517 of 2012)

FEBRUARY 27, 2012

[AFTAB ALAM AND ANIL R. DAVE, JJ.]

Sales Tax - Kerala General Sales Tax Rules, 1963 - r.9(a) - Trade discount - Eligibility for exemption - Held: Exemption is allowable subject to two conditions; first, the discount is given in accordance with the regular practice in the trade and secondly, the accounts should show that the purchaser had paid only the sum originally charged less the discount - Nothing in rule 9(a) to read it in the restrictive manner to mean that a discount in order to qualify for exemption under its provision must be shown in the invoice itself - Kerala General Sales Tax Act, 1963 - s.2(xxvii).

How far deductions are allowable under rule 9(a) of the Kerala General Sales Tax Rules, 1963 for trade discounts is the question which arose for consideration in the present appeal.

The High Court had held that unless the discount was shown in the invoice itself, it would not qualify for deduction and further that any discount that was given by means of credit note issued subsequent to the sale of the article was in reality an incentive and not trade discount eligible for exemption under rule 9(a) of the Rules.

Allowing the appeals, the Court

HELD: 1.1. In order to clearly understand the kinds of discount that are exempted in terms of rule 9(a) one

may usefully refer to the definition of 'turnover' under Section 2(xxvii) of the Kerala General Sales Tax Act, 1963. The main body of the definition is followed by several explanations. It is seen that the very definition of "turnover" recognises discounts other than cash discount and provides that those other discounts too like the cash discount shall not be included in the turnover. [Paras 23, 24] [811-E-F; 812-C]

1.2. Significantly, Rule 9(a) does not speak of invoices but stipulates that the discount must be shown in the accounts. On a plain reading of the provision it is clear that the exemption is allowable subject to two conditions; first, the discount is given in accordance with the regular practice in the trade and secondly, the accounts should show that the purchaser had paid only the sum originally charged less the discount. There is nothing in rule 9(a) to read it in the restrictive manner to mean that a discount in order to qualify for exemption under its provision must be shown in the invoice itself. [Para 26] [812-F-H]

Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) v. M/s Advani Oorlikon (P) Ltd., **(1980) 1 SCC 360 : 1980 (1) SCR 931;** *Deputy Commissioner of Sales Tax(Law) Board of Revenue (Taxes), Ernakulam v. Motor Industries Co, Ernakulam,* **(1983) 2 SCC 108 : 1983 (2) SCR 384 and** *Union of India and Others v. Bombay Tyres International (P) Ltd.,* **(2005) 3 SCC 787 - relied on.**

Godavari Fertilizers and Chemicals Ltd. v. Commissioner of Commercial Taxes, **(2004) 138 STC 133 and** *Kalpana Lamps and Components Ltd. v. State of Kerala,* **(2006) 143 STC 666 - approved.**

3. The cases of the appellants for the respective assessment periods are remitted to the Assessing Authority with a direction to make assessments and pass

fresh orders in accordance with law and in light of this judgment. The Assessing Authority shall not reject the appellants' claim for exemption of the amounts of trade discount solely on the ground that the discount amounts were not shown in the sale invoices. [Para 34] [818-D-F]

Case Law Reference:

1980 (1) SCR 931	**relied on**	**Para 29**
1983 (2) SCR 384	**relied on**	**Para 30**
(2005) 3 SCC 787	**relied on**	**Para 31**
(2004) 138 STC 133	**approved**	**Para 32**
(2006) 143 STC 666	**approved**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2516-2517 of 2012 etc.

From the Judgment & Order dated 26.06.2009 of the High Court of Kerala at Ernakulam in Sales Tax Revision No. 396 of 2008 and dated 15.06.2010 in Review Petition No. 148 of 2010.

WITH

C.A. Nos. 2521-2522 of 2012.

A.K. Ganguly, R. Venkataramani, Ritin Rai, V.K. Monga, K. Sreekumar, V. Vijaya Lakshmi, P.V. Dinesh, Aljo K. Joseph, T.P. Sindhu for the Appellant.

V. Giri, M.T. George, Mohammed Sadique T.A., Kavitha K.T. for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted in both the Special Leave Petitions.

2. How far deductions are allowable under rule 9(a) of the

Kerala General Sales Tax Rules, 1963 ("the Rules" hereinafter) for trade discounts?

3. A division bench of the Kerala High Court has held that unless the discount was shown in the invoice itself, it would not qualify for deduction and further that any discount that was given by means of credit note issued subsequent to the sale of the article was in reality an incentive and not trade discount eligible for exemption under rule 9(a) of the Rules. The decision was rendered somewhat gratuitously in the case of M/s IFB Industries Ltd., (the appellant in the appeals arising from SLP (Civil) Nos. 26102-03 of 2010) but it is the India Cements Ltd., the appellant in the other set of appeals (arising from SLP (Civil) Nos. 6861-62 of 2011), that got badly hit by the decision and its claim for deduction of many kinds of trade discounts was rejected summarily and even without an opportunity of any effective hearing to it right from the stage of assessment up to the High Court. But to put the matter in order, we must see how the issue developed before reaching this Court and for that we need to first advert to the case of M/s IFB Industries Ltd.

4. M/s IFB Industries Ltd. is a manufacturer of home appliances. It has a scheme of trade discount for its dealers under which the dealer, on achieving a pre-set sale target gets certain discount on the price for which it purchased the articles from the manufacturer, the appellant. As the discount is subject to achieving the sale target the dealer would naturally qualify for it in the later part of the financial year/assessment period, that is to say, long after the sales took place between the appellant and its dealer. For the sales taking place between the appellant and its dealer after the sale target is achieved, the dealer would of course get the articles on the discounted price but for the sales that took place before the sale target was achieved, the appellant would issue credit notes in favour of the dealer. The Assessing Authority, in principle, accepted the appellant's claim for deduction of the amount of discount given by it to its dealers through credit notes under rule 9(a) of the

Rules and it was only a dispute over computation that took the matter to the High Court and the High Court held that the discount in question was not trade discount at all and it was not eligible for deduction in terms of rule 9(a).

5. The case of the appellant (M/s IFB Industries Ltd.) relates to assessment periods 2001-02 and 2002-03. Dealing with the assessment periods 2001-02, the Assistant Commissioner (Assessment), Commercial Taxes, (the Assessing Authority) in its order dated January 27, 2006 observed that the dealer had given discount to the tune of Rs.58,15,485/- and as the discount was allowable in ordinary course of business, that turnover was allowed as exempted.

6. In making the computation, however, the Assessing Authority started with the figure of 'Taxable turnover as per account (Home appliances) Vth Schedule Items' that was Rs.11,62,36,424.23. He then added to it the amounts of (i) Turnover under AMC, (ii) Sales return, (iii) Stock transfer, (iv) Second sale, (v) Tax collected and (vi) Scheme Discount amounting to Rs.58,15,485/- and arrived at the figure of 'total turnover proposed' that came to Rs.14,27,69,607/-. From the total turnover, he then deducted the amounts of (i) AMC, (ii) Sales return, (iii) Second sales, (iv) Tax Collected and (v) Scheme Discount being the sum of Rs.58,15,485/- and, thus, finally arrived at the figure of Rs.11,95,56,460/- as the 'taxable turnover proposed'.

7. The Assessing Authority passed a similar order for the assessment period 2002-03 as well.

8. The appellant had objection to the computation made by the Assessing Authority. It contended that though in principle allowing deduction for the trade discount the Assessing Authority actually denied any deduction by subtracting the amount of trade discount only after first adding it to the turnover. In the computation made by the Assessing Authority the amount of trade discount, thus, got neutralized and the appellant did not

actually get any deduction of the trade discount from its turnover.

9. Before proceeding further, it needs to be understood that the appellant's objection would have any basis only in case it is shown that the original figure of Rs.11,62,36,424.23 taken by the Assessing Authority as '**Taxable** turnover' was **inclusive** of the amount of the scheme discount being the sum of Rs.58,15,485/-. For, unless the amount of scheme discount was a factor of '**Taxable** turnover' there would be no question of deducting it from taxable turnover. Only in case the appellant could show that the figure of Rs.11,62,36,424.23 also included the amount of Rs.58,15,485/- as the trade discount, there would be any question of deducting it from the larger figure.

10. Be that as it may, the appellant preferred appeals against the Assessment Order (Sales Tax Appeal Nos. 219 & 220 of 2006) in which it also took the objection that the computation made by the Assessing Authority by first adding up the amount of trade discount and only then deducting it from the turnover denied it the exemption of trade discount which the Assessing Authority had himself allowed in the earlier part of his order. It is significant to note, however, that in the appeal also it was never stated that the figure of Rs.14,27,69,607/- forming the basis of the computation included the amount of trade discount of Rs.58,15,485/-.

11. The Deputy Commissioner (Appeals) III Ernakulam, (the Appellate Authority) seems to have accepted the case of the appellant and while disposing of its appeals by order dated April 28, 2006 observed that in effect the appellant's claim was disallowed even though it was allowed in the order of the Assessing Authority. He, accordingly, directed the Assessing Authority to verify whether it was a computation mistake and to modify the order accordingly.

12. Against the order passed by the Appellate Authority, the Revenue preferred appeals (T.A. Nos. 429 & 430 of 2006/ C.O. 67 & 68 of 2006) before the Kerala Sales Tax Appellate

Tribunal and the Tribunal by its order dated February 28, 2007 allowed the Revenue's appeals holding that since there was no assessment on trade discount, the direction of the Assessing Authority to verify whether there was a mistake in this computation was without any basis.

13. The appellant made a Rectification application but it was rejected by the Tribunal by order dated August 29, 2008.

14. Against the order passed by the Sales Tax Appellate Tribunal, the appellant went to the High Court in ST Revision Nos. 396 & 397/2008. The appellant, safe in the belief that the Assessing Authority had in principle accepted its claim for deduction of the trade discount from the taxable turnover, confined its revision to the computation made by the Assessing Authority. The High Court, nevertheless, went into the basic question whether the discount under the scheme of the appellant at all qualified for deduction under rule 9(a) of the Rules. In a brief order dated June 26, 2009 that does not refer to any earlier precedents of this Court or even of the Kerala High Court, the High Court observed that from a plain reading of rule 9(a) it appeared that what is allowable as discount in the computation of taxable turnover is the trade discount given in the bills. According to the High Court, what is insisted in the rule is that the purchaser should have paid the price charged, less the discount. And this certainly meant that the discount should be shown in the original invoice and tax should be charged only on the net amount exclusive of discount so that the buyer gets the deduction towards discount.

15. On the appellant's claim of deduction of their trade discount from the taxable turnover, the High Court made the following observation: -

> "Petitioner is a manufacturer engaged in supply of goods in wholesale to distributors and dealers. Sales are therefore first sales and discount if any given can only be trade margin to dealers. If tax is not to be charged on the

dealer margin, then discount should be given in the invoice itself. If the petitioner has made sales in this way, then necessarily deduction should have been claimed in the monthly return itself as the taxable turnover does not cover discount/trade margin given in the invoice. On the other hand, in the Tribunals order, what is referred to as scheme discount which is nothing but incentives given by manufacturers, and wholesalers to dealers, may be for seasonal sales or may be for annual sales. Such incentives are normally given by the credit note at the end of the season or at the end of the year. These incentives given through credit notes are outside the scope of discount covered by Rule 9(a) of the KGST Rules."

16. Observing thus, the High Court found and held that the assessment in the case of the appellant had not been properly made. It, accordingly, set aside the orders passed by the Revenue authorities and remitted the case to the Assessing Authority for passing fresh assessment orders in light of its order and after examining the quarterly returns and the annual returns submitted by the appellant.

17. The appellant has brought the matter to this Court making the grievance that though the order of the High Court is an order of remand, for all intent and purposes it puts an end to its claim of deduction of trade discount from its taxable turnover.

18. Shortly after the case of M/s IFB Industries Ltd., came the case of Godrej and Boyce Mfg. Co. Ltd. and in an equally brief order dated November 4, 2009 a bench of the Kerala High Court took the same view on the question of deductibility of trade discounts as in the case of M/s IFB Industries Ltd. The High Court observed that in order to be eligible for deduction in terms of rule 9(a) of the Rules the discount must be granted in the invoices itself. According to the High Court, the rule stipulates that in order to qualify for deduction it should be proved that the purchaser had paid the sale price less amount

of discount allowed. This presupposed that the deduction available is only trade discount allowed in invoices and not on credit notes given later.

19. By the time the case of the India Cement Ltd. (appellant in the appeals arising from SLP(C) Nos. 6861-6862 of 2011) came up for assessment for the assessment periods 2003-04 and 2004-05 the decision of the High Court in M/s IFB Industries Ltd. was firmly before the Revenue authorities. The Assessing Authority, therefore, turned down the claim of the appellant, the India Cement Ltd., for exemption of different kinds of discount, namely, special discount, annual discount, turnover discount, target discount etc. given by means of credit notes and aggregating to the large sum of Rs.25,55,83,751.82. The Assessing Authority referred to the High Court decision in M/s IFB Industries Ltd. and rejected the appellant's claim for deduction of the aforesaid amount from their taxable turnover holding that, discounts given through credit notes were nothing but incentives and did not come under rule 9(a) of the Rules.

20. The appellant challenged the assessment orders before the High Court in Writ Petitions (WP(C) Nos. 34989 & 38517 of 2010). A single judge of the High Court declined to entertain the writ petitions filed directly against the assessment orders and by order dated January 18, 2011 dismissed the writ petitions leaving it open to the appellant to seek their remedies before the statutory authorities.

21. Against the order of the single judge the appellant filed intra-court appeals (W.A. Nos. 173 & 177 of 2011). The division bench agreed that since the appellant was confronted with an order of the division bench of the High Court, it would be pointless to relegate it to the statutory authorities. It referred to its orders passed in the cases of M/s IFB Industries Ltd. and Godrej and Boyce Mfg. Co. It also noted that against its decision in M/s IFB Industries Ltd. a SLP was filed which was admitted by this Court. It also referred to the decisions of this Court and of the Kerala High Court relied upon by the appellant

in support of the contentions that a discount in order to qualify for deduction under rule 9(a) need not necessarily be shown in the invoice itself and may also be given by means of credit notes. It, however, declined to reconsider its order in M/s IFB Industries Ltd. and by order dated February 8, 2011 dismissed the appeals observing as follows: -

> "We feel that appellant's remedy is to challenge the decision of this Court relied on by the Assessing Officer in disallowing claim of deduction of discount before the Supreme Court. Consequently, following our above two decision, we uphold the assessment disallowing discount on credit notes. These Writ Appeals are, accordingly, dismissed on merit leaving it open to the appellant to approach the Supreme Court, if they have any grievance against this judgment."

22. In the aforesaid circumstances, the appellant is before this Court making the grievance that its claim stands rejected practically unheard and without any considerations of the earlier precedents on the point relied upon by it in support of its claim.

23. In order to clearly understand the kinds of discount that are exempted in terms of rule 9(a) we may usefully refer to the definition of 'turnover' under Section 2(xxvii) of the Kerala General Sales Tax Act, 1963. The main body of the definition is as follows: -

> "(xxvii) "turnover" means the aggregate amount for which goods are either bought or sold, supplied or distributed by a dealer, either directly or through another, on his own account or on account of others, whether for cash or for deferred payment or other valuable consideration."

It is followed by several explanations. Explanation 2(ii) is as follows: -

> "Explanation 2 - Subject to such conditions and restrictions, if any, as may be prescribed in this behalf,-

> (i) xxx
>
> (ii) **any cash or other discount** on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers **shall not be included in the turnover**."

(emphasis added)

24. It is, thus, to be seen that the very definition of "turnover" recognises discounts other than cash discount and provides that those other discounts too like the cash discount shall not be included in the turn over.

25. Rule 9(a) provides as follows -

> "9. Determination of taxable turnover - In determining the taxable turnover, the amounts specified in the following clauses shall subject to the conditions specified therein, be deducted from the total turnover of the dealer: -
>
> (a) All amounts allowed as discount, provided that such discount is allowed in accordance with the regular practice in the trade and provided also that the accounts show that the purchaser has paid only the sum originally charged less the discount."

