BRIJ MOHAN LAL
*v.*
UNION OF INDIA & ORS.
(Transfer Case No. 23 of 2001)

APRIL 19, 2012

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

*Judiciary:*

*Fast Track Court Scheme - Appointment to the posts of FTC judges under the Scheme as ad hoc judges - Vacancies in the regular judicial cadre of States - Absorption and regularisation against such post - Entitlement to - Held: On analysis of the Rules relating to the different States, the appointment letters issued and methodology adopted for appointment of the FTC judges, appointees cannot have any legal, much less an indefeasible right to the posts - Financing of the FTC Scheme has already been stopped by Central Government with effect from 31st March, 2011 - Relevant Rules of the States, and the Notifications state that appointees have been appointed not only on ad hoc and temporary basis but the entire FTC Scheme itself was ad hoc and for a duration of five years only - No permanent post was created - Thus, appointees do not have any absolute right to the post - Service Law - Constitution of India, 1950 - Articles 233 and 235.*

*FTC Scheme by the Central Government - Financed for limited period - Some States continuing with the Scheme while others forced to discontinue it because of non-availability of funds - Scope of judicial review - Held: It is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to justice so that every person is able to receive an expeditious, inexpensive and fair trial - Financial limitations*





*or constraints cannot be justified as a valid excuse - Policy of State has to be in larger public interest and free of arbitrariness - Adhocism and uncertainty adversely affect any State policy and its results - Though the Central Government took a decision to stop financing and consequently to wind up the FTC Scheme however, at the same time it allocated substantial funds for starting morning, evening and shift courts - Thus, not appropriate to decide upon a comparative analysis of the policy decisions but whichever policy is taken up has to be fair in public interest - Constitution of India, 1950 - Article 21 and 39 - Administrative law - Policy decision.*

*Administration of justice in States - Decision/ recommendations of the conference of the Chief Ministers of the States and Chief Justices of the High Courts - Implementation of - Held: Decision/recommendations of the Conference should form the basis of the policy decisions by the State or the Central Government relating to the administration of justice - Due weightage should be attached to these recommendations - On facts, decision taken by the Government, Union of India who participated in the Conference to extend FTC Scheme for the period of 5 years beyond 31st March 2010 i.e. till 31st March 2015 as also other measures taken to tackle the problem of arrear of cases - However, decision of the Conference not implemented and the decision contrary to the minutes taken and placed before the Supreme Court that the FTC Scheme would not be financed by the Central Government beyond 31st March, 2011 - Thus, the Central Government not justified in brushing aside the minutes and recommendations of such a high level meeting in a most casual manner.*

*Fast Track Courts (FTC) Scheme by Central Government - Implementation of, by various States - Ad hoc appointment of District and Session Judges in FTCs made by different States in different manner - Subsequently Central Government agreeing to finance the FTC Scheme uptil 30th*

*March, 2011 - Challenge to the decision of, various State Governments and praying for continuation of scheme and absorption in regular cadre - Held: As regards State of Gujarat, appointment of persons as Judicial Officers to preside over the FTCs by way of direct recruitment from the Bar were made purely on ad hoc basis and urgent temporary basis for a period of 2 years terminable without notice, thus, cannot vest or confer any right upon the appointees to be absorbed in the permanent cadre - These appointments were to come to an end by lapse of time - In case of State of Orissa prayer for quashing of the caution letter issued to some officers to dispose of eight Session Trials every month, misconceived - Appointees in the State of Orissa as also State of Punjab and Haryana cannot claim any indefeasible right either to regularization or absorption against regular vacancies as the posts were temporary and were bound to come to an end by efflux of time - As regards the State of Andhra Pradesh, FTC Judges were appointed under a separate set of Rules than the Rules governing the regular appointment to the State Higher Judicial Services, thus, such appointments would be ad hoc and temporary and the appointees shall not derive any benefit from such appointments - As regards State of Rajasthan, the Judicial Officers promoted as FTC Judges who had not taken any written competitive examination before their promotion to the post under the Higher Judicial Service, have to undertake written examination for absorption in the regular cadre of Higher Judicial Service - Gujarat State Judicial Service Rules, 2005 - Orissa Judicial Service (Special Scheme) Rules, 2001 - Punjab Superior Judicial Services Rules, 2007 - Rajasthan Higher Judicial Service Rules, 1969 - Andhra Pradesh State Higher Judicial Service Special Rules for Adhoc Appointments, 2011 - Administrative Law.*

*Policy decision as regard Fast Track Courts (FTC) by Central Government for an initial period of five years - FTCs Scheme implemented by various States - Subsequently with the intervention of this Court, Scheme extended by another*



*five years and it stood extended upto March, 2011 - Decision of Central Government to discontinue the Scheme beyond 31st March 2011 - Some States continuing with the Scheme and some discontinuing with it due to non-availability of funds - Directions sought for extension of the Scheme - Interference with - Held: Normally courts do not interfere with the policy decisions taken by the Government but, to protect the guarantees of Article 21, to improve the Justice Delivery System, to fortify the independence of judiciary, while ensuring attainment of constitutional goals as well as to do complete justice, certain orders and directions issued - Directions issued for creation of additional courts and 10 per cent of the total regular cadre of the State as additional posts - Persons appointed by way of direct recruitment from the Bar as FTCs Judges entitled to be appointed to the regular cadre of the Higher Judicial Services of the respective State in the manner stated - Candidates promoted as FTC Judges having requisite experience in service, to be absorbed and promoted to the Higher Judicial Services of that State subject to the given conditions - Policy decision not to finance the FTC Scheme beyond 31st March, 2011 not struck down since it has already taken effect - However, the States having taken a policy decision to continue the FTC Scheme beyond 31st March 2011 to adhere to the same - States free to take a policy decision whether or not to continue the FTC Scheme as a permanent feature - Hereafter, all the States, shall not take a decision to continue the FTC Scheme on ad hoc and temporary basis - Union of India and the State Governments to re-allocate and utilize the funds apportioned by the 13th Finance Commission to regularize FTC judges - Recommendations made at the Chief Justices and Chief Ministers Conference to be placed before the Cabinet of the Centre or the State for consideration and not be rejected at bureaucratic level - Constitution of India, 1950 - Articles 21 and 142.*

*Constitution of India, 1950:*

*Articles 32 and 226 - Issuance of mandamus in policy decision - Decision by the Central Government not to finance the FTC Scheme beyond 31st March 2011 - Power of court to issue mandamus - Held: Any policy or decision of the Government which would undermine or destroy the independence of the judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution - Thus, the Government should not frame any policies or do any acts which shall derogate from the very ethos of the stated basic principle of judicial independence - If the policy decision is likely to prove counter-productive and increase the pendency of cases it would tantamount to infringement of their basic rights and constitutional protection - Thus, the Court is competent to issue a writ of mandamus - Administrative Law - Policy decision.*

*Articles 19(1)(g), 19(6), 233 to 235 - Right to practice law - Reasonable restriction - Appointment of retired District and Session Judges as ad hoc judges in Fast Track Courts (FTCs) - Discontinuance of FTCs - Appointees on ceasing to be judges debarred from practicing in District and Subordinate Courts- Challenge to - Held: Right to practice law is not an absolute right - It is subject to possession of requisite qualifications as contemplated under the Advocates Act, 1961 and to the limitations prescribed in the Bar Council of India Rules - Appointee's right to practice is abridged with respect to the courts in which they acted as judges and courts of the equivalent or lower grade - They can still practice in higher courts - It does not amount to complete and absolute restriction on their right to practice but is only a partial restriction - It cannot be a consideration for compelling the Government to continue their appointments, if they are otherwise not entitled under law to continue - Judiciary - Administrative law - Advocates Act, 1961 - Bar Council of India Rules.*



**The Central Government took a decision to implement the Fast Track Courts Scheme (FTCs) for a limited period particularly to deal with the arrears of criminal cases in the country. The entire scheme was to be financed by the Central Government. The policy decision was accepted by various State Governments. It was implemented by appointing ad hoc Judges to preside over FTCs, from amongst the retired Judges, by promotion from Civil Judges (Senior Division), and by direct recruitment from the Bar. Thereafter, the Central Government took a decision not to finance the FTC Scheme beyond 31st March, 2011. However, some of the State Governments took a decision at their own level to continue with the FTC Scheme, for the time being.**

**Writ petition was filed in the High Court of Punjab and Haryana challenging inter alia the scheme and policy of appointment of the retired District and Sessions Judges as ad hoc Judges of the FTCs in the State Judicial Services; and in the High Court of Andhra Pradesh seeking the direction that the constitution of the FTCs and 32 presiding officers in the State of Andhra Pradesh and the G.O.Ms. be declared as unconstitutional and should be set aside. These writ petitions were transferred to this Court and were taken up as Transferred Cases. Other parties who had filed similar petitions in different High Courts also intervened. Transferred Cases were disposed of with certain directions. The directions were also issued for filing quarterly status reports regularly from time to time about the functioning of the FTCs in the entire country and the same were filed. Meanwhile, instant writ petitions and special leave petitions were filed against various judgments of different High Courts seeking inter alia issuance of appropriate writ or direction to the respondents to extend the FTC Scheme for another five years or even till 31.03.2015 and to release the necessary funds for that purpose; that the decision of the**

**Union of India to discontinue the FTC Scheme beyond 31st March, 2011 be declared as arbitrary, discriminatory and violative of the fundamental rights under Article 21 of the Constitution; that the direct recruits from the Bar, appointed as *ad hoc* Additional District Judge under the FTC Scheme whose services were terminated be continued in employment; that they should be absorbed against vacant posts in the regular cadre; that the notification issued calling for applications from eligible candidates for direct recruitment from the Bar to the cadre of the District Judge be quashed; and that they are not liable to take the limited competitive examination for promotion to the cadre of District Judges and be treated as regular members of the State Judicial Service.**

**Partly allowing the appeals and the writ petitions, the Court**

**HELD:**

**Whether any of the appointees to the post of *ad hoc* judges under the FTC Scheme have a right to the post in context of the facts of the instant case:**

**1.1 Upon an analysis of the Rules relating to the different States, the appointment letters issued to the appointees and the methodology that was adopted for appointment of the Fast Track Court Judges, it becomes clear that the appointees cannot be said to have any legal, much less an indefeasible, right to the posts in question. Firstly, the posts themselves were temporary, as they were created under and within the ambit and scope of the FTC Scheme sponsored by the Union of India, which was initially made only for a limited period of five years. Now, financing of the FTC Scheme has already been stopped by the Central Government with effect from 31st March, 2011. No permanent posts were ever created. In other words, their appointments were temporary appointments against temporary posts. The relevant Rules of the States**



**clearly postulate that the appointments made under the Rules were purely on *ad hoc* basis and urgent temporary basis and were terminable without notice. The Rules as well as the respective notifications of appointment issued to these appointees, unambiguously stated that no right would be conferred upon the appointees for regular promotion on the basis of working on *ad hoc* basis under the FTC Scheme. It clearly demonstrates that these were temporary and, in some cases, even time-bound appointments, terminable without prior notice. [Para 60] [376-E-H; 377-A-C]**

**1.2 Normally, there are three kinds of posts that may exist in a cadre-(1) permanent posts; (2) temporary posts; and (3) quasi-permanent posts. Accordingly, there can be a temporary employee, a permanent employee or an employee in quasi-permanent capacity. Whereas a permanent employee has a right to the post, a temporary employee has no right to the post. Thus, it follows that for a person to have a right to the post, the post itself has to be a permanent post duly sanctioned in the cadre. The person should be permanently appointed to that post. Normally, it is only under these circumstances that such an employee gets a right to the post, but even when a temporary employee is appointed against a permanent post, he could get a right to the post provided he had at least acquired the status of a quasi-permanent employee under the relevant Rules. Where neither the post is sanctioned nor is permanent and, in fact, the entire arrangement is *ad hoc* or is for an uncertain duration, it cannot create any rights and obligations in favour of the appointees, akin to those of permanent employees. [Para 61] [377-D-H; 378-A-B]**

*Indian Drugs and Pharmaceuticals Ltd. v. Workmen* **(2007) 1 SCC 408: 2006 (9) Suppl. SCR 73;** *Parshotam Lal Dhingra v. Union of India* **AIR 1958 SC 36: 1958 SCR 828;** *Champaklal Chimanlal Shah v. Union of India* **AIR 1984 SC**

**1854;** *Jaswant Singh v. State of Haryana* **(1979) 4 SCC 440: 1980 (1) SCR 420 - referred to.**

**1.3 There should be a right vested in an employee, which is duly recognized and declared in accordance with the Rules governing the conditions of service of such employee before such relief is granted. Unless the Government employee holds any status, it may not be possible to grant relief to the Government employee, particularly, when such relief is not provided under the relevant Rules. These Rules had been framed under Article 309 of the Constitution and had the force of law. [Paras 64 and 65] [379-E-G]**

**1.4 The doctrine of pleasure, under Constitution, deals with three different categories of posts. First, offices which are held during the pleasure of the President or Governor, as the case may be; second, offices held during pleasure of the President or Governor but subject to some restrictions against removal; and third, offices held for a specified term but with immunity against removal, except by impeachment. The third category of posts is not subject to the doctrine of pleasure. Having regard to the Constitutional scheme, it is not possible to extend the type of protection against removal granted to one category of officers, to another category. It is believed that, where Rule of Law prevails, there can be nothing like unfettered discretion or unaccountable action. The degree of reasoning required in support of the decision may vary. The degree of scrutiny during judicial review may vary. But the need for reasoning exists. As a result, when the Constitution of India provides that some offices will be held during the pleasure of the President, without any express limitations or restrictions, this power should, however, necessarily be read as being subject to the fundamentals of constitutionalism. [Paras 67, 68] [380-H; 381-A-E]**

*B.P. Singhal v. Union of India* **(2010) 6 SCC 33;** *Union*



*of India & Anr. v. Tulsiram Patel* **(1985) 3 SCC 398 - referred to.**

**1.5 Right to a post is not a fundamental right but is a civil or a statutory right. That the creation of a post, absorption and payment of salaries on regular pay scales are purely Executive functions. It is primarily the nature of the post, the method and manner of appointment to the said post and the Rules governing the conditions of service of that post which would be the precepts to deal with such situations. [Para 66] [380-B, D]**

*P.U. Joshi v. Accountant General* **(2003) 2 SCC 632:2002 (5) Suppl. SCR 573;** *Union of India v. S.N. Panicker* **(2001) 10 SCC 520 - referred to.**