(emphasis added)

26. It is significant to note that the rule does not speak of invoices but stipulates that the discount must be shown in the **accounts**. On a plain reading of the provision it is clear that the exemption is allowable subject to two conditions; first, the discount is given in accordance with the regular practice in the trade and secondly, the accounts should show that the purchaser had paid only the sum originally charged less the discount. We find nothing in rule 9(a) to read it in the restrictive manner to mean that a discount in order to qualify for exemption under its provision must be shown in the invoice itself.

27. We, therefore, find it difficult to sustain the view taken by the Kerala High Court in the orders impugned before us.

28. We are fortified in our view on the basis of some earlier decisions of this Court and some High Courts, including the Kerala High Court.

29. In *Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) v. M/s Advani Oorlikon (P) Ltd.,* (1980) 1 SCC 360, this Court pointed out that cash discounts and trade discounts are wholly distinct and separate concepts and are not to be confused with one another. Advani Oorlikon was a case under the Central Sales Tax Act and section 2(h) of the Act defined the expression 'sale price' to mean 'the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as **cash discount**…'. It is to be noted that though the Central Sales Tax Act mentioned only cash discount as being deductible from sale price, this Court nevertheless held that any trade discount must also be similarly deducted for determining sale price of goods. In paragraphs 5 and 6 of the judgment the Court observed and held as follows: -

> "5. At the outset, it is appropriate that we set forth the two relevant definitions contained in the Central Sales Tax Act. Section 2(j) defines "turnover" to mean "the aggregate of the sale prices received and receivable by him (the dealer) in respect of sales of any goods in the course of inter-State trade or commerce...". And Section 2(h) of the Act defines the expression "sale price" to mean "the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade...". It is true that a deduction on account of cash discount is alone specifically contemplated from the sale consideration in the definition of "sale price" by Section 2(h), and there is no doubt that cash discount cannot be confused with trade discount. The two concepts are wholly distinct and separate. Cash discount is allowed when the purchaser makes payment promptly or within the period of credit allowed. It is a discount granted in consideration of expeditious payment. A trade discount is a deduction from the catalogue price of goods allowed by wholesalers to retailers engaged in the trade. The allowance enables the retailer to sell the goods at the catalogue price and yet make a reasonable margin of profit after taking into account his business expense. The outward invoice sent by a wholesale dealer to a retailer shows the catalogue price and against that a deduction of the trade discount is shown. The net amount is the sale price, and it is that net amount which is entered in the books of the respective parties as the amount reliable. *Orient paper Mills Ltd. v. State of Orissa,* (1975) 35 STC 84: 1974 Tax LR 2224 (Ori. HC)
>
> 6. Under the Central Sales Tax Act, the sale price which enters into the computation of the turnover is the consideration for which the goods are sold by the assessee. In a case where trade discount is allowed on the catalogue price, the sale price is the amount determined after deducting the trade discount. The trade discount does not enter into the composition of the sale price, but exists apart from and outside it and prior to it. It is immaterial that the definition of "sale price" in Section 2(h) of the Act does not expressly provide for the deduction of trade discount from the sale price. Indeed, having regard to the circumstance that the sale price is arrived at after deducting the trade discount, no question arises of deducting from the sale price any sum by way of trade discount."

30. The decision of this Court in *Deputy Commissioner of Sales Tax(Law) Board of Revenue (Taxes), Ernakulam v. Motor Industries Co, Ernakulam,* (1983) 2 SCC 108, is on rule 9(a) of the Kerala General Sales Tax Rules and the discount admissible to exemption under that provision. It may, however,

be clarified that in terms of the rule, as it stood at that time, exemption was allowable on trade discount given not only in accordance with the regular practice in the trade but also in accordance with the terms of the contract or agreement entered into a particular case. In Motor Industries Co. the claim for exemption was on the basis of the agreement entered into between the dealer and its purchaser, the retailer. But that is of no significance as the issue in the case was in regard to the nature of discount admissible to exemption under rule 9(a). This Court, upholding the decision of the Kerala High Court allowing exemption to the dealer, held and observed as follows:-

> "We shall first deal with the claim made in respect of "service discount". Under clause (a) of Rule 9 of the Rules all amounts allowed as discount where such discount is allowed in accordance with the regular practice of the dealer or is in accordance with the terms of contract or agreement entered into in a particular case have to be deducted from the total turnover in determining the taxable turnover provided the accounts of the assessee show that the purchaser has paid only the sum originally charged less the discount. In the instant case the "service discount" in respect of which the deduction was claimed by the assessee was the additional trade discount allowed by it to its main distributors (purchasers) namely the T.V.S. group of companies which constitute a prestigious group of commercial concerns over and above the normal trade discount in consideration of the extra benefit derived by the assessee by reason of the marketing of its goods through them. This additional trade discount is allowed in accordance with the trade agreement subject to periodical variation depending upon the cost structure and changes in market conditions. It is not disputed that there were such agreements between the assessee and the purchasers and the accounts of the assessee truly reflected the actual discount allowed to the purchasers. What is however urged by the department is that the said additional discount

> allowed by the assessee could not strictly be termed as discount as it was in lieu of services rendered by its main distributors by way of popularisation of the sales and consumption of the products sold by the assessee. We find it difficult to accept the submission made on behalf of the department. Rule 9(a) says that all amounts allowed as discount either in accordance with regular practice or in accordance with agreement would be deductible from the total turnover provided they are duly supported by the entries in the accounts of the assessee. Ordinarily any concession shown in the price of goods for any commercial reason would be a trade discount which can legitimately be claimed as a deduction under clause (a) of Rule 9 of the Rules. Such a concession is usually allowed by a manufacturer or a wholesale dealer in favour of another dealer with the object of improving prospects of his own business. It is common experience that when goods are marketed through reputed companies, firms or other individual dealers the demand for such goods increases and correspondingly the business of the manufacturer or the wholesaler would become more and more prosperous and its capacity to withstand competition from other manufacturers or other dealers dealing in similar goods would also improve. Hence any concession in price shown in such circumstances by way of an additional incentive with a view to promote one's own trade does qualify for deduction as a trade discount. It cannot be termed as a service charge as is attempted to be termed in this case. In fact in this case apart from buying the products of the assessee, no other service is being rendered by the T.V.S. group of companies to the assessee. In the circumstances the additional discount or "service discount" as it is called in this case is no other than the discount referred to in Rule 9(a) of the Rules."

31. In *Union of India and Others v. Bombay Tyres International (P) Ltd.,* (2005) 3 SCC 787, in a very brief order

this Court very succinctly described 'trade discount' and held it to be deductible from the sale price:

> "(1) Trade discounts - Discounts allowed in the trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price."
>
> (emphasis added)

32. A bench of the Andhra Pradesh High Court in *Godavari Fertilizers and Chemicals Ltd. v. Commissioner of Commercial Taxes,* (2004) 138 STC 133, examined a number of earlier decisions on this point and came to the conclusion that a discount given by means of credit notes issued subsequent to the sale is as much a trade discount admissible to deduction in determining the turnover of a dealer.

33. A bench of the Kerala High Court in *Kalpana Lamps and Components Ltd. v. State of Kerala,* (2006) 143 STC 666, in paragraphs 4 and 5 of the judgment observed and held as follows: -

> "4. According to us, in the present case, the Appellate Tribunal dismissed the appeal merely on the ground that the circumstances under which the special discount has been granted to the customer (sic). Learned counsel for the petitioner submits that the petitioner was not able to convince the Tribunal because no opportunity was given by both the authorities, viz., the assessing authority and the appellate authority. They rejected the case of the petitioner merely on the ground that the books of accounts were not

> produced. Hence, the petitioner prayed for an opportunity to explain the circumstances under which the special discount was granted.
>
> 5. Before parting with the case, we may state that so far as the special discount is concerned, all that the authorities have to look into whether as a matter of fact, the petitioner received only the sum originally charged less the discount. It is the look out of the traders to see that the trade increase and it is for that purpose the trade discount is given. Hence, a person may not be able to clearly prove as to why the special discount was given. But if there has been a consistent practice of giving special discount, that has to be accepted by the assessing authority."

34. On the basis of the discussions made above and in light of the earlier decisions of the Court, we are unable to sustain the orders of the Kerala High Court coming under appeal. The impugned orders in both the appeals are set aside. The cases of the appellants for the respective assessment periods are remitted to the Assessing Authority with a direction to make assessments and pass fresh orders in accordance with law and in light of this judgment. The Assessing Authority shall not reject the appellants' claim for exemption of the amounts of trade discount solely on the ground that the discount amounts were not shown in the sale invoices.

35. In the result the appeals are allowed but with no orders as to cost.

B.B.B. Appeals allowed.

DEEPAK KUMAR ETC.
v.
STATE OF HARYANA AND ORS. ETC.
I.A. NOS.12-13 OF 2011
IN
(Special Leave Petition (C) No.19628-29 of 2009)

FEBRUARY 27, 2012

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

Environmental Laws - Mining lease - Necessity of proper environmental assessment plan - Government of Haryana issued auction notice dated 3.6.2011 proposing to auction extraction of minor mineral boulder, gravel and sand quarries of area not exceeding 4.5 hectares in each case in the District of Panchkula, auction notices dated 8.8.2011 in the District of Panchkula, Ambala and Yamuna Nagar exceeding 5 hectares and above, quarrying minor mineral, road metal and masonary stone mines in the District of Bhiwani, stone, sand mines in the District of Mohindergarh, slate stone mines in the District of Rewari, and also in the Districts of Kurukshetra, Karnal, Faridabad and Palwal, with certain restrictions for quarrying in the river beds of Yamuna, Tangri, Markanda, Ghaggar, Krishnavati River basin, Dohan River basin etc. - Validity of the auction notices under challenge - Complaint of illegal mining going on in the State of Rajasthan and Uttar Pradesh - Held: There are no materials to come to the conclusion that the removal of minor mineral boulder, gravel, sand quarries etc. covered by the auction notices dated 3.6.2011 and 8.8.2011, in the places notified therein and also in the river beds would not cause environmental degradation or threat to the biodiversity, destroy riverine vegetation, cause erosion, pollute water sources etc. - The auction notices dated 3.6.2011 and 8.8.2011 have permitted quarrying mining and

removal of sand from in-stream and upstream of several rivers, which may have serious environmental impact on ephemeral, seasonal and perennial rivers and river beds and sand extraction may have an adverse effect on bio-diversity as well - Further it may also lead to bed degradation and sedimentation having a negative effect on the aquatic life - The auction notices were issued without conducting any study on the possible environmental impact on/in the river beds and elsewhere - When faced with a situation where extraction of alluvial material within or near a river bed has an impact on the rivers physical habitat characteristics, like river stability, flood risk, environmental degradation, loss of habitat, decline in biodiversity, it is not an answer to say that the extraction is in blocks of less than 5 hectares, separated by 1 kilometre, because their collective impact may be significant, hence the necessity of a proper environmental assessment plan - Taking note of the technical, scientific and environmental matters, MoEF, Government of India, issued various recommendations in March 2010 followed by the Model Rules, 2010 framed by the Ministry of Mines which have to be given effect to, inculcating the spirit of Article 48A, Article 51A(g) read with Article 21 of the Constitution - The State of Haryana and various other States have not so far implemented the recommendations of the MoEF or the guidelines issued by the Ministry of Mines before issuing auction notices granting short term permits by way of auction of minor mineral boulders, gravel, sand etc., in the river beds and elsewhere of less than 5 hectares - Direction to all the States, Union Territories, MoEF and the Ministry of Mines to give effect to the recommendations made by MoEF in its report of March 2010 and the model guidelines framed by the Ministry of Mines, within a period of six months from date of this order and submit their compliance reports - Central Government also should take steps to bring into force the Minor Minerals Conservation and Development Rules 2010 at the earliest - State Governments and UTs also should take immediate steps to frame necessary rules under Section 15

of the Mines and Minerals (Development and Regulation) Act, 1957 taking into consideration the recommendations of MoEF in its Report of March 2010 and model guidelines framed by the Ministry of Mines, Govt. of India - In the meanwhile, leases of minor mineral including their renewal for an area of less than five hectares be granted by the States/ Union Territories only after getting environmental clearance from the MoEF - Mines and Minerals (Development & Regulation) Act 1957 - s.15 - Constitution of India, 1950 - Articles 48A, 51A(g) r/w 21.

CIVIL APPELLATE JURISDICTION : I.A. Nos.12-13 of 2011

IN

SLP (CIVIL) No. 19628-19629 of 2009 etc.

From the Judgment & Order dated 15.05.2009 of the High Court of Punjab & Haryana at Chandigarh in CWP Nos. 20134 of 2004 and 4758 of 2008.

WITH

SLP (C) Nos. 729-731 of 2011, 21833 of 2009, 12498-12499 of 2010, SLP (C).....CC 16157 of 2011 with SLP (C).....CC 18235 of 2011.

Mohan Jain, ASG, P.S. Narasimha, Gopal Subramanium, Ranjit Kumar, P.S. Patwalia, Ranbir Chandra, Narender Hooda, Sr. AAG, Dr. Manish Singhvi, AAG, Gaurav Agarwal, K. Parmeswar, Haris Beeran, P.K. Manohar, V. Venayagam Balan, Shish Pal Laler, N.P. Midha, Balbir Singh Gupta, D.K. Thakur, B.K. Prasad, S.N. Terdol, Shvinder Dwivedi, Tarjit Singh, Manjit Singh (for Kamal Mohan Gupta), Aseem Mehrotra, Mohd. F. Khan, Shefai Jain, R.P. Singh, Shree Pal Singh, Devashish Bharuka, Radha Shyam Jena, Tapesh Kumar Singh, Samir Ali Khan, Jitender Mohan Sharma, Sandeep Singh, Vibhor Verdhan, Sameer Singh, Mohit Kumar Shah, Ashutosh Singh, Devanshu K. Devesh, Irshad Ahamad, Sarvesh Singh,

A. Benayagamblan, Manish Pitale, Wasi Haider, C.S. Ashri, Asha G. Nair, Sanand, Ramakrishnan, Meena C.R., Kamlendra Misra, Karanjawala & Co. Prakash Kumar Singh, Vijay Panjwani, Anitha Shenoy, Vibha Dutta Makhija, D.S. Mahra, H. Wahi, D.K. Sinha, Milind Kumar, Krihnanand Pandey, Rachana Srivastava, B.S. Banthia, D.K. Sinha, Gopal Singh, Anil Srivastava, H. Wahi, Corporate Law Group, R.S. Jena, T.V. George, Naresh K. Sharma, Prashant Bhushan, Shibashish Mishra, Irshad Ahmad, Prerna Mehta, S.M. Jadhav, Shiv Kumar Suri, G. Prakash, E.M.S. Anam, Gopal Singh, Subharo Sanyal, B.K. Prasad, Himinder Lal, Moinudding Ansari, L.R. Singh, C.D. Singh, Lalitha Kaushik, K.S. Bhati, Neeraj Shekhar, Sumita Hazarika, Suresh A. Shroff & Co. S. Prasad, Khaitan & Co. Pragati Neekhra, Naresh K. Sharma, R. Nedumaran, K.K. Mani, Srikala Gururishna Kumar, S. Srinivasan, Prashant Kumar, L.K. Pandey, Shiv Prakash Pandey, Sangeeta Kumar, Nikhil Nayyar, V. Ramasubramanian, Pratap Venugopal, Namrata Sood (for K.J. John & Co.), R. Ayyam Perumal, Prabha Swami, M.A. Chinnasamy, C.N. Sree Kumar, Naveen R. Nath, Revathy Raghavan, L.C. Agrawala, Ashwani Bhardwaj for the appearing parties.

The Order of the Court was delivered

K.S. RADHAKRISHNAN, J. I.A. Nos. 12-13 of 2011 are allowed. SLP (C) Nos.12498-12499 of 2010 be detagged and be listed after two weeks.

The Department of Mines and Geology, Government of Haryana issued an auction notice dated 3.6.2011 proposing to auction the extraction of minor mineral boulder, gravel and sand quarries of an area not exceeding 4.5 hectares in each case in the District of Panchkula, auction notices dated 8.8.2011 in the District of Panchkula, Ambala and Yamuna Nagar exceeding 5 hectares and above, quarrying minor mineral, road metal and masonary stone mines in the District of Bhiwani, stone, sand mines in the District of Mohindergarh, slate stone mines in the District of Rewari, and also in the

Districts of Kurukshetra, Karnal, Faridabad and Palwal, with certain restrictions for quarrying in the river beds of Yamuna, Tangri, Markanda, Ghaggar, Krishnavati River basin, Dohan River basin etc. The validity of those auction notices is under challenge before us, apart from the complaint of illegal mining going on in the State of Rajasthan and Uttar Pradesh.