**1.6 The appointees in the instant case had been appointed not only on *ad hoc* and temporary basis but the entire FTC Scheme itself was *ad hoc* and for a duration of five years only as declared by the Central Government. Despite that, some of the States declared the FTC Scheme for two years only. In these circumstances, it is not possible to hold that the appointees had any right to the post. The submission that there was indication, in the Rules or otherwise, that the said appointments were permanent and that the appointees were entitled to be absorbed regularly in those posts cannot be accepted. [Para 60, 61] [377-C-D; 378-B-C]**

**Whether writ of mandamus can at all be issued in the instant case:**

**2.1 The Central Government took a decision not to finance the FTC Scheme beyond 31st March, 2011. However, some of the State Governments have still taken a decision at their own level to continue with the FTC Scheme, for the time being. None of the States have**

**stated that, as a matter of policy or otherwise, they have decided to continue the FTC Scheme at their own expense as a permanent feature of Justice Administration System. Matters relating to framing and implementation of policy primarily fall in the domain of the Government. It is an established requirement of good governance that the Government should frame policies which are fair and beneficial to the public at large. The Government enjoys freedom in relation to framing of policies. It is for the Government to adopt any particular policy as it may deem fit and proper and the law gives it liberty and freedom in framing the same. Normally, the Courts would decline to exercise the power of judicial review in relation to such matters. But this general rule is not free from exceptions. The Courts have taken the view that they would not refuse to adjudicate upon policy matters if the policy decisions are arbitrary, capricious or mala fide. [Para 70] [382-E-H; 383-A-B]**

*Bennett Coleman & Co. and Others. v. Union of India and Others* **(1972) 2 SCC 788: 1973 (2) SCR 757;** *Asif Hameed v. State of Jammu & Kashmir and Anr.* **1989 Suppl.(2) SCC 364: 1989 (3) SCR 19 - referred to.**

**2.2 The Government has the authority and power to not only frame its policies, but also to change the same. The power of the Government, regarding how the policy should be shaped or implemented and what should be its scope, is very wide, subject to it not being arbitrary or unreasonable. In other words, the State may formulate or reformulate its policies to attain its obligations of governance or to achieve its objects, but the freedom so granted is subject to basic Constitutional limitations and is not so absolute in its terms that it would permit even arbitrary actions. The correct approach in relation to the scope of judicial review of policy decisions of the State can hardly be stated in absolute terms. It will always depend upon the facts and circumstances of a given**



**case. Furthermore, the Court would have to examine any elements of arbitrariness, unreasonableness and other Constitutional facets in the policy decision of the State before it can step in to interfere and pass effective orders in such cases. A challenge to the formation of a State policy or its subsequent alterations may be raised on very limited grounds. Again, the scope of judicial review in such matters is a very limited one. One of the most important aspects in adjudicating such a matter is that the State policy should not be opposed to basic Rule of Law or the statutory law in force. This is termed as the philosophy of law, which must be adhered to by valid policy decisions. [Para 72, 75] [384-C-E; 386-B-D]**

*Mohd. Abdul Kadir and Anr. v. Director General of Police, Assam and Ors.* **(2009) 6 SCC 611 - referred to.**

**2.3 The independence of the Indian Judiciary is one of the most significant features of the Constitution. Any policy or decision of the Government which would undermine or destroy the independence of the judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution. The State policies should neither defeat nor cause impediment to discharge of judicial functions. To preserve the doctrine of separation of powers, it is necessary that the provisions falling in the domain of judicial field are discharged by the Judiciary and that too, effectively. It is, thus, clear that it is the constitutional duty of this Court to ensure maintenance of the independence of Judiciary as well as the effectiveness of the Justice Delivery System in the country. The data and statistics placed on record, of which this Court can even otherwise take judicial notice, show that certain effective measures are required to be taken by the State Governments to bring down the pendency of cases in the lower courts. It necessarily implies that the Government should not frame**

**any policies or do any acts which shall derogate from the very ethos of the stated basic principle of judicial independence. If the policy decision of the State is likely to prove counter-productive and increase the pendency of cases, thereby limiting the right to fair and expeditious trial to the litigants in this country, it will tantamount to infringement of their basic rights and constitutional protections. Thus, this Court is possessed of the jurisdiction and is competent to issue a writ of mandamus and/or appropriate directions. [Paras 76, 80 and 81] [386-E-G; 391-G-H; 392-A-D]**

*S.P. Gupta v. Union of India* **(1981) Supp. SCC 87;** *All India Judges' Association v. Union of India & Ors.* **(1992) 4 SCC 288;** *All India Judges' Association v. Union of India* **(2002) 4 SCC 247: 2002 (2) SCR 712 - referred to.**

*Commonwealth ex rel. Carroll v. Tate et al.* **442 Pa.45; 274 A.2d 193 - referred to.**

**Right to practice**

**3.1 Article 19(1)(g) of the Constitution provides a fundamental right to practice any profession or to carry on any occupation, trade or business. This right is subject to the limitations contained under Article 19(6) of the Constitution. The State is empowered to make any law imposing, in the interest of general public, reasonable restrictions on the exercise of the rights conferred by the said sub-clause. This power specifically refers to the professional or technical qualifications necessary for practicing any profession or carrying on any occupation. The right to practice law is not an absolute right and is subject to the possession of requisite qualifications as contemplated under the Advocates Act, 1961. This right to practice is further subject to the limitations prescribed in and the regulatory regime of the Bar Council of India Rules. Therefore, the submission that once a lawyer**



**possesses the requisite qualifications, he has an unrestricted and unregulated right to practice, is not tenable. [Para 82] [392-E-H]**

**3.2 The appointees submitted that in terms of the Bar Council of India Rules, after they cease to be judges of the FTCs for any reason whatsoever, they shall be debarred from practicing in the district and subordinate courts. Their right to practice is abridged with respect to the courts in which they acted as judges and courts of the equivalent or lower grade. They can still practice in the higher courts, i.e., permissible Tribunals, High Courts and the Supreme Court of India. Thus, there is no complete and absolute restriction on their right to practice. It is only a partial restriction which is based upon securing the larger public interest and the interest of ensuring transparency in the administration of justice. This by itself, therefore, cannot be a consideration for compelling the Government to continue their appointments, if they are otherwise not entitled under law to continuation. There is no merit in the submission that the appointees/petitioners would suffer an irreparable loss by termination of their services as FTC judges and that the restriction contained in Rule 7 of the Bar Council of India Rules amounts to an absolute unreasonable restriction upon their right to practice in the event of such termination. [Paras 83, 84] [393-A-D; 394-B-C]**

*N.K. Bajpai v. Union of India & Anr.* **CA No. 2850 of 2012 decided on 15th March 2012 - relied on.**

**Power of judicial review:**

**4.1 The FTC Scheme was started in the year 2001 for an initial period of five years. However, it was subsequently extended and the Central Government agreed to finance the FTC Scheme uptil 30th March, 2011. Thereafter, the various State Governments have either decided to wind up the FTC Scheme or have extended**

**the FTC Scheme at their own expense. A few States are even considering the continuation of the FTC Scheme as a permanent feature in their respective States. This, to a large extent, created an anomaly in the administration of justice in the States and the entire country. Thus, there is no unanimity between the Union Government and the States either on continuation or the closure of the FTC Scheme. Some of the States would continue with the FTC Scheme while others have been forced to discontinue or close it because of non-availability of funds. [Paras 92, 93] [396-G-H; 397-A-C]**

**4.2 Judicial functions and judicial powers are one of the essential attributes of a sovereign State and on considerations of policy, the State transfers its judicial functions and powers, mainly to the courts established by the Constitution, but that does not affect competence of the State to, by appropriate measures, transfer a part of its judicial functions or powers to Tribunals or other such bodies. However, as far as functioning of the courts, i.e., dispensation of justice by Courts is concerned, the Government has no control whatsoever over the courts. In relation to matters of appointments to the Judicial Services of the States and even to the Higher Judiciary in the country, the Government has some say, however, the finances of Judiciary are entirely under the control of the State. These controls should be minimized to maintain the independence of the Judiciary. The courts should be able to function free of undesirable administrative and financial restrictions in order to achieve the constitutional goal of providing social, economic and political justice and equality before law to its citizens. [Para 99] [398-F-H; 399-A-B]**

*Associated Cements Co. Ltd. v. P.N. Sharma* **AIR 1965 SC 1595:1965 SCR 366 - referred to.**

**4.3 Article 21 of the Constitution of India takes in its**



**sweep the right to expeditious and fair trial which is an essential ingredient of such reasonable, fair and just procedure. Even Article 39A of the Constitution recognizes the right of citizens to equal justice and free legal aid. Thus, it is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to justice so that every person is able to receive an expeditious, inexpensive and fair trial. The State cannot be permitted to deny the constitutional right to speedy trial to the accused on the ground that the State does not have adequate financial resources to incur the necessary expenditure needed, for improving the administrative and judicial apparatus to ensure speedy trial. [Para 100, 131] [399-C-D; 419-E-F]**

*Hussainara Khatoon and Ors. (IV) v. Home Secretary, State of Bihar, Patna* **(1980) 1 SCC 98: 1979 (3) SCR 532;** *Sheela Barse (II) and Ors. v. U.O.I. and Ors.* **(1986) 3 SCC 632;** *Salem Advocate Bar Association v. Union of India* **(2003) 1 SCC 49: 2002 (3) Suppl. SCR 353;** *Prakash Singh Badal v. State of Punjab and Ors.* **(2006) 8 SCC 1: 2006 (6) Suppl. SCR 473;** *High Court of Judicature at Bombay, Through its Registrar v. Shirishkumar Rangrao Patil and Anr.* **(1997) 6 SCC 339: 1997 (3) SCR 1131 - referred to.**

*Jackson v. Bishop* **404 F Supp. 2d 571 - referred to.**

**4.4 Judicial review is recognized as a basic feature of the Constitution and independence of judiciary is integral to the constitutional structure, as an essential attribute of the Rule of law. Judiciary must, therefore, be free from pressure and influences from any quarter. It can be stated with certainty that any impediments to the continued and independent functioning of the judiciary would result in damaging the institution of justice as well as adversely affecting the faith of the public in the functioning of the Courts/Tribunals. Only if continued**

**judicial independence is assured, the Courts/Tribunals would be able to discharge their functions in an impartial manner. [Para 102] [403-D-G]**

*Union of India v. R. Gandhi, President, Madras Bar Association* **(2010) 11 SCC 1: 2010 (6) SCR 857;** *Union of India & Ors. v. Pratibha Bonnerjea & Anr.* **(1995) 6 SCC 765:1995 (5) Suppl. SCR 511;** *Ashoka Kumar Thakur v. Union of India & Ors.* **(2008) 6 SCC 1: 2008 (4) SCR 1 - referred to.**

**4.5 Wherever the right which is being affected is a basic or a fundamental right, the State cannot be permitted to advance an argument of financial constraints in such matters. The policy of the State has to be in the larger public interest and free of arbitrariness. Adhocism and uncertainty are the twin factors which are bound to adversely affect any State policy and its results. Reasons for taking a policy decision would squarely fall in the domain of the State, but it should be free from element of arbitrariness and mala fide. The State cannot in, an *ad hoc* manner, create new systems while simultaneously giving up or demolishing the existing systems when the latter have even statistically shown achievement of results. [Para 107] [404-G-H; 405-A]**

**4.6 In reference to the cases at hand, the Central Government took a decision to stop financing and consequently to wind up the FTC Scheme. However, at the same time, it allocated Rs.2500 crores for operation of the Morning, Evening and Shift Courts in the country besides providing funds under other heads, as per the 13th Finance Commission Report for the period 2010-2011 to 2014-2015. Again, this is a policy decision and though the Government has the jurisdiction to decide on such policy matters, there has to be some rationale and reasonableness in the same. It may not be appropriate for this Court to decide upon a comparative analysis of the**



**policy decisions as to which policy has greater merit and which policy the Government should adopt, but certainly whichever policy is eventually taken up by the State, it has to be fair, in public interest and also satisfy the constitutional limitation of ensuring independence of Judiciary. [Paras 94, 108 and 109] [397-D-E; 405-B-D]**

**4.7 With the passage of time, owing to the tremendous growth in the population of the country and greater awareness among citizens of their rights, civil and criminal litigation before the Courts have increased manifold, without there being an equivalent increase in the strength of Judges and enhancement in the infrastructure of the Courts. Thus, it is essential that some kind of consistent and systematized approach is adopted by all the concerned Governments, including the Union of India, so as to take effective measures to remedy this situation as well as to prevent further undesirable increase in the pendency of cases before the Courts. Expeditious disposal of cases is obviously the first answer to this multifarious problem. [Para 112] [406-B-D]**

**The conference of the Chief Ministers of the States and the Chief Justices of the High Courts.**

**5.1 In order to resolve various administrative and allied issues relating to the administration of justice in the States, it has been the practice to hold the Chief Justices and Chief Ministers Conference, which is presided over by the Chief Justice of India. In these meetings, various steps are discussed, for which an agenda is circulated and suggestions from the High Courts as well as the State Governments are invited. This Conference is normally attended by the Chief Ministers and/or the Law Ministers of the State, Chief Justices of the High Courts and various other authorities from the bureaucracy and the High Courts. Upon due deliberations, decisions are**

**taken, whereafter Minutes of the same are prepared and circulated. The decisions are recorded and circulated to the States and the Union of India specifically for their information and further action. Unfortunately, the practice has shown that these decisions have hardly been implemented by the concerned authorities. One such Conference was held and the matter in regard to setting up of Evening, Morning and Shift Courts was also discussed and it was required that the State Government shall set up at least one Family Court in each district. [Paras 113 and 115] [406-E-H; 408-A-B]**

**5.2 There is nothing placed on record to show that the FTCs at the level of the Magistrate Courts have no further efficacy. All the concerned governments, including the Union of India, which duly participated in the Conference, had decided to extend the FTCs for a period of five years beyond 31st March, 2010 i.e. till 31st March, 2015. It was further contemplated that other measures should also be taken by the respective State Governments and Union of India to tackle the problem of arrear of cases. Hardly any decision in that regard was implemented, but on the other hand, a decision contrary to the minutes was taken with certainty and was placed before this Court that the FTC Scheme would not be financed by the Central Government beyond 31st March, 2011. [Para 116] [409-B-E]**

**5.3 As regards the question whether it is justified for the Central Government, or any other Government, to brush aside the Minutes and recommendations of such a high level meeting in a most casual manner or whether such Minutes require favourable consideration by all concerned and proper and complete policy decisions taken in furtherance thereto and such minutes form the foundation for major policy decisions relating to judiciary, the latter perspective demands an affirmative answer as**