2. When the matter came up for hearing on 25.11.2011, we passed an order directing the CEC to make a local inspection with intimation to MoEF, State of U.P., Rajasthan and Haryana with regard to the alleged illegal mining going on in the States of Uttar Pradesh, Rajasthan and also with regard to the areas identified for mining in the State of Haryana and submit a report. We also directed the CEC to examine whether there has been an attempt to flout EIA Notification dated 14.9.2006 by breaking the homogeneous area into pieces of less than 5 hectares. CEC was also directed to examine whether the activities going on in that area have any adverse environmental impact.

3. CEC, in response to our order, submitted a detailed report on 4.1.2012. However, the report is silent with regard to the disturbing trend of serious illegal and unrestricted upstream, in-stream and flood plain sand mining activities and the prevailing degree of degradation of the sites and the environment, especially on the river beds mentioned earlier. Report of CEC however states that the auction notice also refer to mining leases of less than 5 hectares and hence no environmental clearance need be obtained as per the MoEF notification dated 14.9.2006. No light is also thrown on the question whether there has been, in fact, an attempt to flout the notification dated 14.9.2006 by breaking the homogeneous area into pieces of less than 5 hectares and the possible environmental or ecological impact on quarrying of minor minerals.

4. Mr. Patwalia, learned senior counsel appearing for the petitioners, submitted that CEC report is silent about those

aspects and also whether 1 km. distance has been maintained between the mining blocks of less than 5 hectares. Learned counsel also submitted that mining areas earmarked are at the foothills of fragile Himalayan ranges known as Shivalik hills, which are spread over the Districts of Panchkula, Ambala and Yamuna Nagar and the illegal and excessive mining has caused serious environmental degradation and ecological impact, and no Environmental Impact Assessment has ever taken place in areas earmarked for mining especially on the river beds.

5. Shri Gopal Subramaniam, learned senior counsel appearing for the State of Haryana, submitted that the State has taken adequate and effective precautions to maintain 1 km. separation between mining blocks of less than 5 hectares each and that the auction notice dated 3.6.2011 itself has imposed strict restrictions on quarrying in the river beds so also the auction notice dated 8.8.2011. Further, it was pointed out that the notification dated 14.9.2006 would not apply for quarrying minor minerals from areas of less than 5 hectares and therefore, no environmental impact assessment needs to be undertaken either at the instance of the State Government or the Project Proponent.

6. Shri Mohan Jain, learned Additional Solicitor General, appearing for the MoEF submitted that the grant or allotment of mining licence/lease of smaller plots of less than five hectares should not be encouraged from the environmental point of view and that the applicability of EIA notification of 2006, has to be seen in its letter and spirit so as to ensure environmental safeguards in place and implemented for sustainable mining. Learned counsel also assured, if environmental clearance is sought for covering a mining area of less than five hectares, the same shall be immediately attended to and necessary clearance would be granted in accordance with law.

7. We have no materials before us to come to the conclusion that the removal of minor mineral boulder, gravel,

sand quarries etc. covered by the auction notices dated 3.6.2011 and 8.8.2011, in the places notified therein and also in the river beds of Yamuna, Ghaggar, Tangri, Markanda, Krishnavati river basin, Dohan river basin etc. would not cause environmental degradation or threat to the biodiversity, destroy riverine vegetation, cause erosion, pollute water sources etc. Sand mining on either side of the rivers, upstream and in-stream, is one of the causes for environmental degradation and also a threat to the biodiversity. Over the years, India's rivers and Riparian ecology have been badly affected by the alarming rate of unrestricted sand mining which damage the ecosystem of rivers and the safety of bridges, weakening of river beds, destruction of natural habitats of organisms living on the river beds, affects fish breeding and migration, spells disaster for the conservation of many bird species, increases saline water in the rivers etc. Extraction of alluvial material from within or near a streambed has a direct impact on the stream's physical habitat characteristics. These characteristics include bed elevation, substrate composition and stability, in-stream roughness elements, depth, velocity, turbidity, sediment transport, stream discharge and temperature. Altering these habitat characteristics can have deleterious impacts on both in-stream biota and the associated riparian habitat. The demand for sand continues to increase day by day as building and construction of new infrastructures and expansion of existing ones is continuous thereby placing immense pressure on the supply of the sand resource and hence mining activities are going on legally and illegally without any restrictions. Lack of proper planning and sand management cause disturbance of marine ecosystem and also upset the ability of natural marine processes to replenish the sand.

8. We are expressing our deep concern since we are faced with a situation where the auction notices dated 3.6.2011 and 8.8.2011 have permitted quarrying mining and removal of sand from in-stream and upstream of several rivers, which may have serious environmental impact on ephemeral, seasonal

and perennial rivers and river beds and sand extraction may have an adverse effect on bio-diversity as well. Further it may also lead to bed degradation and sedimentation having a negative effect on the aquatic life. Rivers mentioned in the auction notices are on the foothills of the fragile Shivalik hills. Shivalik hills are the source of rivers like Ghaggar, Tangri, Markanda etc. River Ghaggar is a seasonal river which rises up in the outer Himalayas between Yamuna and Satluj and enters Haryana near Pinjore, District Panchkula, which passes through Ambala and Hissar and reaches Bikaner in Rajasthan. River Markanda is also a seasonal river like Ghaggar, which also originates from the lower Shivalik hills and enters Haryana near Ambala. During monsoon, this stream swells up into a raging torrent, notorious for its devastating power, as also, river Yamuna.

9. We find that it is without conducting any study on the possible environmental impact on/in the river beds and elsewhere the auction notices have been issued. We are of the considered view that when we are faced with a situation where extraction of alluvial material within or near a river bed has an impact on the rivers physical habitat characteristics, like river stability, flood risk, environmental degradation, loss of habitat, decline in biodiversity, it is not an answer to say that the extraction is in blocks of less than 5 hectares, separated by 1 kilometre, because their collective impact may be significant, hence the necessity of a proper environmental assessment plan. Possibly this may be the reason that in the affidavit filed by the MoEF on 23.11.2011 along with the annexure-2 report, the following stand has been taken:

> "The Ministry is of the opinion that where the mining area is homogenous, physically proximate end on identifiable piece of land of 5 ha or more, it should not be broken into smaller sizes to circumvent the EIA Notification, 2006 as the EIA Notification, 2006 is not applicable to the mining projects having lease area of less than 5 ha. The Report

of Committee on Minor Minerals, under the Chairmanship of the Secretary (E&F) with representatives of various state Governments as members including the State of Haryana and Rajasthan recommended a minimum lease size of 5 ha for minor minerals for undertaking scientific mining for the purpose of integrating and addressing environmental concerns. Only in cases of isolated discontinued mineral deposits in less than 5 ha, such mining leases may be considered keeping in view the mineral conservation."

Situations referred to earlier prevail not only in the State of Haryana but also in the neighbouring and other States of the country as well and those issues had come up for serious deliberations before the Government of India, on various occasions.

10. Government of India was receiving various reports regarding the adverse impacts on riverbeds and groundwater due to quarrying/mining of minerals. The Mines and Minerals (Development & Regulation) Act 1957 empowers the State Governments to make rules in respect of minor minerals. It was noticed that proposals for mining of major minerals typically undergo environment impact assessment and environmental clearance procedure, but due attention has not been given to environmental aspects of mining of minor minerals. Environmental Impact Assessment Notification of 1994 did not apply to the mining of minor minerals, noticing that minor minerals were brought under the ambit of the Environmental Impact Assessment Notification of 2006 and as per the said notification mining of minerals with a lease area of 5 hectares and above require prior environmental clearance. MoEF's attention was drawn to several instances across the country regarding damage to lakes, riverbeds and groundwater leading to drying up of water beds and causing water scarcity on account of quarry/mining leases and mineral concessions granted under the Mineral Concession Rules framed by the

State Governments under Section 15 of the Mines and Minerals (Development and Regulation) Act 1957. MoEF noticed that less attention was given on environmental aspects of mining of minor minerals since the area was small, but it was noticed that the collective impact in a particular area over a period of time might be significant. Taking note of those aspects, MoEF constituted a Core Group under the Chairmanship of the Secretary (E&F) to look into the environmental aspects associated with mining of minor minerals, vide its order dated 24.03.2009. The terms of reference to the Group were as under:

(i) To consider the environmental aspects of mining of minor minerals (quarrying as well as river beds mining) for their integration into the mining process.

(ii) Specific safeguard measures required to minimize the likely adverse impacts of mining on environment with specific reference to impact on water bodies as well as groundwater so as to ensure sustainable mining.

(iii) To evolve model guidelines so as to address mining as well as environmental concerns in a balanced manner for their adoption and implementation by all the mineral producing States.

The Group held its first meeting on 7.7.2009 and discussed the impact that may be caused by quarrying/mining of minor minerals on riverbeds and ground waters. It was noticed that individual mines of minor minerals being small in size may have insignificant impact, however, their collective impacts, taking into consideration various mines on a regional scale, is significantly adverse. It was, therefore, felt necessary to consider various aspects since appropriate guidelines have to be issued on the basis of the report of the Committee. The issues which were brought up for consideration were; (i) the need to re-look the definition of minor mineral, (ii) minimum size

of lease for adopting eco friendly scientific mining practices, (iii) period of lease, (iv) cluster of mine approach for addressing and implementing EMP in case of small mines, (v) depth of mining to minimize adverse impact on hydrological regime, (vi) requirement of mine plan for minor minerals, similar to major minerals, and (vii) reclamation of mined out area, post mine land use, progressive mine closure plan etc.

11. Comments and inputs from various States and Experts were also invited so as to prepare a report for consideration of the MoEF. Based on the discussion held and subsequent inputs received, a draft report was prepared and circulated to all members for their further inputs. Report was further discussed on 29.1.2010 for its finalization. The observations/ comments made during the meeting were incorporated in the report and it was again circulated to all members for their consideration. The report so circulated was ultimately finalized. The decision taken by the MoEF affects generally the mining of minor minerals including the riverbed mining throughout the country. For an easy reference, we may extract the issues and recommendations made by the MoEF, which are as follows:

"4.0 ISSUES AND RECOMMENDATIONS

4.1 Definition of Minor Mineral:

The term minor mineral is defined in clause (e) of Section 3 of MMDR Act, 1957 as "minor mineral means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes and any other material which the Central Government may, by Notification in the Gazette of India declare to be a minor mineral". The term 'ordinary sand' used in clause (e) of Section 3 of the MMDR Act, 1957 has been further clarified in rule 70 of the MCR, 1960 as "sand shall not be treated as minor mineral when used for any of the following purposes namely: (i) purposes of refractory and manufacture of ceramic, (ii) metallurgical purposes, (iii) optical purposes,

(iv) purposes of stowing in coal mines, (v) for manufacture of silvicrete cement, (vi) manufacture of sodium silicate and (vii) manufacture of pottery and glass.

Additionally, the Central Government has declared the following minerals as minor minerals: (i) boulder, (ii) shingle, (iii) chalcedony pebbles used for ball mill purposes only, (iv) limeshell, kankar and limestone used in kilns for manufacture of lime used as building material, (v) murrum, (vi) brick-earth, (vii) fuller's earth, (viii) bentonite, (ix) road metal, (x) reh-matti, (xi) slate and shale when used for building material, (xii) marble, (xiii) stone used for making household utensils, (xiv) quartzite and sandstone when used for purposes of building or for making road metal and household utensils, (xv) saltpeter and (xvi) ordinary earth (used or filling or levelling purposes in construction or embankments, roads, railways building).

It may thus be observed that minerals have been classified into major and minor minerals based on their end use rather than level of production, level of mechanization, export and import etc. There do exist some minor mineral mines of silica sand and limestone where the scale of mechanization and level of production is much higher than those of industrial mineral mines. Further, in terms of the economic cost and revenue, it has been estimated that the total value of minor minerals constitutes about 10% of the total value of mineral production whereas the value of non metallic minerals comprises only 3%. It is, therefore, evident that the operation of mines of minor minerals need to be subject to some regulatory parameters as that of mines of major minerals.

Further, unlike India there does not exist any such system based on end usage in other countries for classifying minerals into major and minor categories. Thus, there is a need to re-look at the definition of "minor" minerals per se.

It is, therefore, recommended that Ministry of Mines along with Indian Bureau of Mines, in consultation with the State Governments may re-examine the classification of minerals into major and minor categories so that the regulatory aspects and environment mitigation measures are appropriately integrated for ensuring sustainable and scientific mining with least impacts on environment.

4.2 Size of the Mine Lease:

Area for grant of mine lease varies from State to State. Maximum area which can be held under one or more mine lease is 2590 ha or 25.90 sq.miles in Jammu & Kashmir. Rajasthan prescribed a minimum limit of 1 ha for a lease. Maximum area prescribed for permit is 50x50 m. In most of the States area of permit is not specified in the rules. It has recently been observed by Punjab and Haryana High Court in its order dated 15.5.2009 that State Government are apparently granting short term permits by dividing the mining area into small zones in effect avoids environmental norms.

There is, thus a need to bring uniformity in the extent of area to be granted for mine lease so as to ensure that eco friendly scientific mining practices can be adopted. It is recommended that the minimum size of mine lease should be 5 ha. Further, preparation of comprehensive mine plan for contiguous stretches of mineral deposits by the respective State Governments may also be encouraged. This may suitably be incorporated in the Mineral Concession Rules, 1960 by Ministry of Mines.

4.3 Period of Mine Lease:

The period of lease varies from State to State depending on type of concessions, minerals and its end use. The minimum lease period is one year and maximum 30 years. Minerals like granite where huge investments are

required, a period of 20 years is generally given with the provisions of renewal. Permits are generally granting for short periods which vary from one month to a maximum one year. In States like Haryana, minor mineral leases are auctioned for a particular time period. Mining is considered to be capital intensive industry and considerable time is lost for developing the mine before it attains the status of fully developed mine. If the tenure of the mine lease is short, it would encourage the lessee to concentrate more on rapid exploitation of mineral without really undertaking adequate measures for reclamation and rehabilitation of mined out area, posing thereby a serious threat to the environment and health of the workers and public at large.

There is thus, a need to bring uniformity in the period of lease. *It is recommended that a minimum period of mine lease should be 5 years, so that eco friendly scientific and sustainable mining practices are adopted. However, under exceptional circumstances arising due to judicial interventions, short term mining leases / contracts could be granted to the State Agencies to meet the situation arising there from.*

4.4 Cluster of Mine Approach for Small Sized Mines:

Considering the nature of occurrence of minor mineral, economic condition of the lessee and the likely difficulties to be faced by Regulatory Authorities in monitoring the environmental impacts and implementation of necessary mitigation measures, *it may be desirable to adopt cluster approach in case of smaller mine leases being operated presently. Further, these clusters need be provided with processing/crusher zones for forward integration and minimizing excessive pressure on road infrastructure. The respective State Governments / Mine Owners Associations may facilitate implementation of Environment Management Plans in such cluster of mines.*

4.5 Requirement of Mine Plan for Minor Minerals:

At present, most of the State Governments have not made it mandatory for preparation of mining plan in respect of minor minerals. In some States like Rajasthan, eco friendly mining plans are prepared, which are approved by the State Mining Department. The eco friendly mining plans so prepared, though conceptually welcome, are observed to be deficient and need to be made comprehensive in a manner as is being done for major minerals. Besides, the aspects of reclamation and rehabilitation of mined out areas, progressive mine closure plan, as in vogue for major minerals could be introduced for minor minerals as well.

It is recommended that provision for preparation and approval of mine plan, as in the case of major minerals may appropriately be provided in the Rules governing the mining of minor minerals by the respective State Governments. These should specifically include the provision for reclamation and rehabilitation of mined out area, progressive mine closure plan and post mine land use.