**these decisions and recommendations should be favourably considered by all concerned. Rather, they should form the basis of the policy decisions relating to the administration of justice. The Chief Justices and the Chief Ministers are the constitutional heads of the Judiciary and the Executive, respectively. The matters are discussed by all States, Union of India and Judiciary. The decisions are taken on the basis of the collective wisdom. One can hardly comprehend a constitutional body of a higher normative significance than the Chief Justices and the Chief Ministers of the respective High Courts/States to take such policy decisions at the National level. The meeting is held under the umbrella of the Union of India and is presided over by the Chief Justice of India, Union Minister for Law and Justice and other high dignitaries to deliberate upon issues which relate to the justice delivery system, ultimately affecting the basic and fundamental rights of the citizens of this country at large. [Para 116, 117] [409-D-H; 410-A-B]**

**5.4 It would not only be unfair but unacceptable that these Minutes be placed in the shelves of the Government archives without attaching any significance to them. It would neither be fair nor proper for any level in the bureaucratic hierarchy of the Government to reject such suggestions at the threshold, that too, without any proper reasoning in support thereof. At least, the Cabinet of the Government of India or the State Government, as the case may be should take into consideration the decisions and recommendations of this meeting. Due weightage should be attached to these recommendations and preferably, they should form the basis of the policy decision by the State or the Central Government in relation to the matters concerning Judicial administration. [Para 118] [410-C-E]**

**Merits of respective cases:**

**6.1 In the case of the State of Gujarat, a number of persons were appointed as Judicial Officers to preside over the FTCs by way of direct recruitment from the Bar. Their services have been terminated on the ground of unsatisfactory performance. The High Court declined to set aside the termination of services of most officers. In the impugned judgment, the High Court noted unsatisfactory performance as the cause for termination of their services. Entries of their service records has been reproduced. All these officers had been appointed as *ad hoc* and temporary FTC Judges. At no point of time was anything done, directly or indirectly, by the State to give rise to a legitimate expectation of the appointees that their services would be regularized and they would be absorbed in the regular cadre. On the basis of the Confidential Records referred to by the High Court, in its judgment, it is difficult to take any different view, particularly when these judicial officers were only temporary and *ad hoc* appointees with no vested right to the post. Certainly, this is not a case of mala fide termination. In the subsequent writ petitions before the High Court only one reason was given for the termination, i.e., the Central Government refused to extend the FTC Scheme and so, the State Government also decided not to extend the FTC Scheme beyond 31st March, 2011. This probably was not a valid reason to dismiss the writ petitions because the court ought to have examined the prayer of those officers for regularization of their services and absorption against the regular cadre posts. This aspect of the writ petition was not even discussed by the High Court and the writ petitions were dismissed. [Para 119] [410-F-H; 411-A-E]**

*Brij Mohan Lal v Union of India and Ors.* **CWP No. 5740 of 2001 - referred to.**



**6.2 The petitioners also raised a challenge to Rules 4 and 6 of the Gujarat Rules under which they were appointed, on the ground that the same are arbitrary and discriminatory, Firstly, the Rules under which the petitioners were appointed after 2001 themselves were to be in force only till 31st December, 2005. Till 2005, none of the appointees challenged these Rules. For these four years, they, in fact, took full advantage of their appointment under these Rules and received different service benefits thereunder. It cannot be said that these Rules themselves were temporary and were enacted to meet an emergency situation. The appointments were made purely on *ad hoc* and urgent temporary basis for a period of two years, terminable without any prior notice. A temporary appointment, which itself was made for a period of two years, can hardly be equated to a tenure appointment and must be construed on such terms. These appointments were to come to an end by lapse of time. Such an appointment obviously cannot vest or confer any right upon the appointees to be absorbed in the permanent cadre, as they were not appointed in accordance with the provisions of the Gujarat Judicial Service Recruitment Rules, 1961. The expression 'liable to be terminated at any time without any notice' could be susceptible to objections if it was used in the case of a quasi permanent or permanent employee of a Government servant. However, there were no permanent posts contemplated under the FTC Scheme. The entire FTC Scheme was *ad hoc* and formulated to operate only until the year 2005. It was continued beyond that period in accordance with the directions of this Court but now a decision has been taken not to continue the FTC Scheme beyond 31st March, 2011. Even if, it is accepted that the expression 'liable to be terminated at any time without any notice' is arbitrary and opposed to the basic Rule of Law, it still has to satisfy the twin tests laid down in the case of Parshotam Lal Dhingra, i.e., firstly, whether**

**the Government servant being terminated or reduced in rank thereby had a right to the post or to the rank, as the case may be and, secondly, whether he had been visited with evil consequences. Both of these tests have to be answered in the negative, in the facts and circumstances of the instant case. These officers had no right to their posts and, consequently, discontinuation of their services in the facts of the present case cannot be construed as punitive or one visiting the petitioners with civil consequences. This holds true even though in some cases, it has been recorded that the performance of these appointees was found to be unsatisfactory but that is not the lone reason given by the High Court for dispensing with their services. It is the discontinuation of the FTC Scheme itself that is the principal reason for terminating the services of all these officers. In the instant case, the Rules themselves were temporary and were bound to cease to have force of law after 2005. The posts created were temporary and ad hoc. The appointments were made on ad hoc and urgent temporary basis for a limited period of two years and terminable without notice. In these circumstances, neither can it be stated that there existed posts which had permanent or quasi-permanent character and were the duly sanctioned posts of the regular cadre of the State Government nor that the appointees had any right to these posts. [Para 120] [411-G-H; 412-A-H; 413-A-D]**

*Parshotam Lal Dhingra v. Union of India* **AIR 1958 SC 36: 1958 SCR 828;** *Mohd. Abdul Kadir and Anr. v. Director General of Police, Assam and Ors.* **(2009) 6 SCC 611 - relied on.**

**6.3 Writ Petitions were filed by some of the appointees from the State of Orissa praying for quashing of the caution issued to some officers whereby they were required to dispose of eight sessions trials every month**



**which, so far, they had not been able to achieve and that if they still failed to achieve the said target, their services would be liable to be terminated. The challenge on the ground that it is violative of Articles 14 and 16 of the Constitution inasmuch as no such restriction or limitation of disposing eight Session Trials every month is applied to the members of the State Higher Judicial Services and that the same yardstick should uniformly be applied to the direct recruits appointed under the Rules as well as to the Judicial Officers promoted/transferred to the FTCs, is misconceived. The Judicial Officers appointed under the regular cadre of the State Higher Judicial Services are subject to various restrictions and limitations of judicial conduct as imposed by the High Court and under the relevant Rules in force. Without exception, unit system for disposal of cases prevails and is applicable to the courts presided over by such officers. On the contrary, the FTC Judges are to deal only with session trials. This was the very purpose for which the Scheme was created and, as such, they cannot claim that the imposition of such a condition is *ex facie* unreasonable, arbitrary or discriminatory. In fact, in the writ petitions filed no data has been provided to substantiate that it is neither practicable nor possible for these courts to dispose of eight Session Trials, as contemplated under this caution letter. [Paras 121, 122] [413-F-G; 414-D-H; 415-A]**

**6.5 Absorption in service is not a right. Regularization also is not a statutory or a legal right enforceable by the persons appointed under different rules to different posts. Regularization shall depend upon the facts and circumstances of a given case as well as the relevant Rules applicable to such class of persons. The relief of regularization of the persons and workmen who had been appointed against a particular scheme or project has been rejected. In matters of public employment, absorption, regularization or permanent continuance of**

**temporary, contractual or casual daily wage or *ad hoc* employees appointed and continued for long in such public employment would be de hors the constitutional scheme of public employment and would be improper. It would also not be proper to stay the regular recruitment process for the concerned posts. [Para 123] [415-F-H; 416-A-B]**

*Secretary, State of Karnataka & Ors. v. Uma Devi* **(3) & Ors. (2006) 4 SCC 1: 2006 (3 ) SCR 953 - referred to.**

**6.6 The State of Orissa issued an advertisement for direct recruitment to the Higher Judicial Services of the State. The appointees to the FTCs prayed that this advertisement be quashed and they be absorbed against the regular vacancies. The said prayer was made even in other States. There is no merit in the contention. There are two different sets of Rules, applicable in different situations, to these two different classes of officers and further they are governed by different conditions of service. They cannot be placed at par. The process of their appointments is distinct and different. The petitioner-appointees have no right to the posts as the posts themselves were temporary and were bound to come to an end by efflux of time. With reference to the letters of their appointment and the Rules under which the same were issued, it is clear that these petitioners cannot claim any indefeasible right either to regularization or absorption. Under the Orissa Superior Judicial Services and Judicial Service Rules, 2007, there is no provision for absorption or regularization of *ad hoc* Judges. Thus, it would neither be permissible nor proper for the Court to halt the regular process of selection on the plea that these petitioners have a right to be absorbed against the posts in the regular cadre. [Paras 121, 122, 123, 124] [413-G-H; 415-C-F; 416-C-D]**

**6.7 The petitioners from the State of Andhra Pradesh**



**prayed that the advertisement issued for filling up the vacancies in the regular cadre should be quashed and not processed any further and the petitioners instead should be absorbed against those vacancies. There is no merit in these submissions. The FTC Judges were appointed under a separate set of Rules than the Rules governing the regular appointment to the State Higher Judicial Services. It has been clearly stipulated that such appointments would be *ad hoc* and temporary and that the appointees shall not derive any benefit from such appointments. [Paras 125 and 126] [416-E-G]**

**6.8 The judgment of this Court in All India Judges' Association case (2002) as well as the relevant Rules contemplate that a person who is to be directly appointed to the Higher Judicial Services has to undergo a written examination and appear in an interview before he can be appointed to the said cadre. As far as appointment by promotion is concerned, the promotion can be made by two different modes, i.e., on the basis of seniority-cum-merit or through out of turn promotion wherein any Civil Judge, Senior Division who has put in five years of service is required to take a competitive examination and then to the extent of 25 per cent of the vacancies available, such Judges would be promoted to the Higher Judicial Services. [Para 128] [417-D-G]**

**6.9 In the case of State of Rajasthan, the Judicial Officers from the cadre of Civil Judge, Senior Division, were promoted as FTC Judges. They continued to hold the posts for a considerable period. The petitioner admitted that these officers who were promoted as *ad hoc* FTC Judges had not taken any written competitive examination before their promotion to this post under the Higher Judicial Services. They were promoted on *ad hoc* basis depending on the availability of vacancy in the FTCs. Once the Rules required a particular procedure to be adopted for promotion to the regular posts of the**

**Higher Judicial Services, then the competent authority can effect the promotion only by that process and none other. In view of the admitted fact that these officers have not taken any written examination, there is no reason as to how the challenge made by these Judicial Officers to the directive issued by the State Government for undertaking of written examination may be sustained. Thus, the relief prayed for cannot be granted in its entirety. [Para 127, 128] [416-H; 417-A; G-H; 418-A-B]**

*All India Judges' Association v.Union of India & Ors.* **(2002) 4 SCC 247: 2002 (2) SCR 712 - relied on.**

**6.10 In the case of the State of Punjab and Haryana, the appointees directly appointed as FTC Judges by way of direct recruitment from the Bar, prayed for regularization of their services and absorption in the regular cadre as well as for continuation of the FTC Scheme till their absorption. The relief of regularization/ absorption cannot be granted to these petitioners. They too have no right to the post. Admittedly, these candidates also did not pass any written competitive examination and were appointed solely on the basis of an interview and must now undergo the requisite examination. [Para 129] [418-C-E]**

**The effect of Madhumita Das and Brij Mohan Lal and the directions that this Court is required to issue in light thereof**

**7.1 This Court would fail in its duty if it declines to exercise its jurisdiction in the latter class of cases (duty upon the Court to test the merits or otherwise of the policy decision), solely on the ground that it was a policy decision and, thus, is beyond the limits of judicial review, being a matter primarily within the domain of the Government. Keeping in view its constitutional duty, the constitutional rights of citizens of this country at large**



**and with reference to the facts of a given case, this Court may be duty bound to amplify and extend the arm of justice in accordance with the principle Est boni Judicls ampliare Justiciary non-Jurisdictionem. The argument that matters of policy are, as a rule, beyond the power of judicial review has to be dispelled. This Court would be required to take unto itself the task of issuing appropriate directions to ensure that the Rule of Law prevails and the constitutional goals are not defeated by inaction either when the law requires action or when the policy in question is so arbitrary that it defeats the larger public interest. [Para 134] [421-D-G]**

**7.2 The Union of India failed to place any material on record to justify its decision, deciding to stop financing the FTC Scheme with effect from 31st March, 2011. The submission that it would not be a case where this Court should venture to issue a mandamus directing continuation of the Scheme and reverse the policy decision taken by the Union of India, is accepted. Though policy decisions should be interfered with rarely by the court, but the instant case is certainly one where the Court should issue certain directions to ensure that the fundamental rights and protections available to the citizens are not violated and at the same time, the decision of the Government of India does not undermine the independence of judiciary. It may not be mandatory, but is always desirable that the policy decision in relation to administration of justice should be made by Union of India in consultation with the Supreme Court and/or the respective High Courts of the State. The recommendation of bodies like the Law Commission of India or other special commissions appointed in relation to administration of justice delivery system ought to be taken into consideration. But, it cannot be said that the recommendations given by one of the important organs**

**of the State, the judiciary, are not given effective consideration and due weightage in framing and implementation of the policies relating to matters of administration of justice. It would neither be appropriate nor logical for the Union of India and/or the State Governments to raise an argument that this Court may not issue any directions or mandamus to the concerned Government, as it may have far reaching consequences. Firstly, the Union of India and the State Governments are not expected to raise such issue and secondly, it can hardly be disputed that the Governments have not been able to successfully perpetrate any stable and result-oriented solution to reduce the huge pendency of criminal cases before the courts. The finances, infrastructure and existence of adequate posts are the prime considerations which would weigh with any Authority or Court while taking any policy decisions or passing necessary directions in that behalf. [Para 136, 137] [423-A-H; 424-A-B]**

**7.3 The fact that the 13th Finance Commission recommended a grant of Rs. 5,000 Crores to the States for improving the justice delivery system in the country with a specific objective of reducing the arrears significantly and out of this amount of Rs.5,000 crore a sum of Rs.2,500 crore has been allotted for morning/ evening/shift courts and no amount has been allotted for FTCs weighed with the Central Government for not continuing the FTC Scheme after 31.03.2011. [Para 138] [424-B-D]**