4.6 Creation of Separate Corpus for Reclamation / Rehabilitation of Mines of Minor Minerals:

Mining of minor minerals, in our country, is by and large unorganized sector and is practiced in haphazard and unscientific manner. At times, the size of the leasehold is also too small to address the issue of reclamation and rehabilitation of mined outs areas. It may, therefore, be desirable that before the concept of mine closure plan for minor minerals is adopted, the existing abandoned mines may be reclaimed and rehabilitated with the involvement of the State Government. *There is thus, a need to create a separate corpus, which may be utilized for reclamation and rehabilitation of mined out areas. The respective State Governments may work out a suitable mechanism*

for creation of such corpus on the 'polluter pays' principle. An organizational structure may also need to be created for undertaking and monitoring these activities.

4.7 Depth of Mining:

Mining of minerals, whether major or minor have a direct bearing on the hydrological regime of the area. Besides, affecting the availability of water as a resource, it also affects the quality of water through direct run of going into the surface water bodies and infiltration / leaching into groundwater. Further, groundwater withdrawal, dewatering of water from mine pit and diversion of surface water may cause surface and sub surface hydrologic systems to dry up. An ideal situation would require that quarrying should be restricted to unsaturated zone only above the phreatic water table and should not intersect the groundwater table at any point of time. However, from the point of view of mineral conservation, it may not be desirable to impose blanket ban on mining operation below groundwater table.

It is, therefore, recommended that detailed hydro-geological report should be prepared in respect of any mining operation for minor minerals to be undertaken below groundwater table. Based on the findings of the study so undertaken and the comments / recommendations of Central Ground Water Authority / State Ground Water Board, a decision regarding restriction on depth of mining for any area should be taken on case to case basis.

4.8 Uniform Minor Mineral Concession Rules:

The economic value of the minor minerals excavated in the country is estimated to contribute to about 9% of the total value of the minerals whereas the non metallic minerals contribute to about 2.8%. Keeping in view the large extent of mining of minor minerals and its significant

potential to adversely affect the environment, it is *recommended that Model Mineral Concession rules may be framed for minor minerals as well and the minor minerals may be subjected to a simpler regulatory regime, which is, however, similar to major minerals regime.*

4.9 River Bed Mining:

4.9.1 Environment damage being caused by unregulated river bed mining of sand, bazari and boulders is attracting considerable attention including in the courts. The following recommendations are therefore made for the river bed mining.

(a) In the case of mining leases for riverbed sand mining, specific river stretches should be identified and mining permits/lease should be granted stretch wise, so that the requisite safeguard measures are duly implemented and are effectively monitored by the respective Regulatory Authorities.

(b) The depth of mining may be restricted to 3m/ water level, whichever is less.

(c) For carrying out mining in proximity to any bridge and/or embankment, appropriate safety zone should be worked out on case to case basis, taking into account the structural parameters, locational aspects, flow rate etc. and no mining should be carried out in the safety zone so worked out.

5.0 Conclusion:

Mining of minor minerals, though individually, because of smaller size of mine leases is perceived to have lesser impact as compared to mining of major minerals. However, the activity as a whole is seen to have significant adverse impacts on environment. It is, therefore, necessary that the

mining of minor minerals is subjected to simpler but strict regulatory regime and *carried out only under an approved framework of mining plan, which should provide for reclamation and rehabilitation of the mined out areas. Further, while granting mining leases by the respective State Governments "location of any eco-fragile zone(s) within the impact zone of the proposed mining area, the linked Rules/Notifications governing such zones and the judicial pronouncements, if any, need be duly noted*. The Union Ministry of Mines along with Indian Bureau of Mines and respective State Governments should therefore make necessary provisions in this regard under the Mines and Minerals (Development and Regulation) Act, 1957, Mineral Concession Rules, 1960 and adopt model guidelines to be followed by all States. "

(emphasis supplied)

The report clearly indicates that operation of mines of minor minerals needs to be subjected to strict regulatory parameters as that of mines of major minerals. It was also felt necessary to have a re-look to the definition of "minor" minerals per se. The necessity of the preparation of "comprehensive mines plan" for contiguous stretches of mineral deposits by the respective State Governments may also be encouraged and the same be suitably incorporated in the Mineral Concession Rules, 1960 by the Ministry of Mines. Further, it was also recommended that States, Union Territories would see that mining of minor minerals is subjected to simpler but strict regulatory regime and carried out only under an *approved framework of mining plan,* which should provide for *reclamation and rehabilitation* of mined out areas. Mining Plan should take note of the level of production, level of mechanisation, type of machinery used in the mining of minor minerals, quantity of diesel consumption, number of trees uprooted, export and import of mining minerals, environmental impact, restoration of flora and host of other matters referred to in 2010 rules. A proper framework has also

to be evolved on cluster of mining of minor mineral for which there must be a *Regional Environmental Management Plan*. Another important decision taken was that while granting of mining leases by the respective State Governments, *location of any eco-fragile zone(s)* within the *impact zone* of the proposed mining area, the linked Rules/Notifications governing such zones and the judicial pronouncements, if any, need to be duly noted.

12. The Minister for (E & F) wrote DO letter dated 1st June, 2010 to all the Chief Ministers of the States to examine the report and to issue necessary instructions for incorporating the recommendations made in the report in the Mineral Concession Rules for mining of minor minerals under Section 15 of Mines and Mineral (Development and Regulation) Act, 1957. Following are the key recommendations re-iterated in the letter:

"(1) Minimum size of mine lease should be 5 ha.

(2) Minimum period of mine lease should be 5 years.

(3) A cluster approach to mines should be taken in case of smaller mines leases operating currently.

(4) Mine plans should be made mandatory for minor minerals as well.

(5) A separate corpus should be created for reclamation and rehabilitation of mined out areas.

(6) Hydro-geological reports should be prepared for mining proposed below groundwater table.

(7) For river bed mining, leases should be granted stretch wise, depth may be restricted to 3m/water level, whichever is less, and safety zones should be worked out.

(8) The present classification of minerals into major and minor categories should be re-examined by the Ministry of Mines in consultation with the States."

13. The Ministry of Mines, Govt. of India sent a communication No.296/7/2000/MRC dated 16.05.2011 called "Environmental aspects of quarrying and of minor minerals - Evolving of Model Guidelines" along with a draft model guidelines calling for inputs before 30. 06. 2011. Draft rules called Minor Minerals Conservation and Development Rules, 2010 were also put on the website. Further, it may be noted Section 15(1A)(i) of the Act specifies the manner in which rehabilitation of flora and other vegetation, such as trees, shrubs and the like destroyed by reasons of any quarrying or mining operations shall be made in the same area or in any other area once selected by the State Government, whether by way of reimbursement of the cost of rehabilitation or otherwise by the persons holding the quarrying or mining lease.

14. We are of the view that all State Governments / Union Territories have to give due weight to the above mentioned recommendations of the MoEF which are made in consultation with all the State Governments and Union Territories. Model Rules of 2010 issued by the Ministry of Mines are very vital from the environmental, ecological and bio-diversity point of view and therefore the State Governments have to frame proper rules in accordance with the recommendations, under Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957.

15. Quarrying of river sand, it is true, is an important economic activity in the country with river sand forming a crucial raw material for the infrastructural development and for the construction industry but excessive in-stream sand and gravel mining causes the degradation of rivers. In-stream mining lowers the stream bottom of rivers which may lead to bank erosion. Depletion of sand in the streambed and along coastal areas causes the deepening of rivers which may result in

destruction of aquatic and riparian habitats as well. Extraction of alluvial material as already mentioned from within or near a streambed has a direct impact on the stream's physical habitat characteristics.

16. We are of the considered view that it is highly necessary to have an effective framework of mining plan which will take care of all environmental issues and also evolve a long term rational and sustainable use of natural resource base and also the bio-assessment protocol. Sand mining, it may be noted, may have an adverse effect on bio-diversity as loss of habitat caused by sand mining will effect various species, flora and fauna and it may also destabilize the soil structure of river banks and often leaves isolated islands. We find that, taking note of those technical, scientific and environmental matters, MoEF, Government of India, issued various recommendations in March 2010 followed by the Model Rules, 2010 framed by the Ministry of Mines which have to be given effect to, inculcating the spirit of Article 48A, Article 51A(g) read with Article 21 of the Constitution.

17. The State of Haryana and various other States have not so far implemented the above recommendations of the MoEF or the guidelines issued by the Ministry of Mines before issuing auction notices granting short term permits by way of auction of minor mineral boulders, gravel, sand etc., in the river beds and elsewhere of less than 5 hectares. We, therefore, direct to all the States, Union Territories, MoEF and the Ministry of Mines to give effect to the recommendations made by MoEF in its report of March 2010 and the model guidelines framed by the Ministry of Mines, within a period of six months from today and submit their compliance reports.

18. Central Government also should take steps to bring into force the Minor Minerals Conservation and Development Rules 2010 at the earliest. State Governments and UTs also should take immediate steps to frame necessary rules under Section 15 of the Mines and Minerals (Development and

Regulation) Act, 1957 taking into consideration the recommendations of MoEF in its Report of March 2010 and model guidelines framed by the Ministry of Mines, Govt. of India. Communicate the copy of this order to the MoEF, Secretary, Ministry of Mines, New Delhi, Ministry of Water Resources, Central Government Water Authority, the Chief Secretaries of the respective States and Union Territories, who would circulate this order to the concerned Departments.

19. We, in the meanwhile, order that leases of minor mineral including their renewal for an area of less than five hectares be granted by the States/Union Territories only after getting environmental clearance from the MoEF.

Ordered accordingly.

B.B.B. Matter adjourned.

RAJESH TALWAR

v.

C.B.I. & ORS.

(Transfer Petition (Crl.) No. 45 of 2012 etc.)

MARCH 02, 2012

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

Code of Criminal Procedure, 1973 - s. 406 - Transfer of proceedings under - Petitioners seeking transfer of proceedings from the court of the Special Judicial Magistrate (CBI), Ghaziabad, U.P., to a court of competent jurisdiction in Delhi/New Delhi - Grounds of inconvenience of the petitioner to travel long distance to participate in the court proceedings; threatened personal security on account of physical assault on the petitioner at the hands of psychopath, resulting in grievous injuries to him as also other grounds raised - Held: Inconvenience of traveling a distance of merely 52 Kms. from Delhi to Ghaziabad would not be such as can be the basis for seeking transfer - Jurisdiction of a court to conduct criminal prosecution is based on the provisions of Code of Criminal Procedure - Complainant or an accused may have to travel across several States to reach the jurisdictional court - Witnesses also travel in order to depose before the court - If the plea of inconvenience is accepted, the provisions earmarking the courts having jurisdiction to try cases would be rendered meaningless - As regards threatened personal security, it is also not possible to accept that the physical assault on the petitioner at the hands of a psychopath can be a valid basis for transfer of the present proceedings from Ghaziabad to Delhi/New Delhi - In view of the measures adopted by the Sessions Judge, the CBI and the State Administration towards security arrangements in the court-premises generally, and also, the special arrangements

which the respondents have undertaken to make, with particular reference to the petitioners, justice would be dispensed to the petitioners in an atmosphere shorn of any fear or favour - Order passed by the Special Judicial Magistrate (CBI), Ghaziabad, U.P. that during the proceedings no person shall be allowed to enter in the court room except for the parties to the case and their respective counsel to be enforced in letter and in spirit - In case of breach, the Special Judicial Magistrate (CBI), Ghaziabad, U.P. to take appropriate steps including coercive measures if necessary, to enforce the same - The majesty of law must be maintained at all costs - Based on certain insinuations against the presiding officer of the trial court, the petitioners asserted that they were not likely to get justice, as the concerned court was proceeding in the matter with a pre-determined mind - Said ground was not pressed during the course of hearing - Even raising such a ground in the pleadings can certainly be termed as most irresponsible - Insinuations can also be stated to have been aimed even at the High Court as the said order was also challenged before the High Court but it failed - Petitioners are cautioned from making any irresponsible insinuations with reference to court-proceedings - Proper course would be, to assail before a superior court, any order which may not be to the satisfaction of the petitioners, in accordance with law - The further ground for transfer of case that they were prevented from discharging their responsibility appropriately, are vague, and as such, cannot be the basis of a justifiable claim for transfer of proceedings, u/s. 406 - Neither the application nor the affidavit disclose that the petitioner's counsel were prevented from as also the identity of those responsible - It cannot be concluded that the petitioners would be deprived of a free and fair trial at Ghaziabad - There is no well-substantiated apprehension that justice would not be dispensed to the petitioners impartially, objectively and without any bias - The basis on which transfer of proceedings was sought, being just speculative and unjustified

apprehensions based inter alia on vague and non-specific allegations stands dismissed - Transfer petition.

Maneka Sanjay Gandhi vs. Rani Jethmalani **(1979) 4 SCC 167;** *Zahira Habibulla H. Sheikh vs. State of Gujarat,* **(2004) 4 SCC 158;** *Ravir Godbole vs. State of M.P.* **(2006) 9 SCC 786;** *Sri Jayendra Saraswathy Swamigal (II), Tamil Nadu v. State of Tamil Nadu* **(2005) 8 SCC 771: 2005 (4) Suppl. SCR 556;** *Central Bureau of Investigation (CBI) v. Hopeson Ningshen* **(2010) 5 SCC 115: 2010 (5) SCR 666;** *Surendra Pratap Singh v. State of Uttar Pradesh* **(2010) 9 SCC 475: 2010 (11) SCR 909;** *Nahar Singh Yadav v Union of India* **(2011) 1 SCC 307;** *Vikas Kumar Roorkewal v. State of Uttarakhand* **(2011) 2 SCC 178: 2011 (1) SCR 279;** *Jahid Shaikh v. State of Gujarat* **(2011) 7 SCC 762;** *Bhairu Ram v. Central Bureau of Investigation* **(2010) 7 SCC 799: 2010 (9) SCR 554;** *Jyoti Mishra v. Dhananjaya Mishra* **(2010) 8 SCC 803: 2010 (10) SCR 229 - referred to.**

Case Law Reference:

(1979) 4 SCC 167	**Referred to**	**Para 6**
(2004) 4 SCC 158	**Referred to**	**Para 6**
(2006) 9 SCC 786	**Referred to**	**Para 6**
2005 (4) Suppl. SCR 556	**Referred to**	**Para 13**
2010 (5) SCR 666	**Referred to**	**Para 6, 13**
2010 (11) SCR 909	**Referred to**	**Para 13**
2011 (1) SCR 279	**Referred to**	**Para 13**
(2011) 7 SCC 762	**Referred to**	**Para 13**
2010 (9) SCR 554	**Referred to**	**Para 15**
2010 (10) SCR 229	**Referred to**	**Para 15**

CRIMINAL ORIGINAL JURISDICTION : Transfer Petition (Crl.) No. 45 of 2012 etc.

Petition Under Section 406 of Code of Crl. Procedure.

WITH

T.P.(Crl.) No. 46 of 2012.

Mukul Rohatgi, Pinaki Mishra, R.N. Karanjawala, Sanjiv Sen, Manik Karanjawala, Sandeep Kapur, Shivek Trehan, Jai Dehadrai (for Karanjawala & Co.), Praveen Rai, Avinash Kumar for the Appellant.

H.P. Raval, ASG, Ratnakar Dash, Shail K. Dwivedi, AAG, P. K. Dey, Padmalakshmi Nigam, Farukh Rasheed, Arvind Kumar Sharma, Rajeev, K. Dubey Kamlendra Mishra for the Respondents.

The order of the Court was delivered

ORDER

1. Dr. Rajesh Talwar has filed Transfer Petition (Crl.) no. 45 of 2012 and Dr. Mrs. Nupur Talwar has filed Transfer Petition (Crl.) no. 46 of 2012. These petitions have been filed under Section 406 of the Code of Criminal Procedure, 1973, praying for the transfer of Special Case No. 01/2011 pending before the Court of the Special Judicial Magistrate (CBI) Ghaziabad, U.P., to a Court of competent jurisdiction at Delhi/New Delhi. Both these petitions are being disposed of by a common order, because the prayers made are identical and are based on the same grounds, arising out of the same factual background.

2. Before dealing with the grounds raised by the petitioners, it is necessary to briefly record the sequence of events leading to the filing of the instant transfer petitions. The prosecution under reference pertains to the murder of Aarushi Talwar, daughter of the two petitioners, namely, Dr. Rajesh Talwar and Dr. Mrs. Nupur Talwar, on the night intervening 15.5.2008 and 16.5.2008. On 16.5.2008, Dr. Rajesh Talwar got a first information report registered at police station, Sector 20, Noida, alleging that their domestic help Hemraj had committed the murder of their daughter Aarushi Talwar. On the following day, i.e., on 17.5.2008, the body of Hemraj was also found on

the roof of the petitioners' residence. Hemraj had also been murdered. On 23.5.2008, Dr. Rajesh Talwar was arrested by the State Police. On 24.5.2008, Dr. Rajesh Talwar was produced before the Chief Judicial Magistrate, Gautam Buddh Nagar. On 27.5.2008, the Chief Judicial Magistrate, granted police custody of Dr. Rajesh Talwar till 30.5.2008. Even though the matter was originally investigated by the State Police, on 29.5.2008, investigation was transferred to the Central Bureau of Investigation (hereinafter referred to as "the CBI"). The CBI then recorded a separate first information report. On 30.5.2008, Dr. Rajesh Talwar was sent to judicial custody.

3. Having concluded the investigation, the CBI filed an application (purported to be an application under Section 169 of the Code of Criminal Procedure), asserting lack of incriminating evidence against Dr. Rajesh Talwar. In the application it was also asserted, that further judicial custody of Dr. Rajesh Talwar was unnecessary. Accordingly, on 11.7.2008, the Special Judicial Magistrate (CBI) Ghaziabad, ordered the release of Dr. Rajesh Talwar, on bail.

4. On 29.12.2010, a closure report was submitted by the CBI before the Special Judicial Magistrate (CBI) Ghaziabad. It was contended therein, that sufficient evidence was not available to prove the guilt of Dr. Rajesh Talwar, in the murder of his daughter Aarushi Talwar. Accordingly, a prayer was made for the closure of the case due to insufficient evidence. Since Dr. Rajesh Talwar was the author of the first information report dated 16.5.2008, notice of the aforesaid application came to be issued to him. On 25.1.2011, Dr. Rajesh Talwar filed a detailed protest petition. By an order dated 9.2.2011, the Special Judicial Magistrate (CBI) Ghaziabad, rejected the prayer made by the CBI for closure of the case due to insufficient evidence. Simultaneously, the Magistrate summoned Dr. Rajesh Talwar and Dr. Mrs. Nupur Talwar to face trial under Section 302 read with Section 34 and Section 201 read with Section 34 of the Indian Penal Code. The summoning order dated 9.2.2011 was assailed by the petitioners by filing

Criminal Revision no. 1127 of 2011 before the High Court of Judicature at Allahabad. The aforesaid challenge made under Section 482 of the Code of Criminal Procedure, was rejected by the High Court on 18.3.2011. Dr. Rajesh Talwar assailed the order passed by the High Court by filing Special Leave Petition (Crl.) No. 2981 of 2011, whereas, the said order was assailed by Dr. Mrs. Nupur Talwar by filing Special Leave Petition (Crl.) No. 2982 of 2011. The challenge raised by the petitioners was declined by this Court vide an order dated 6.1.2012 (in Special Leave Petition (Crl.) No. 2982 of 2011 filed by Dr. Mrs. Nupur Talwar) and on 9.1.2012 (in the Special Leave Petition (Crl.) No. 2981 of 2011 filed by Dr. Rajesh Talwar). The aforesaid rejection order dated 9.1.2012 is being extracted hereinbelow:-

> "We have heard learned counsel for the parties. It appears that pursuant to the order of this Hon'ble Court in Criminal Appeal No. 68 of 2012 titled "Dr. Mrs. Nupur Talwar versus C.B.I. Delhi & Anr.", whereby this Hon'ble Court upheld the order dated 9.2.2011 of the Special Judicial Magistrate (CBI), Ghaziabad in Special Case No. 01 of 2011 whereby cognizance was taken, the petitioner herein would appear before the Special Judicial Magistrate (CBI), Ghaziabad on 4.2.2012 which, we understand, is the date fixed for hearing.
>
> It is also not in dispute that the petitioner Dr. Rajesh Talwar is on bail since 2008 virtually by an order dated 11th July, 2008 and he also furnished bail bond pursuant to that order. In that view of the matter, we direct the petitioner – Dr. Rajesh Talwar to remain on bail. It is understood that the petitioner has already deposited his passport and the same is lying with the Court of the learned Magistrate. In the meantime, the petitioner shall not leave the local Police Station without obtaining the permission of the learned Magistrate.
>
> With this order, the present Special Leave Petition is disposed of. We make it clear that this order will not

prevent either of the parties from moving such application as they are entitled to in accordance with law."

5. The instant two transfer petitions seeking transfer of the proceedings in Special Case No. 01/2011 from the Court of Special Judicial Magistrate (CBI) Ghaziabad, to a Court of competent jurisdiction at Delhi/New Delhi, have been separately filed by Dr. Rajesh Talwar and Dr. Mrs. Nupur Talwar, primarily on the grounds of convenience and personal security. During the course of hearing, learned counsel for the petitioners raised the following contentions on the issue of convenience:-

(i) It was submitted, that after the murder of Aarushi Talwar on the night intervening 15.5.2008 and 16.5.2008, for the petitioners to reside in the same premises where the murder of their daughter had been committed, had become impossible. Consequently, they had shifted their residence from Noida to New Delhi. As such, it was submitted that it would be more convenient for the petitioners to face trial in Delhi/New Delhi rather than at Ghaziabad.

(ii) Ghaziabad, it was pointed out, was farther away from Noida (where the murder was committed) than New Delhi. In this behalf, it was submitted, that distance between Noida and Ghaziabad is 35 kms., whereas, the distance between Noida and New Delhi is only 17 kms. Based on the traffic situation between Delhi and Ghaziabad, it was submitted, that the petitioners would have to undertake several hours of travel time to attend Court proceedings on each date of hearing. This inconvenience could be avoided if the proceedings in question were transferred from Ghaziabad to Delhi/New Delhi.

(iii) It was pointed out, that since the first information report was lodged by the CBI at New Delhi itself,

there would be no difficulty in proceeding with the case at Delhi itself.

(iv) It was also contended, that holding trial before a Court of competent jurisdiction at Delhi/New Delhi would also be a matter of convenience to the prosecuting agency, inasmuch as, the counsel, as also the officials/officers of the CBI were Delhi/New Delhi based, and they too would not have to travel to Ghaziabad on each date of hearing.

(v) Lastly, it was asserted, that a large number of witnesses would also have to be summoned from outside U.P. It was also pointed out, that these witnesses would have to unnecessarily travel to Ghaziabad. Just like the petitioners, all outside witnesses would likewise face avoidable inconvenience, if the prayer made in the instant petition is accepted.

6. On the issue of personal security, learned counsel for the petitioners contended, that when the petitioners had gone to attend court proceedings at Ghaziabad on 25.1.2011, and whilst they were physically inside the court premises alongwith their lawyers, Dr. Rajesh Talwar faced a vicious attack at the hands of one Utsav Sharma, with a cleaver knife. It was submitted, that Dr. Rajesh Talwar suffered grievous injuries and was rushed to undergo several reconstructive surgeries in the intensive care unit of the Indraprastha Apollo Hospital, New Delhi. While explaining the assault, it was pointed out, that Dr. Rajesh Talwar was given three blows with the meat cleaver causing a grevious injury on the right side of his forehead, which also resulted in the rupture of a major artery, and also, serious injuries on both of his hands. It was also alleged, that Dr. Rajesh Talwar was rendered handicapped as a result of the injuries inflicted upon him by Utsav Sharma, for more than two months. It was pointed out, that a first information report was registered by Dr. Dinesh Talwar (brother of Dr. Rajesh Talwar) at police station Kavi Nagar, Ghaziabad on 25.1.2011, in connection

with the aforesaid assault. The aforesaid encounter within the court premises, according to learned counsel for the petitioners, has completely shaken the confidence of the petitioners. The petitioners are stated to be under deep fear of attending court-proceedings at Ghaziabad after the said assault. Relying on the judgment rendered by this Court in *Maneka Sanjay Gandhi Vs. Rani Jethmalani,* (1979) 4 SCC 167, it was asserted, that this Court had authoritatively held, that the safety of the person of an accused (as also, the complainant) is an essential condition for participation in a criminal trial. Where safety itself is put in peril by commotion, tumult or threat on account of pathological conditions prevalent in a particular venue, it was submitted, a request as the one in the instant case, for transfer of proceedings should be acceded to. Insofar as the present case is concerned, it was submitted on behalf of the petitioners, that the circumstances in the present case have gone far beyond the possibility of a physical assault, inasmuch as, a brutal physical attack has actually been made on Dr. Rajesh Talwar (on 25.1.2011). Relying on the judgment rendered by this Court in *Zahira Habibulla H. Sheikh Vs. State of Gujarat,* (2004) 4 SCC 158, it was contended, that justice should not only be done but it should be seen to be done. It was pointed out, that where circumstances are such that render holding of a fair and impartial trial, uninfluenced by extraneous considerations impossible, an apprehension expressed by an individual seeking transfer, should be accepted as reasonable. Inviting the Court's attention to the incident of 25.1.2011, it was submitted, that there could be no doubt, that in the circumstances prevalent in the courts at Ghaziabad, the apprehension expressed by the petitioners, that they are unlikely to be subjected to a fair and impartial trial, uninfluenced by extraneous considerations, is not unreal. Relying on the judgment rendered by this Court in *Central Bureau of Investigation (CBI) Vs. Hopeson Ningshen,* (2010) 5 SCC 115, it was submitted, that in a case wherein the CBI itself felt that there was a real danger of the accused being physically attacked during the course of the trial, this Court came to be

approached (by the CBI) for transfer of the venue of prosecution. The prayer made by the CBI was acceded to by this Court by observing, that there could be no quarrel, that there was a real possibility of a physical attack on the respondent-accused so long as he was at Manipur. Yet again, it is emphasized by the learned counsel appearing on behalf of the petitioners, that the present case stands on a far better footing, inasmuch as, a factual assault resulting in serious injuries has actually been suffered by Dr. Rajesh Talwar within the court premises at Ghaziabad. It is, therefore, contended, that the fear in the minds of the petitioners, is not imaginary. The fear in the minds of the petitioners, is very real and bonafide. In order to support the prayer of the petitioners on the facts delineated hereinabove, learned counsel for the petitioners placed reliance on the judgment rendered by this Court in *Ravir Godbole Vs. State of M.P.,* (2006) 9 SCC 786. The order relied upon by the petitioners is being extracted hereinbelow:-

> "1. We have heard counsel for the parties.
>
> 2. The petitioner is being tried of an offence punishable under Section 307 IPC. *The trial was to take place at Indore but, in view of the fact that the rival gang has been after his blood and two attempts were made on his life, the High Court transferred his trial to Bhopal. It appears that even during the trial at Bhopal he was attacked a third time and serious injuries were caused to him which necessitated his being admitted to the hospital and an operation being performed to repair his damaged liver.*
>
> 3. *In these circumstances, the petitioner has prayed that his case may be transferred to any court outside the State of M.P. Counsel for the State does not dispute the fact that the petitioner has been attacked thrice during this period and he does face danger to his life.* Of course, the State contends that it will provide him with protection such

as is considered necessary. We notice that a gunman was deputed to provide security to the petitioner but despite that he was attacked a third time causing him serious injuries, and the gunman deputed to protect him could do nothing except to make himself scarce.

4. *In these facts and circumstances, we transfer Sessions Trial No. 65 of 2004 pending before the Special Court (Atrocities), Bhopal Sessions Court, Bhopal to the Court of the District and Sessions Judge, Nasik who may try the case himself or assign the trial to a court of competent jurisdiction.* The record of the case shall be immediately transmitted by the Bhopal Sessions Court to the Court of the District and Sessions Judge, Nasik.

5. This transfer petition is allowed."

(emphasis is ours)

7. It would be relevant to notice, that in the pleadings of the two transfer petitions, the petitioners have raised a third ground (besides those of convenience and personal security, referred to in the foregoing paragraphs). No submissions were addressed in connection therewith during the course of hearing. Reference to the third ground has been made in this order only because it was pointed out by the learned counsel representing the CBI, that the petitioners had alleged, that they were not likely to get justice, as it appeared to them, that the Ghaziabad court was proceeding with the matter with a pre-determined mind. The cause of the petitioners instant impression (as per the pleadings), emerges from an application filed by Dr. Rajesh Talwar on 28.2.2011 under Section 205 of the Code of Criminal Procedure. In the aforesaid application, Dr. Rajesh Talwar had sought exemption from personal appearance, on the ground that he had suffered a physical assault in the court premises on 25.1.2011, and had been advised bed rest. The Special Judicial Magistrate (CBI) Ghaziabad, had rejected the

application for exemption, and issued bailable warrants against Dr. Rajesh Talwar. Insofar as Dr. Mrs. Nupur Talwar is concerned, she too had sought exemption from personal appearance on the ground, that she had to file an affidavit at Allahabad in a criminal revision petition, to assail the summoning order dated 9.2.2011(refer to paragraph 4 above). It is submitted, that the application filed by Dr. Mrs. Nupur Talwar was also declined. In the order dated 28.2.2011 the Special Judicial Magistrate (CBI) Ghaziabad, ordered issuance of bailable warrants against the petitioners. From the aforesaid determination, it was sought to be inferred, that the petitioners were not likely to get justice, as the Ghaziabad Court was proceeding with the matter with a pre-determined mind.

8. During the course of hearing, another ground was also canvassed on behalf of the petitioners, although no mention thereof had been made in the pleadings of the two transfer petitions. During the course of hearing, our attention was invited by the learned counsel appearing on behalf of the petitioners, to an affidavit dated 24.2.2012 filed by Shri Praveen Kumar Rai, Advocate. The said Shri Praveen Kumar Rai, in his affidavit, interalia deposed, that on 25.1.2011, the Special Judicial Magistrate (CBI) Ghaziabad, had noticed the sensitivity of the case and had, by invoking the court's inherent power under Section 327 of the Code of Criminal Procedure, directed, that no person would be allowed to enter the court-room except the parties to the case or their respective counsel; yet during the course of hearing on 4.2.2012, a lot of media-persons and advocates unrelated to the case, were present inside the court-room. While dilating on the court proceedings conducted on 4.2.2012, without disclosing the identity of any particular counsel/advocate, it was averred in paragraphs 5 and 6 (of the affidavit dated 24.2.2012) as under:-

"5. That one of the advocates, who on earlier occasion has been rebuked by the Ld. Magistrate and certain strictures have also been passed against him as well, was also present in the Court room. It is

pertinent to mention here that on 7.1.2011 the said counsel had filed an application and thereafter during the course of arguments on the said application misbehaved with the Court and others therein. The Ld. Magistrate in her order dated 21.1.2011 while dismissing the application disapproved the behaviour of the counsel and passed strictures after warning him for future. However, the said warning and strictures have not affected him at all. He not only interfered in the case, but also attempted to stop the counsels for the petitioner herein from advancing their submissions. The deponent immediately brought this to the notice of the Ld. Magistrate but to no avail and the interruptions continued in the proceedings. It is germane to state that the concerned advocate does not represent either the prosecution or the accused persons and thus, no privilege of hearing can be extended to the concerned advocate. A true translated copy of the order dated 21.1.2011 is annexed herewith and marked as Annexure A-2.

6. That faced with such a perilous situation the counsels did not have any option but to file an application before the Ld. Magistrate for taking appropriate actions and passing necessary directions in the matter. The said application is still pending. A photocopy of certified copy of the said application dated 4.2.2012 is annexed herewith and marked as Annexure A-3."

It is also necessary to extract hereunder the application dated 4.2.2012 (appended as Annexure A-3 to the affidavit dated 24.2.2012) of Shri Praveen Kumar Rai, counsel for Dr. Mrs. Nupur Talwar:-

"Sir,

It is most respectfully submitted that in the above noted case the applicants counsels appear before the Hon'ble Court today to move application in the light of order passed by Hon'ble Supreme Court in Transfer Petition. The counsel for applicants were restrained by some other Advocates who have no concern with the case during the course of their submission. This happened even when, the order passed by Hon'ble Court dated 25.1.2011 U/s 327 Cr.P.C. is still in force.