**It would be clear from the extracts from the recommendations of the 13th Finance Commission that the recommendations were based on the proposals of the Department of Justice, Government of India for setting up morning/evening and shift courts because the morning courts in Andhra Pradesh and the evening courts in Gujarat had demonstrated the feasibility of**



**morning and evening courts. The morning and evening courts, however, may not be feasible in the other States in India due to various local conditions prevailing in the States. Moreover, the idea behind having morning/ evening/ shift courts is that sufficient infrastructure such as court rooms were not available for regular courts and with the same infrastructure more hours of judicial work could be done through morning/evening and shift courts. The fact, however, remains that with the help of funds allotted by the 11th Finance Commission, the States have already established additional court rooms for the FTCs. These relevant aspects was not considered by the Central Government while rejecting the recommendations in the Conference of Chief Ministers of the States and Chief Justices of the High Courts for continuing the FTC Scheme after 31.03.2010. The State Governments and the High Courts of different States should have been consulted and their views should have been taken before the Central Government took the final decision to reject the proposal at the Conference of the Chief Ministers of States and Chief Justices of the High Courts to continue the FTC Scheme. However, it is found that the policy-decision of the Central Government to discontinue the FTC Scheme beyond 31.03.2011 has already been given effect to and for this reason there is no inclination to strike down the policy-decision of the Union of India to discontinue the FTC scheme beyond 31.03.2011. [Para 139] [426-B-H; 427-A]**

**7.4 It would be clear from the recommendations of the 13th Finance Commission that there are over 3 crores pending cases in various courts in the country and there is enormous delay in disposing of the cases resulting in immense hardship, including those borne by large number of under-trials. If the FTC *ad hoc* direct recruits who have over the years gained a lot of judicial experience are regularised and absorbed in the regular**

**cadre of Additional District Judges in different States, the problem of arrear of cases can be handled to some extent. The State Governments, however, may not have the funds to bear the salary and allowances of additional posts of Additional District Judges and therefore, may not be in a position to regularise the *ad hoc* FTC Judges. To meet the cost disability of some of the State Governments, the 13th Finance Commission has provided funds for different projects, grant-in-aid and infrastructural expenditure relating to establishment and running of courts. To meet the expenses of the State Government for improving the Justice Delivery System, the 13th Finance Commission, therefore, recommended a total grant of Rs.5,000 crores under the specific heads. Thus, the Central Government should, in consultation with the State Governments and the High Courts of the different States, reconsider allocating some amount out of the grant of Rs.5000 crores and for such additional amount for meeting the initial expenses of increase in cadre strength of Additional District Judges for absorbing the direct recruits of the FTC Scheme by way of regularisation. [Paras 140, 141 and 142] [427-B-E; 428-D-E; 429-B-D]**

**7.5 In terms of Articles 141 and 144 of the Constitution, the law declared by the Supreme Court of India is binding on all Courts and all authorities which are to act in aid of the law so declared. The framers of the Constitution, in no uncertain terms, declared that the judgments of this Court are binding on all. In fact, there is a duty upon the Authorities and all other Courts to act in aid of such decisions. In the case of *Brij Mohan Lal this Court issued number of directions in relation to establishment and functioning of the FTCs. It repelled the challenge to the FTC Scheme. The modes of appointment of Judges to the FTCs were also provided. The judgment itself said that no right would be conferred on the Judicial Officers in service for claiming any regular promotion on**



**the basis of serving as FTC Judges. While stating the order of preference for appointment to these Courts, this Court held that the first preference would be given to judges from amongst the eligible judicial officers by *ad hoc* promotion, the second preference would be given to the retired judges with good service records and the third preference would be given to the members of the Bar by direct recruitment. Thereafter, this Court passed a detailed order in the case of Madhumita Das, finding some substance in the plea that while assessing the performance, there cannot be different yardsticks, i.e. the same parameters have to be adopted while judging the performance of the petitioners viz-a-viz. those which are recruited from another source, i.e. from amongst the Judicial Officers. However, in the interim order, this Court made a specific direction that the petitioners would continue to hold the post until further orders, which it directed the High Court to pass. It was also stated therein that as and when regular vacancies would arise, the cases of the petitioners shall be duly considered and there shall not be any need for them to appear in any examination meant for recruitment to the cadre of District Judge. Thus, these two orders must be seen in light of the fact that the Union of India, as well as the State Governments of their own, extended the FTC Scheme for another five years i.e. till 2010 and thereafter, by another year. The Central Government ultimately took the decision not to finance the FTC Scheme with effect from 30th March, 2011. Even thereafter, a number of States have taken the decision to continue the FTC Scheme while retaining the appointees thereto till 2012, 2013 and even till 2016. The State of Haryana has even thought of making it as a permanent feature of dispensation of justice in the State. The cumulative effect of all these factors is that the petitioners had a legitimate expectation that either their services would be continued as the FTC Scheme would be made a permanent feature of the**

**justice administration in the concerned State or they would be absorbed in the regular cadre. But mere expectation or even legitimate expectation of absorption cannot be a cause of action for claiming the relief of regularization, particularly when the same is contrary to the Rules and letters of appointment. In **Madhumita Das the protection was granted in an interim order and such directions cannot be issued, if they are contrary to the enacted statute. When all these facts, circumstances and the judgments of this Court are harmoniously construed with an intention to do complete justice as well as to protect the fundamental rights and protections available to the public at large, it would appear necessary that this Court passes certain directions. [Paras 143, 144 and 145] [429-E-H; 430-A-H; 431-A-C]**

*Brij Mohan Lal v Union of India and Ors.* **CWP No. 5740 of 2001;** *Smt Madhumita Das & Ors v State of Orissa & Ors* **2008 AIR SCW 4274 - referred to.**

**8. Without any intent to interfere with the policy decision taken by the Governments but, unmistakably, to protect the guarantees of Article 21 of the Constitution, improve the Justice Delivery System and fortify the independence of judiciary, while ensuring attainment of constitutional goals as well as to do complete justice to the lis before this Court, in terms of Article 142 of the Constitution, the following orders and directions are passed:**

**1. Being a policy decision which has already taken effect, the policy decision of the Union of India vide letter dated 14th September, 2010 not to finance the FTC Scheme beyond 31st March, 2011 is not struck down.**

**2. All the States which have taken a policy decision to continue the FTC Scheme beyond 31st March 2011 shall adhere to the respective dates as announced.**



**3. The States which are in the process of taking a policy decision on whether or not to continue the FTC Scheme as a permanent feature of administration of justice in the respective States are free to take such a decision.**

**4. All the States, henceforth, shall not take a decision to continue the FTC Scheme on *ad hoc* and temporary basis. The States are at liberty to decide but only with regard either to bring the FTC Scheme to an end or to continue the same as a permanent feature in the State.**

**5. The Union of India and the State Governments shall re-allocate and utilize the funds apportioned by the Thirteenth Finance Commission and/or make provisions for such additional funds to ensure regularization of the FTC judges in the manner indicated and/or for creation of additional courts as directed.**

**6. All the decisions taken and recommendations made at the Chief Justices and Chief Ministers Conference shall be placed before the Cabinet of the Centre or the State, as the case may be, which alone shall have the authority to finally accept, modify or decline, implementation of such decisions and, that too, upon objective consideration and for valid reasons.**

**7. No decision, recommendation or proposal made by the Chief Justices and Chief Ministers Conference shall be rejected or declined or varied at any bureaucratic level, in the hierarchy of the Governments, whether in the State or the Centre.**