It is, therefore, most humbly prayed that in the above said reason and in the interest of justice Hon'ble Court may kindly restrained the persons and advocates who have no concerned in the case by entering in the Court room during the hearing of the case."

Based on the aforesaid factual position it is contended that the petitioners have strong reservations whether unimpaired proceedings are at all possible in the case in hand. It is therefore contended, that it would be in the fitness of the matter, to transfer proceedings in the case, from Ghaziabad to Delhi/ New Delhi

9. We have recorded hereinabove the four different grounds under which the petitioners have sought to press their claim for transfer of the proceedings pending before the court of the Special Judicial Magistrate (CBI), Ghaziabad, U.P., to a court of competent jurisdiction at Delhi/New Delhi. It would be appropriate and in the fitness of matters to first record the response of the learned Senior Counsel representing the CBI to each of the issues. The submissions of the learned counsel representing the respondents are therefore being summarized hereinafter:-

10. As noticed in paragraph 5 hereinabove, the foremost contention seeking transfer of proceedings from Ghaziabad to Delhi/New Delhi is based on the inconvenience of the petitioners to travel from New Delhi to Ghaziabad on each date

of hearing. In so far as the instant aspect of the matter is concerned, it was the contention of the learned counsel for the respondents, that shifting of the residence of an accused cannot be a valid justification for seeking transfer, nor is the place where the first information report was registered by the CBI relevant for the said purpose. It is submitted that the identity of the jurisdictional court is determined on the basis of the provisions of the Code of Criminal Procedure, wherein residence of the accused and the place of registration of the first information report are inconsequential. In so far as the inconvenience alleged by the petitioners to travel to Ghaziabad is concerned, it was brought to our notice that 72 of the witness likely to be produced during the course of the prosecution under reference, are located in the State of Uttar Pradesh, whereas, 61 witnesses are from Delhi or from outside U.P. Of the aforesaid 61 witnesses, 19 are CBI officials/officers; 16 are employees of the Central Forensic Science Laboratory or the All India Institute of Medical Sciences, New Delhi; 6 witnesses are from telephone companies, 20 witnesses have been examined earlier out of which some are relations of the petitioners themselves; and of the remaining two witnesses one is from Punjab and the other is from Haryana. It is also submitted, that none of the 61 witnesses, to be produced from Delhi or from outside U.P., have expressed inconvenience to depose before the Special Judicial Magistrate (CBI), Ghaziabad, U.P. It is contended, that the distance between Noida and Ghaziabad, as also, between Noida and Delhi depicted in the submissions advanced by the learned counsel for the petitioners are irrelevant. It is submitted, that the issue of jurisdiction is never determined on the basis of distance(s), but is based on the territorial jurisdiction of the court within which an offence has been committed. It is submitted that Dr. Rajesh Talwar and Dr. Mrs. Nupur Talwar have been attending court proceedings at Ghaziabad since 2008, i.e., for the last about three years. It is pointed out, that neither of the petitioners ever expressed inconvenience to participate in the court proceedings at Ghaziabad hitherto before. However, all these

pleas are being raised only after the Special Judicial Magistrate (CBI), Ghaziabad, U.P., by his/her order dated 9.2.2011 had summoned the petitioners to face trial under Section 302 read with Section 34 of the Indian Penal Code, and Section 201 read with Section 34 of the Indian Penal Code, in connection with the murder of Arushi Talwar. It is accordingly submitted that the plea raised by the petitioners for transfer of proceedings on the basis of inconvenience, is wholly trumped up and ought to be rejected.

11. In so far as the second issue canvassed at the hands of the petitioners on the ground of personal security is concerned (see paragraph 6 hereinabove), learned Senior Counsel representing the respondents invited our attention to the counter affidavit filed on behalf of the respondent-CBI, wherein, while repudiating the contention advanced at the hands of the petitioners, it has been pointed out that the attack on Dr. Rajesh Talwar in the court-premises at Ghaziabad on 25.1.2011 was at the hands of a psychologically disturbed person hailing from Varanasi, who had come to Ghaziabad from Ahmedabad (in Gujarat). It is therefore the contention of the learned counsel for the respondents, that the attack was not aimed at interfering with the petitioners right to defend themselves, but because of mental imbalance of the attacker. It is submitted, that the same person Utsav Sharma had also attacked DGP Rathore in a court-premises at Chandigarh, prior to having attacked Dr. Rajesh Talwar. It is therefore contended, that the physical attack on Dr. Rajesh Talwar was certainly not aimed at disrupting court-proceedings or interfering with the defence of the petitioners. As such, it is submitted that the aforesaid stray incident cannot be a justifiable basis for seeking transfer of proceedings under Section 406 Cr.P.C. from the court of the Special Judicial Magistrate (CBI), Ghaziabad, U.P. to some other court of competent jurisdiction in Delhi/New Delhi. Learned counsel representing the respondents also pointed out, from the counter affidavit filed by the CBI, that the Sessions Judge, Ghaziabad had personally reviewed the security arrangements in the entire

court-premises at Ghaziabad, whereupon, security/police personnel have been deployed to prevent any similar untoward incident in future. It was also brought to our notice, from the counter affidavit filed by the CBI, that the venue of the proceedings relating to the petitioners, has been shifted to a new building, which has a proper boundary wall on all sides, with only one small entrance. The counter affidavit also records an assurance, that as and when the case of the petitioners will be fixed for hearing, proper police force will be deployed by the local administration, to ensure safety and security of the petitioners. It is therefore the contention of the learned Senior Counsel representing the CBI, duly supported by the learned counsel for the State of Uttar Pradesh, that all possible care will be taken, for the safety and welfare of the petitioners.

12. Even though learned counsel representing the petitioners did not canvass the third ground (see paragraph 7 hereinabove) during the course of hearing, yet learned counsel for the respondents had expressly drawn our attention to the same. The purpose of inviting our attention to the third ground was to demonstrate, that the petitioners have not even spared the presiding officer of the court. The petitioners have cast aspersions on the court itself. It has been averred in the pleadings, that the petitioners are not likely to get justice from the Ghaziabad court, because the Special Judicial Magistrate (CBI), Ghaziabad, U.P. by his/her order dated 28.2.2011 had declined the prayer made by the petitioners for exempting them from personal appearance, and since the petitioners had not appeared on 28.2.2011, the court had issued bailable warrants against the petitioners. This, according to the learned Senior Counsel representing the respondents, can never constitute a valid basis for drawing any inference against a court, specially when the challenge raised by the petitioners in assailing the order dated 28.2.2011 (declining exemption from personal appearance, and ordering issuance of bailable warrants), before the High Court of Judicature at Allahabad was rejected. In fact, it is the contention of the learned Senior Counsel for the

respondents, that the insinuation levelled on behalf of the petitioners is contemptuous in nature, and calls for initiation of proceedings against the petitioners under the Contempt of Courts Act, 1971. Based on all the submissions recorded hereinabove, it was the contention of the learned counsel for the respondents, that even the third ground raised by the petitioners for seeking transfer of proceedings under Section 406 of the Code of Criminal Procedure, cannot be accepted.

13. In so far as the last contention is concerned (see paragraph 8 hereinabove), the same was based on the affidavit of Shri Praveen Kumar Rai, Advocate, dated 24.2.2012. It was submitted at the hands of the learned counsel for the respondents, that there was no occasion for the respondents to repudiate the same, as the factual position depicted therein does not emerge from the pleadings of the transfer petitions filed by the two petitioners. It is therefore the contention of the learned counsel for the respondents, that the petitioners should not be permitted to press the instant ground for seeking transfer. Be that as it may, it is further the contention of the learned Senior Counsel representing the respondents, that the allegations contained in the affidavit dated 24.2.2012 are vague, as the identity of the counsel who attempted to stop the counsel representing the petitioners from advancing their submission, has not been disclosed. In the application allegedly filed on 4.2.2012 (appended as Annexure A-3, with the affidavit dated 24.2.2012) also, the identity of the counsel who restrained the counsel representing the petitioners, from making his submissions has also not been disclosed. Accordingly, it is asserted that the allegations made in the last submission being vague cannot be relied upon to accept the prayer of the petitioners for transfer of proceedings under Section 406 of the Code of Criminal Procedure.

14. We have noticed hereinabove the grounds of challenge canvassed at the hands of the learned counsel for the petitioners, as also, the response thereto at the hands of the learned counsel representing the respondents. In so far as the

issue of transfer of criminal proceedings from one court to another under Section 406 of the Code of Criminal Procedure is concerned, it would be in the fitness of matters to examine the parameters laid down by this Court for transfer of proceedings. In this behalf reference may, first of all, be made to the decision rendered in *Sri Jayendra Saraswathy Swamigal (II), Tamil Nadu v. State of Tamil Nadu,* (2005) 8 SCC 771, wherein in paragraph 5, this court recorded the grounds on which transfer was sought and thereafter, recorded its own determination in paragraph 23. Accordingly, paragraphs 5 and 23 of the judgment are being extracted hereunder:

> "5**.** The transfer of the case has been sought on several grounds and basically speaking they are as under:
>
> (*i*) The State machinery in Tamil Nadu and specially the Special Investigation Team headed by Shri Prem Kumar, Superintendent of Police, has shown great zeal and has made extraordinary efforts, much beyond what is required under the law to anyhow secure the conviction of the accused and to achieve that object has procured and fabricated false evidence.
>
> (*ii*) The Chief Minister of the State of Tamil Nadu, who is also holding the Home portfolio, has made statements on the floor of the House that the petitioner and the other co-accused are actually involved in the murder of Sankararaman and has also given some press statements and has thereby pre-empted a fair decision in the criminal trial, as statements of persons holding such high offices and specially those made on the floor of the House, are generally believed to be correct and thus the accused stand condemned even before the commencement of the trial.
>
> (*iii*) A solatium of Rs 5 lakhs was paid by the Chief Minister of Tamil Nadu to Padma Sankararaman (widow of deceased Sankararaman) on 24-11-2004, long before completion of investigation and submission of charge-

> sheet, and this was given wide publicity in the electronic media and newspapers, etc., which shows that the State Government is taking special interest in the case and is too keen to secure conviction of the accused in order to justify the stand taken by it.
>
> (*iv*) Concocted and false cases have been registered against 16 co-accused. Even before their bail applications in the present case could be heard, detention orders were passed against them under the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Slum Grabbers and Video Pirates Act, 1982 (for short "the Goondas Act") between 16-1-2005 and 6-2-2005 so that even after grant of bail by the Court they may remain in custody.
>
> (*v*) The advocates appearing for the petitioner and other co-accused have been put under great threat on account of lodging of false and fabricated criminal cases against them and a situation has been created wherein they may not be in a position to defend the accused properly. This will also have a general effect as other lawyers would feel hesitant to conduct the case on behalf of the accused.
>
> (*vi*) The Mutt and other associated and connected trusts have 183 accounts in banks, which were all frozen by SIT resulting in paralysing the religious and other activities of the Mutt and other connected bodies.
>
> (*vii*) Criminal cases have been lodged against some leading journalists of the country and other prominent personalities, who had written articles criticising the arrest of the petitioner, which not only violates right of free speech but also creates an atmosphere of threat against anyone daring to speak or write in favour of the accused and thus the accused seriously apprehend that they would not get a fair trial in the State of Tamil Nadu.

(*viii*) Shri Prem Kumar, who is heading the Special Investigation Team, is not a fair and upright officer and superior courts have passed strictures against him several times in the past for his uncalled-for actions in going out of the way to implicate innocent persons in criminal cases.

23**.** *We have discussed above many facets of the case which do show that the State machinery in Tamil Nadu is not only taking an undue interest but is going to any extent in securing the conviction of the accused by any means and to stifle even publication of any article or expression of dissent in the media or press, interview by journalists or persons who have held high positions in public life and are wholly unconnected with the criminal case. The affidavits and the documents placed on record conclusively establish that a serious attempt has been made by the State machinery to launch criminal prosecution against lawyers, who may be even remotely connected with the defence of the accused. The Superintendent of Police, SIT and the Police Inspector connected with the investigation even went to the extent of prompting the approver Ravi Subramaniam to make insinuation against a very Senior Counsel, who has been practising for over 43 years and is appearing as counsel for the petitioner.* The other counsel had to file writ petitions in the Madras High Court for seeking a direction for transferring investigation of the criminal cases registered against them from the local police to CBI. *The police submitted charge-sheet against two junior lady lawyers under various sections of IPC including Section 201 IPC when even accepting every word in the FIR lodged by Smt Chitra, wife of Ravi Subramaniam (approver) as correct, no offence under the said provision is made out.* Clause (1) of Article 22, which finds place in Part III of the Constitution dealing with fundamental rights, gives a guarantee to a person arrested and detained to be defended by a legal practitioner of his choice. Section 303

of the Code of Criminal Procedure says that any person accused of an offence before a criminal court or against whom proceedings are instituted under the Code, may of right be defended by a pleader of his choice. Even under the British rule when the Code of Criminal Procedure, 1898 was enacted, Section 340(1) thereof gave a similar right to an accused. *It is elementary that if a lawyer whom the accused has engaged for his defence is put under a threat of criminal prosecution, he can hardly discharge his professional duty of defending his client in a fearless manner. A senior and respected counsel is bound to get unnerved if an insinuation is made against him in court that he approached the wife of a witness for not giving evidence against the accused in the court. From the material placed before us we are prima facie satisfied that a situation has arisen in the present case wherein the lawyers engaged by the petitioner and other co-accused cannot perform their professional duty in a proper and dignified manner on account of various hurdles created by the State machinery. The lawyers would be more concerned with shielding their own reputation or their liberty rather than cross-examining the prosecution witnesses for eliciting the truth*. The constant fear of not causing any annoyance to the prosecution witnesses specially those of the Police Department would loom large over their mind vitally affecting the defence of the accused. *Passing of the detention order against 16 co-accused soon after grant of bail to the petitioner by this Court on 10-1-2005, which order could be of some support in seeking parity or otherwise for securing bail in the present murder case, is a clear pointer to the fact that the State wanted to deprive them of any chance to secure release from custody*. Even though this Court has issued notice on the special leave petition filed by the State against the order of the High Court by which habeas corpus petition of the 16 co-accused was allowed, yet the observations made in the said order show in unmistakable

terms that the even tempo of life was not disturbed, nor was public order affected by the murder of Sankararaman and the detention order was passed without any basis. *Again, the action of the State in directing the banks to freeze all the 183 accounts of the Mutt in the purported exercise of the power conferred under Section 102 CrPC, which had affected the entire activities of the Mutt and other associated trusts and endowments only on the ground that the petitioner, who is the head of the Mutt, has been charge-sheeted for entering into a conspiracy to murder Sankararaman, leads to an inference that the State machinery is not only interested in securing conviction of the petitioner and the other co-accused but also to bring to a complete halt the entire religious and other activities of the various trusts and endowments and the performance of pooja and other rituals in the temples and religious places in accordance with the custom and traditions and thereby create a fear psychosis in the minds of the people. This may deter anyone from appearing in court and give evidence in defence of the accused.* Launching of prosecution against prominent persons who have held high political offices and prominent journalists merely because they expressed some dissent against the arrest of the petitioner shows the attitude of the State that it cannot tolerate any kind of dissent, which is the most cherished right in a democracy guaranteed by Article 19 of the Constitution."

(emphasis is ours)

Reference may also be made to the decision rendered by this Court in *Central Bureau of Investigation (CBI) v. Hopeson Ningshen,* (2010) 5 SCC 115, wherein this Court recorded its conclusion in the following paragraphs:

"18**.** CBI in its capacity as the investigating agency has clearly conveyed the risks associated with conducting the trial in Manipur. Even if one were to concede that the apprehension about social unrest and communal tension

between the Meteies and the Nagas were a little exaggerated, *there can be no quarrel that there exists a real possibility of a physical attack on the respondent-accused as long as he is in Manipur. It was precisely because of this consideration that the respondent-accused is being held in custody at a distant location in Delhi.* Furthermore, conducting the trial in Manipur could also reasonably lead to more friction in the State of Manipur which in turn could affect the trial proceedings themselves.

19. We must especially take note of the fact that the killings took place in a region where opinions are sharply divided on the justness of the causes espoused by NSCN(IM) and that the respondent-accused is a member of the same organisation. This creates a risk of intimidation of the witnesses as well as undue prejudice seeping into the minds of those who may be involved in the legal proceedings in different capacities.

20**.** In this scenario, in our considered view it would be expedient in the ends of justice to conduct the trial in Delhi. We accordingly direct that the impugned cases be transferred from the Court of the Chief Judicial Magistrate, Ukhrul, Manipur to a Designated CBI Court (manned by a judicial officer of the rank of a Sessions Judge) in New Delhi."

(emphasis is ours)

The scope of jurisdiction under Section 406 of the Code of Criminal Procedure was also considered by this Court in *Surendra Pratap Singh v. State of Uttar Pradesh,* (2010) 9 SCC 475, wherein this Court held as under:

14**.** Mr Gupta submitted that except for wild allegations made against the investigating authorities and the officials of the State Government, nothing substantial has been disclosed from the submissions made on behalf of the petitioner which would indicate that either the investigating

agencies or the prosecuting agency was in any way biased in favour of Respondent 2. On the other hand, upon a fair investigation undertaken by two separate agencies, which included CB CID, it had been found that Respondent 2 was not in any way connected with the alleged incident of 24-6-2005. In fact, at the relevant time, the party to which he belonged was not in power which would enable him to influence the course of investigation. Mr. Gupta submitted that no interference was called for with the investigation reports submitted both by the local police as also by CB CID, and the transfer petition was, therefore, liable to be dismissed.

15**.** We have carefully considered the submissions made on behalf of the respective parties. *While the arrest of Respondent 2 may have been stayed by the High Court, the circumstances in which the incident had occurred on 24-6-2005 coupled with the fact that Respondent 2 was returned as an MLA in the same elections, does to some extent justify the apprehension of the petitioner that the perspective of the prosecution may become polluted. There is no getting away from the fact that Respondent 2 is an MLA and that too belonging to the present dispensation. Since justice must not only be done but must also seem to be done, this case, in our view, is an example where the said idiomatic expression is relevant.*

16**.** It would not be proper on our part to dilate on this question further during the pendency of the trial. *We are, however, of the view that in order to do fair justice to all the parties, the trial should be held outside the State of Uttar Pradesh and, accordingly, we allow the transfer petition and direct that the matter be transferred to the High Court of Madhya Pradesh which shall decide the place and the court before which the trial may be conducted."*

(emphasis is ours)

The issue in hand was also examined by this Court in *Nahar Singh Yadav v. Union of India,* (2011) 1 SCC 307. Relevant extract including the parameters delineated by this Court which ought to be kept in mind while considering an application for transfer and the consideration of the factual matrix involved in the controversy dealt with are being extracted hereunder:

> "21**.** Reverting to the main issue, a true and fair trial is sine qua non of Article 21 of the Constitution, which declares that:
>
> "21. *Protection of life and personal liberty*.—No person shall be deprived of his 'life' or 'personal liberty' except according to procedure established by law."
>
> It needs no emphasis that a criminal trial, which may result in depriving a person of not only his personal liberty but also his life has to be unbiased, and without any prejudice for or against the accused. *An impartial and uninfluenced trial is the fundamental requirement of a fair trial, the first and the foremost imperative of the criminal justice delivery system. If a criminal trial is not free and fair, the criminal justice system would undoubtedly be at stake, eroding the confidence of a common man in the system, which would not augur well for the society at large. Therefore, as and when it is shown that the public confidence in the fairness of a particular trial is likely to be seriously undermined, for any reason whatsoever, Section 406 CrPC empowers this Court to transfer any case or appeal from one High Court to another High Court or from one criminal court subordinate to one High Court to another criminal court of equal or superior jurisdiction subordinate to another High Court, to meet the ends of justice.*
>
> 22**.** It is, however, the trite law that power under Section 406 CrPC has to be construed strictly and is to be exercised sparingly and with great circumspection. *It needs little emphasis that a prayer for transfer should be*

allowed only when there is a well-substantiated apprehension that justice will not be dispensed impartially, objectively and without any bias. In the absence of any material demonstrating such apprehension, this Court will not entertain application for transfer of a trial, as any transfer of trial from one State to another implicitly reflects upon the credibility of not only the entire State judiciary but also the prosecuting agency, which would include the Public Prosecutors as well.

XXX XXX XXX XXX

29**.** Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406 CrPC should be exercised, it is manifest from a bare reading of sub-sections (2) and (3) of the said section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:

(i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;

(ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;

(iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State exchequer in making payment of travelling and other

expenses of the official and non-official witnesses;

(iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and

(v) existence of some material from which it can be inferred that some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice.

30**.** Having considered the rival claims of both the parties on the touchstone of the aforestated broad parameters, we are of the view that the apprehension entertained by CBI that the trial of the case at Ghaziabad may not be fair, resulting in miscarriage of justice, is misplaced and cannot be accepted. *From the material on record, we are unable to draw any inference of a reasonable apprehension of bias nor do we think that an apprehension based on a bald allegation that since the trial Judge and some of the named accused had been close associates at some point of time and that some of the witnesses are judicial officers, the trial at Ghaziabad would be biased and not fair, undermining the confidence of the public in the system.* While it is true that Judges are human beings, not automatons, but it is imperative for a judicial officer, in whatever capacity he may be functioning, that he must act with the belief that he is not to be guided by any factor other than to ensure that he shall render a free and fair decision, which according to his conscience is the right one on the basis of materials placed before him. There is no exception to this imperative. Therefore, we are not disposed to believe that either the witnesses or the Special Judge will get influenced in favour of the accused merely because some of them happen to be their former colleagues. *As already stated, acceptance of such allegation, without something more substantial, seriously*

undermines the credibility and the independence of the entire judiciary of a State. Accordingly, we outrightly reject this ground urged in support of the prayer for transfer of the trial from Ghaziabad.

31**.** *As regards the plea that the Court of Special Judge, CBI, Ghaziabad is already heavily overburdened, in our opinion, that is again not a ground for transfer of trial. If at all the said court is overburdened, it will be open to the High Court to request the State Government to create another court of a Special Judge at Ghaziabad and we are confident that having regard to the nature of the case and the serious concern already shown by the State Government by issuing Notification dated 10-9-2008 promptly and expeditiously, the State Government will take appropriate steps in that behalf* so that the guilty are brought to book at the earliest not only in this case but in other sensitive trials, stated to be pending in that court, as well.

32**.** For the aforestated reasons, as at present, we do not find any merit in the request of CBI for transfer of the trial from Ghaziabad to any other place. Accordingly, the prayer is declined. The trial court is directed to proceed with the case expeditiously."

(emphasis is ours)

The issue of transfer of proceedings under Section 406 of the Code of Criminal Procedure was examined by this Court in *Vikas Kumar Roorkewal v. State of Uttarakhand,* (2011) 2 SCC 178, wherein this Court observed as under:

"23**.** *It is true that there must be reasonable apprehension on the part of the party to a case that justice may not be done and mere allegation that there is apprehension that justice will not be done cannot be the basis for transfer.* However, there is no manner of doubt that the reasonable apprehension that there would be failure of justice and acquittal of the accused only because the witnesses are

threatened is made out by the petitioner.

24**.** This Court, on various occasions, had opportunity to discuss the importance of fair trial in criminal justice system and various circumstances in which a trial can be transferred to dispense fair and impartial justice. It would be advantageous to notice a few decisions of this Court with regard to the scope of Section 406 of the Code of Criminal Procedure.

XXX XXX XXX XXX

29**.** From the averments made in the petition it is evident that the accused belong to a powerful gang operating in U.P. from which the State of Uttarakhand is carved out. The petitioner has been able to show the circumstances from which it can be reasonably inferred that it has become difficult for the witnesses to safely depose truth because of fear of being haunted by those against whom they have to depose. The reluctance of the witnesses to go to the court at Haridwar in spite of receipt of repeated summons is bound to hamper the course of justice. If such a situation is permitted to continue, it will pave way for anarchy, oppression, etc., resulting in breakdown of criminal justice system. In order to see that the incapacitation of the eyewitnesses is removed and justice triumphs, it has become necessary to grant the relief claimed in the instant petition. On the facts and in the circumstances of the case this Court is of the opinion that interest of justice would be served if transfer of the case from Haridwar to Delhi is order."

(emphasis is ours)

Last of all reference may be made to the decision rendered by this Court in *Jahid Shaikh v. State of Gujarat,* (2011) 7 SCC 762. The observations made by this Court with reference to Section 406 of the Code of Criminal Procedure, are placed below:

"39**.** However, such a ground, though of great importance,

cannot be the only aspect to be considered while deciding whether a criminal trial could be transferred out of the State which could seriously affect the prosecution case, considering the large number of witnesses to be examined to prove the case against the accused. *The golden thread which runs through all the decisions cited on behalf of the parties, is that justice must not only be done, but must also be seen to be done. If the said principle is disturbed, fresh steps can always be taken under Section 406 CrPC and Order 36 of the Supreme Court Rules, 1966 for the same reliefs.*

40**.** *The offences with which the accused have been charged are of a very serious nature, but except for an apprehension that justice would not be properly administered, there is little else to suggest that the charged atmosphere which existed at the time when the offences were alleged to have been committed, still exist and was likely to prejudice the accused during the trial. All judicial officers cannot be tarred with the same brush and denial of a proper opportunity at the stage of framing of charge, though serious, is not insurmountable.* The accused have their remedies elsewhere and the prosecution still has to prove its case.

41**.** *As mentioned earlier, the communally surcharged atmosphere which existed at the time of the alleged incidents, has settled down considerably and is no longer as volatile as it was previously. The Presiding Officers against whom bias had been alleged, will no longer be in charge of the proceedings of the trial. The conditions in Gujarat today are not exactly the same as they were at the time of the incidents, which would justify the shifting of the trial from the State of Gujarat.* On the other hand, in case the sessions trial is transferred outside the State of Gujarat for trial, the prosecution will have to arrange for production of its witnesses, who are large in number, to any venue that may be designated outside the State of

Gujarat.

42**.** At the present moment, the case for transfer of the trial outside the State of Gujarat is based on certain incidents which had occurred in the past and have finally led to the filing of charges against the accused. *The main ground on which the petitioners have sought transfer is an apprehension that communal feelings may, once again, raise its ugly head and permeate the proceedings of the trial if it is conducted by the Special Judge, Ahmedabad. However, such an allegation today is more speculative than real, but in order to dispel such apprehension, we also keep it open to the petitioners that in the event the apprehension of the petitioners is proved to be real during the course of the trial, they will be entitled to move afresh before this Court for the relief sought for in the present transfer petition."* (emphasis is ours)

It is in light of the parameters recorded by this Court that we shall endeavour to determine the veracity of the prayer made by the petitioners for transfer of proceedings from the court of the Special Judicial Magistrate (CBI), Ghaziabad, U.P., to a court of competent jurisdiction in Delhi/New Delhi.

15. First and foremost we shall deal with the ground of inconvenience raised by the petitioners for seeking transfer of proceedings. In so far as the instant issue is concerned, besides the judgments referred to hereinabove, reference may be made to the decision rendered in *Bhairu Ram v. Central Bureau of Investigation,* (2010) 7 SCC 799, wherein the issue of inconvenience was considered, and this Court held as under:

"10**.** *In the case on hand, except convenience, the petitioners have not pressed into service any other ground for transfer.* In fact, Mr P.H. Parekh, informed this Court that the petitioners are willing to attend the proceedings at Delhi, if the case is transferred to Special Court, CBI, Delhi.

11**.** Mr H.P. Raval, learned Additional Solicitor General,

after taking us through specific averments made in the counter-affidavit filed on behalf of Respondents 1 and 2 (CBI), submitted that the main accused Shri B.R. Meena is a very influential person in the State of Rajasthan and there is strong apprehension that due to influence of Shri B.R. Meena, there would be no fair trial at Jaipur or any other place in the State of Rajasthan. He also pointed out that the Court of Special Judge, CBI at Greater Mumbai has ample jurisdiction to try this case because various movable properties have been found in Mumbai and the main accused, Shri B.R. Meena, was posted in Mumbai from 2001 to the end of the check period i.e. 4-10-2005 and this is the period during which most of the properties were allegedly acquired by him and his family members.

12. We have already adverted to the fact that against the main accused Shri B.R. Meena, (IRS 1977), Commissioner of Income Tax, Income Tax Appellate Tribunal, Mumbai, a case has been registered on 29-9-2005 under Section 13(2) read with Section 13(1)(*e*) of the Prevention of Corruption Act, 1988 for possession of assets in his own name and in the name of his family members to the extent of Rs 43,29,394 which were disproportionate to his known sources of income and could not be satisfactorily accounted for. It further shows that Respondent 3, during the check period i.e. 1-4-1993 to 4-10-2005, acquired assets disproportionate to his known sources of income to the extent of Rs 1,39,39,025.

13. The petitioners have been charge-sheeted for commission of offences under Section 109 read with Section 193 IPC read with Section 13(2) read with Section 13(1)(*e*) of the Prevention of Corruption Act, 1988 for having actively aided and abetted Respondents 3 to 4 by fabricating false evidence through preparation of false agreements to sell with the object to justify/explain the huge cash recoveries from the residential premises of Respondent 3. It further reveals that the petitioners entered

into false transactions with Respondent 3 showing receipt of cash amounts against alleged purchase of immovable properties from him. The stamp papers were purchased against (*sic* after) registration of case and false agreements to sell were prepared in connivance with each other.

14. A perusal of the charge-sheet containing all these details clearly shows that witnesses to be examined are not only from Jaipur, Rajasthan, but also from various other places including Mumbai. Though the petitioners may have a little inconvenience, the mere inconvenience may not be sufficient ground for the exercise of power of transfer but it must be shown that the trial in the chosen forum will result in failure of justice.

15. We have already pointed out that except the plea of inconvenience on the ground that they have to come all the way from Rajasthan no other reason was pressed into service. Even, the request for transfer to Delhi cannot be accepted since it would not be beneficial either to the petitioners or to the prosecution. In fact, the main accused, Respondents 3 and 4 have not filed any petition seeking transfer. In such circumstances, the plea of the petitioners for transfer of the case from the Court of Special Judge, CBI, Greater Mumbai to Special Judge, CBI, Jaipur on the ground of inconvenience cannot be accepted."

(emphasis is ours)

The ground of inconvenience for transfer again came up for consideration before this Court in *Jyoti Mishra v. Dhananjaya Mishra,* (2010) 8 SCC 803, wherein the Court observed as follows:

"5. It is true that in cases of dissolution of marriage, restitution of conjugal rights or maintenance, this Court shows much indulgence to the wife and ordinarily transfers the case to a place where it would be more convenient for

the wife to prosecute the proceedings. But a criminal case is on a somewhat different footing. The accused may not be able to attend the court proceedings at Indore for many reasons, one of which may be financial constraints, but the consequences of non-appearance of the accused before the Indore Court would be quite drastic.

6. Having regard to the consequences of non-appearance of the accused in a criminal trial, we are loath to entertain the petitioner's prayer for transfer. In a criminal proceeding, the right of the accused to a fair trial and a proper opportunity to defend himself cannot be ignored for the convenience of the complainant simply because she happens to be the estranged wife." (emphasis is ours)

From the two judgments, referred to hereinabove, it clearly emerges that inconvenience cannot be a valid basis for transfer of "criminal proceedings" from one court to another under Section 406 of the Code of Criminal Procedure. Be that as it may, we are of the view that the instant contention advanced at the hands of the learned counsel for the petitioner is wholly frivolous. According to the factual position depicted by the learned counsel for the petitioners themselves, the distance between Noida and Ghaziabad is 35 kms. whereas the distance between Noida and Delhi is 17 kms. Based on a simple mathematical conclusion the distance between Delhi and Ghaziabad must be approximately 52 kms. (35+17=52). It is ununderstandable how a plea of inconvenience can be based to avoid travelling a distance of merely 52 kms. Even if it is assumed that a couple of hours would be consumed for travelling to and fro (from Delhi to Ghaziabad and back) the inconvenience would not be such as can be the basis for seeking transfer. Jurisdiction of a court to conduct criminal prosecution is based on the provisions of Code of Criminal Procedure. Often either the complainant or the accused have to travel across an entire State to attend to criminal proceedings, before a jurisdictional court. In some cases to reach the venue of the trial court, a complainant or an accused

may have to travel across several States. Likewise, witnesses too may also have to travel long distances, in order to depose before the jurisdictional court. If the plea of inconvenience for transferring the cases from one court to another, on the basis of time taken to travel to the court conducting the criminal trial is accepted, the provisions contained in the Criminal Procedure Code earmarking the courts having jurisdiction to try cases would be rendered meaningless. Convenience or inconvenience are inconsequential so far as the mandate of law is concerned. The instant plea therefore, deserves outright rejection.

16. In so far as the second contention advanced at the hands of the counsel for the petitioner is concerned, transfer has been sought on the issue of threatened personal security. The petitioners believed that their personal security is at risk on account of a vicious attack with a cleaver's knife on Dr. Rajesh Talwar, which resulted in his having suffered grievous injuries not only on his face but on both his hands as well. The injuries are stated to have rendered Dr. Rajesh Talwar handicapped for more than two months. The aforesaid incident has allegedly had the effect of making both the petitioners scared to attend any court-proceedings at the Ghaziabad court-complex. The case set up by the petitioners is, that the incident in question has completely shaken the confidence of the petitioners, and that, it is unsafe for the petitioners to appear before the Special Judicial Magistrate (CBI), Ghaziabad, U.P. to defend themselves. Whilst we are of the view that all preventive measures should have been in place to avoid any assault of the nature which Dr.Rajesh Talwar encountered on 25.1.2011, we appreciate the impossibility of the aforesaid task specially when the attacker is a person suffering from a mental disability. Such an attack cannot be deemed to have been aimed at disabling the petitioners to defend themselves. The physical assault suffered by the petitioner was clearly unrelated to their court-proceedings. In the aforesaid view of the matter, the incident relied upon by the learned counsel for the

petitioners to seek transfer of proceedings by invoking Section 406 of the Code of Criminal Procedure, is clearly misconceived. Even otherwise, the counter affidavit filed on behalf of the CBI is categorical on the issue in hand, to the effect that the Sessions Judge, Ghaziabad, has personally reviewed the security system in the entire court-premises, security/police personnel have been deployed so that no untoward incident occurs in future. Additionally, the venue of the court-proceedings of the petitioners has been shifted to a new building which has proper boundary walls on all sides, with only one small entrance. The building where the petitioners are required to attend the court proceedings is therefore totally safe. In the counter affidavit filed by the CBI it has been expressed, that whenever the case of the petitioners' is to be heard, adequate police force would be deployed by the local administration. The aforesaid undertaking (expressed in the counter affidavit, filed on behalf of the CBI has been endorsed by the learned counsel representing the State of Uttar Pradesh. Even though it has been pointed out that the petitioners have not moved any application either to the Special Judicial Magistrate (CBI), Ghaziabad, U.P. or to the police for seeking protection; we are assured, if such a request is made at the hands of the petitioners, the same will be duly considered in accordance with law. We have extracted a relevant part of the affidavit dated 24.2.2012 filed by Shri Praveen Kumar Rai, Advocate in paragraph 8 hereinabove. While perusing the aforesaid affidavit we noticed reference therein to an order dated 25.1.2011 passed in respect of the proceedings pending before the Special Judicial Magistrate (CBI), Ghaziabad, U.P. While dealing with the contention in hand, it is necessary to place on record the aforesaid order dated 25.1.2011, the same is accordingly being extracted hereunder:-

> "Under the circumstances seeing the sensitivity of the case, by invoking inherent provisions under section 327 Cr.P.C. the court feels it in the interest of justice that during the proceedings of the instant case no person shall be allowed to enter in the courtroom except for the parties to the case and their respective counsels.
>
> Sd/-
>
> Special Judicial Magistrate
>
> (CBI),Ghaziabad"

The aforesaid order reveals the seriousness of the presiding officer concerned. So as to ensure not only the safety of the petitioners but also a free and fair trial, keeping in mind the sensitive nature of the case, an appropriate order has already been passed by the presiding officer. We have no doubt in our mind, that the order dated 25.1.2011 shall be enforced in letter and in spirit. In case of breach thereof we would expect the Special Judicial Magistrate (CBI), Ghaziabad, U.P. to take appropriate steps including coercive measures if necessary, to enforce the same. The majesty of law must be maintained at all costs. In the background of the aforesaid developments, we are of the view that the proceedings being conducted at the court-complex at Ghaziabad, cannot be termed as unsafe, so as to be considered as threatening the personal security of the petitioners. As such, we find no merit in the prayer for transfer of proceedings from Ghaziabad to Delhi/New Delhi even on the ground of personal security.

17. The third ground raised by the petitioners, noticed in paragraph 7 hereinabove, needs no adjudication at our hands on account of the fact that the same was not pressed by the learned counsel representing the petitioners during the course of hearing. The details depicting the third ground have been noticed only because the learned Senior Counsel representing the respondents insisted on inviting our attention to the fact that the petitioners had expressed baseless insinuations against the presiding officer of the court. Based on certain insinuations the petitioners had asserted, that they were not likely to get justice, as the concerned court was proceeding in the matter with a pre-determined mind. The insinuations levelled by the petitioners are based on an order passed by the Special Judicial

Magistrate (CBI), Ghaziabad, U.P. dated 28.2.2011. Learned counsel for the petitioners advisedly refrained from pressing the instant ground during the course of hearing. Even raising such a ground in the pleadings, to state the least, can certainly be termed as most irresponsible. The impertinence of the petitioners in the instant case, is magnified manifold because the order dated 28.2.2011 was assailed by the petitioners before the High Court of Judicature at Allahabad, but the challenge failed. In this view of the matter, the insinuations can also be stated to have been aimed even at the High Court. Although we could have initiated action against the petitioners, yet in the peculiar facts and circumstances of this case, we refrain ourselves from doing so. However, we consider it just and appropriate to warn the petitioners from any such impertinence in future.

18. In so far as the last contention advanced at the hands of the learned counsel for the petitioners is concerned, the same was based on the affidavit of Shri Praveen Kumar Rai, Advocate dated 24.2.2012, as also, an application filed by the said counsel on 4.2.2012 (Annexure A-3 with the affidavit, independently extracted hereinabove). We find merit in the contention advanced at the hands of the learned Senior Counsel representing the respondents, that the application dated 4.2.2012 (Annexure A-3) as also the affidavit of Shri Praveen Kumar Rai, Advocate, dated 24.2.2012 are vague, and as such, cannot be the basis of a justifiable claim for supporting a prayer for transfer of proceedings, under Section 406 of the Code of Criminal Procedure. As pointed out by the learned counsel for the respondents, even though allegations have been levelled in the application (dated 4.2.2012) as well as the affidavit (dated 24.2.2012), that the petitioners counsel were prevented from discharging their responsibility appropriately; neither the application nor the affidavit disclose what the petitioners counsel were prevent from, as also, the identity of those responsible. Therefore, the last contention, in our considered view, is also devoid of any merit and as such deserves rejection.

19. For the reasons stated hereinabove, we find no merit in the Transfer Petitions separately filed by Dr. Rajesh Talwar and Dr. Mrs. Nupur Talwar. It is not possible in the facts and circumstances of this case for us to conclude, that the petitioners will be deprived of a free and fair trial at Ghaziabad. We are also satisfied that there is no well-substantiated apprehension, that justice will not be dispensed to the petitioners impartially, objectively and without any bias. It is also not possible for us to accept that the physical assault on Dr. Rajesh Talwar on 25.1.2011 at the hands of a psychopath can be a valid basis for transfer of the present proceedings from Ghaziabad to Delhi/New Delhi. In view of the measures adopted by the Sessions Judge, the CBI and the State Administration towards security arrangements in the court-premises generally, and also, the special arrangements which the respondents have undertaken to make, with particular reference to the petitioners, we are satisfied that justice will be dispensed to the petitioners in an atmosphere shorn of any fear or favour. We have extracted the order passed by the Special Judicial Magistrate (CBI), Ghaziabad, U.P. dated 25.1.2011 in paragraph 16 hereinabove. We wish to reiterate, that the order dated 25.1.2011 shall be enforced in letter and in spirit. In case of breach thereof we would exp ect the Special Judicial Magistrate (CBI), Ghaziabad, U.P. to take appropriate steps including coercive measures if necessary, to enforce the same. The majesty of law must be maintained at all costs. We have no doubt, that the basis on which the petitioners are seeking transfer of proceedings are just speculative and unjustified apprehensions based interalia on vague and non-specific allegations. The instant Transfer Petitions are accordingly dismissed. We also wish to caution the petitioners, from making any irresponsible insinuations with reference to court-proceedings. The proper course would be, to assail before a superior court, any order which may not be to the satisfaction of the petitioners, in accordance with law.

N.J. Transfer petitions dismissed.

###NEXT FILE

JAI PRAKASH SINGH

v.

THE STATE OF BIHAR & ANR. ETC.

(Criminal Appeal Nos. 525-526 of 2012)

MARCH 14, 2012

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

Code of Criminal Procedure, 1973 - s. 438 - Anticipatory bail - Grant of - On facts, FIR registered against respondent for commission of offence u/ss. 302/34 IPC - FIR was lodged promptly within two hours from the time of incident - Deceased received multiple abrasions and five gun shot injuries - There was a strong motive between the parties - High Court enlarged the respondents on anticipatory bail - Sustainability of - Held: Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty - High Court did not apply any of the parameters laid down by the Supreme Court for grant of anticipatory bail, and rather dealt with a very serious matter in a most casual and cavalier manner - High Court ought to have exercised its extra-ordinary jurisdiction considering the nature and gravity of the offence and as the FIR had been

lodged spontaneously, its veracity is reliable - High Court did not consider as to whether custodial interrogation was required and also did not record any reason as to how the pre-requisite condition incorporated in the statutory provision itself stood fulfilled - Order de hors the grounds provided in s. 438 itself suffers from non-application of mind - Thus, orders passed by the High Court set aside.

FIR - Promptness in filing - Object of - Effect on the prosecution case - Stated.

FIR was lodged against the respondents alleging commission of offences under Sections 302/34 IPC. It is alleged that the respondents opened indiscriminate firing at the deceased. The deceased received 5 bullet injuries on his person resulting in his death on the spot. 10-15 days ago, the respondent had threatened the complainant to kill him and his brother on account of old dispute between the parties. The respondents applied for anticipatory bail. The Sessions Judge rejected the same. However, the High Court enlarged the respondents on anticipatory bail under Section 438 Cr.P.C. Therefore, the appellants filed the instant appeals.

Disposing of the appeals, the Court

HELD: 1.1 The FIR had been lodged promptly within a period of two hours from the time of incident at midnight. Promptness in filing the FIR gives certain assurance of veracity of the version given by the informant/complainant. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the

crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/ deliberations. [Paras 11 and 12]

Thulia Kali v. The State of Tamil Nadu **AIR 1973 SC 501: 1972 (3) SCR 622 ;** *State of Punjab v. Surja Ram* **AIR 1995 SC 2413: 1995 (2) Suppl. SCR 590;** *Girish Yadav and Ors. v. State of M.P.* **(1996) 8 SCC 186:1996 (3) SCR 1021;** *Takdir Samsuddin Sheikh v. State of Gujarat and Anr.* **AIR 2012 SC 37 - relied on.**

1.2 There is no substantial difference between Sections 438 and 439 Cr.P.C. so far as appreciation of the case as to whether or not a bail is to be granted, is concerned. However, neither anticipatory bail nor regular bail can be granted as a matter of rule. The anticipatory bail being an extra-ordinary privilege should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail. [Para 13]

State of M.P. and Anr. v. Ram Kishna Balothia and Anr. **AIR 1995 SC 198: 1995 (1) SCR 897;** *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.* **AIR 2011 SC 312: 2010 (15) SCR 201;** *Kartar Singh v. State of Punjab* **(1994) 3 SCC 569;** *Narcotics Control Bureau v. Dilip Prahlad Namade* **(2004) 3 SCC 619: 2004 (3) SCR 92 - referred to.**

1.3 Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the

reasons therefore. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. [Para 18]

D.K. Ganesh Babu v. P.T. Manokaran & Ors. **(2007) 4 SCC 434; 2007 (3) SCR 1;** *State of Maharashtra & Anr. v. Mohd. Sajid Husain Mohd. S. Husain and Ors.* **(2008) 1 SCC 213: 2007 (10) SCR 995;** *Union of India v. Padam Narain Aggarwal and Ors.* **(2008) 13 SCC 305: 2007 (3) SCR 1 - relied on.**

1.4 The High Court did not apply any of the said parameters laid down by the Supreme Court, rather dealt with a very serious matter in a most casual and cavalier manner and showed undeserving and unwarranted sympathy towards the accused. The High Court erred in not considering the case in correct perspective and allowed the said applications on the grounds that in the FIR some old disputes had been referred to and the accused had fair antecedents. [Paras 19 and 20]

1.5 In the facts and circumstances of the case, it was not a fit case for grant of anticipatory bail. The High Court ought to have exercised its extraordinary jurisdiction following the aforesaid parameters considering the nature and gravity of the offence and as the FIR had been lodged spontaneously, its veracity is reliable. The High Court very lightly brushed aside the fact that FIR had been lodged spontaneously and further did not record any reason as how the pre-requisite conditions incorporated in the statutory provision itself stood fulfilled. Nor did the court consider as to whether custodial interrogation was required. The court may not exercise its discretion in derogation of established principles of law, rather it has to be in strict adherence to them. Discretion has to be guided by law; duly governed by rule and cannot be

arbitrary, fanciful or vague. The court must not yield to spasmodic sentiment to unregulated benevolence. The order dehors the grounds provided in Section 438 Cr.P.C. itself suffers from non-application of mind and therefore, cannot be sustained in the eyes of law. [Para 21]

1.6 The impugned judgments and orders passed by the High Court are set aside. The anticipatory bail granted to the said respondents is cancelled. [Para 22]

Case Law Reference:

1972 (3) SCR 622	**Relied on**	**Para 12**
1995 (2) Suppl. SCR 590		**Relied on Para 12**
1996 (3) SCR 1021	**Relied on**	**Para 12**
AIR 2012 SC 37	**Relied on**	**Para 12**
1995 (1) SCR 897	**Referred to**	**Para 14**
2010 (15) SCR 201	**Referred to**	**Para 16**
2004 (3) SCR 92	**Referred to**	**Para 16**
(1994) 3 SCC 569	**Referred to**	**Para 16**
2007 (3) SCR 1	**Relied on**	**Para 18**
2007 (10) SCR 995	**Relied on**	**Para 18**
2007 (3) SCR 1	**Relied on**	**Para 18**

BHUSHAN POWER AND STEEL LTD. AND ORS.

v.

STATE OF ORISSA AND ANR.

(Civil Appeal No. 2790 of 2012)

MARCH 14, 2012

[ALTAMAS KABIR AND SURINDER SINGH NIJJAR, JJ.]

Mines and Minerals - Mineral Concession Rules, 1960 - Rule 59 - Proposed integrated steel plant - Application for grant of lease for mining of iron ore for use in the plant - Rejection of, by the State Government - Validity - Appellant-company with the intention of setting up an integrated steel plant, entered into discussions with respondent-State Government and inter alia applied for grant of lease for mining of iron ore for use in the proposed plant - Memorandum of Understanding (MOU) dated 15th May, 2002 entered into between the parties wherein respondent-State Government agreed to recommend to Central Government grant of iron ore mines to appellant for its use in the proposed plant - However, upon subsequent re-organisation and restructuring of the Bhushan group (of which appellant-company was a member), respondent-State Government informed appellant company that the earlier MOU dated 15th May, 2002 had ceased to exist and that a fresh MOU was required to be entered into between the appellants and the State Government - Application of appellant company for mining lease in respect of iron ore rejected on various grounds - most significantly on the ground that the area in question came within the relinquished area of a mining lease which was not thereafter thrown open for re-allotment under Rule 59 of the Mineral Concession Rules and the application of appellant was therefore premature - Writ petition filed by appellant dismissed by High Court - Whether the MOU dated 15th May, 2002, continued to subsist in favour of the appellants; whether the State Government was obliged to make recommendations for the grant of iron ore mines in terms of the stipulations contained in the MOU dated 15th May, 2002,and whether in respect of the areas which had not been notified under Rule 59(1), the State Government could make a recommendation