**8. It shall be for the Central Government to provide funds for carrying out the directions contained in this judgment and, if necessary, by re-allocation of funds already allocated under the 13th Finance Commission for Judiciary; and that for creation of additional 10 per cent**

**posts of the existing cadre, the burden shall be equally shared by the Centre and the State Governments and funds be provided without any undue delay so that the courts can be established as per the schedule directed.**

**9. All the persons who have been appointed by way of direct recruitment from the Bar as Judges to preside over the FTCs under the FTC Scheme shall be entitled to be appointed to the regular cadre of the Higher Judicial Services of the respective State only in the manner stated.**

**10. The members of the Bar who have directly been appointed but whose services were either dispensed with or terminated on the ground of doubtful integrity, unsatisfactory work or against whom, on any other ground, disciplinary action had been taken, would not be eligible to the benefits stated therein.**

**11. The respective States and the Central Government are directed to create 10 per cent of the total regular cadre of the State as additional posts within three months from today and take up the process for filling such additional vacancies as per the Higher Judicial Service and Judicial Services Rules of that State.**

**12. These directions, of course, are in addition to and not in derogation of the recommendations that may be made by the Law Commission of India and any other order which may be passed by the Courts of competent jurisdiction, in other such matters.**

**13. The candidates from any State, who were promoted as FTC Judges from the post of Civil Judge, Senior Division having requisite experience in service, would be entitled to be absorbed and remain promoted to the Higher Judicial Services of that State subject to the given conditions.[Para 146] [431-C-H; 432-A-H; 433-A-D; 435-A-G]**



*All India Judges' Association v. Union of India & Ors.* **(1992) 1 SCC 119: 1991 (2) Suppl. SCR 206;** *All India Judges' Association v. Union of India & Ors.* **(1993) 4 SCC 288: 1993 (1) Suppl. SCR 749;** *Record Association v. Union of India & Ors.* **(1993) 4 SCC 441: 1993 (2) Suppl. SCR 659; - referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| 442 Pa.45; 274 A.2d 193 | Referred to | Para 43, 79 |
| 1991 (2) Suppl. SCR 206 | Referred to | Para 43 |
| 1993 (1) Suppl. SCR 749 | Referred to | Para 43, 46 |
| 1993 (2) Suppl. SCR 659 | Referred to | Para 43 |
| 2006 (9) Suppl. SCR 73 | Referred to | Para 61 |
| 1958 SCR 828 | Referred to | Para 62 |
| AIR 1984 SC 1854 | Referred to | Para 63 |
| 1980 (1) SCR 420 | Referred to | Para 63 |
| 2002 (5) Suppl. SCR 573 | Referred to | Para 66 |
| (2001) 10 SCC 520 | Referred to | Para 66 |
| (2010) 6 SCC 33 | Referred to | Para 68 |
| (1985) 3 SCC 398 | Referred to | Para 68 |
| 1973 (2) SCR 757 | Referred to | Para 70 |
| 1989 (3) SCR 19 | Referred to | Para 71 |
| (2009) 6 SCC 611 | Referred to | Para 74 |
| (1981) Supp. SCC 87 | Referred to | Para 77 |
| (1992) 4 SCC 288 | Referred to | Para 78 |
| 2002 (2) SCR 712 | Referred to | Para 78 |

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| **442 Pa.45; 274 A.2d 193** | **Referred to** | **Para 79** |
| **1965 SCR 366** | **Referred to** | **Para 99** |
| **1997 (3) SCR 1131** | **Referred to** | **Para 101** |
| **2010 (6) SCR 857** | **Referred to** | **Para 102** |
| **1995 (5) Suppl. SCR 511** | **Referred to** | **Para 105** |
| **2008 (4) SCR 1** | **Referred to** | **Para 106** |
| **1958 SCR 828** | **Relied on** | **Para 120** |
| **(2009) 6 SCC 611** | **Relied on** | **Para 120** |
| **2006 (3) SCR 953** | **Followed** | **Para 123** |
| **(2002) 2 SCR 712** | **Relied on** | **Para 128** |
| **404 F Supp. 2d 571** | **Referred to** | **Para 131** |
| **1979 (3) SCR 532** | **Referred to** | **Para 131** |
| **(1986) 3 SCC 632** | **Referred to** | **Para 132** |
| **2002 (3) Suppl. SCR 353** | **Referred to** | **Para 133** |
| **2006 (6) Suppl. SCR 473** | **Referred to** | **Para 133** |
| **2008 AIR SCW 4274** | **Referred to** | **Para 144, 145** |

CIVIL ORIGINAL JURISDICTION : Transfer Case (Civil) No. 22 of 2001 etc.

Under Article 139 of the Constitution of India.

WITH

T.C. (C) No. 23 of 2001.

Writ Petitions (C) Nos. 140 of 2005 28, 152 of 2011, 250, 254, 261 of 2008.



Civil Appeal Nos. 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657-3658 and 3659-3662 of 2012.

P.S. Narasimha, (A.C.), A. Mariaputham, T.S. Doabia, Ashok Bhan, Nagendra Rao, V. Shekar, C.S. Rajan, Jaydeep Gupta, Ranjit Kumar, Arvind Varma, Raju Ramachandran, Dr. Manish Singhvi Manjit Singh and Anil Grover, AAG, S.W.A. Qadri Imtiaz Ahmed, Sunita Sharma, S.K. Mishra, B.V. Balramdas Satya Siddiqui, Shailendra Kr. Mishra, S.S. Rawat, Moh. Khairati, DS Mehra, Rekha Pandey, Ashwani Garg, Zaid Ali, Aruna Mathur, Yusf Khan, Kaustabh Sinha, S.K. Dwivedi, R.P. Mehrotra, Vandana Mishra, Chander Shekhar Ashri, Rachana Srivastava, Ranchi Daga, Kishor M. Paul, Abha R. Sharma, Ajai Bhalla, Nitin Bhardwaj, Hemal K. Sheth, A Venayagam Balan, Shiv Mangal Sharma, Ankit Shah, M.K. Shah, Abhinandini Sharma, Sitesh Narayan Singh, Manoj K. Mishra, V.K. Mishra, Shiv Pati B. Pandey, R. Santhan Krishnan, C.S.N. Mohan Rao, D.N. Ray, Lokesh K. Choudhary, Sumita Ray, Satish Chand Gupta, Sarbendra Kumar, Rameshwar Prasad Goyal, Haresh Raichura, Saroj Raichura, A.D.N. Rao, D. Mahesh Babu, P. Parmeswaran, Kamini Jaiswal, H. Wahi, Rojalin Pradhan, Jesal, Suveni Banerjee, V.N. Raghupathy, KH. Nobin Singh, Ashok Mathur, Anshul Narayan, Javed Mahmud Rao, Ashok Kumar Singh, T.G.N. Nair, K.N. Madhusoodanan, T.V. Ratnam, Prashant Bhushan, K. Ram Kumar, Gopal Singh, Manish Kumar, Chandan Kumar, Rituraj Biswas, Anil Shrivastav, Anis Suhrawardy, Sanjay R. Hegde, Ranjan Mukherjee, S. Bhowmick, S.C. Ghose, Deepika Ghatowar, Vartika Sahay, for (Corporate Law Group), J.P. Dhanda, Vikas Upadhyay, B.S. Banthia, V.D. Khanna, T.C. Sharma, V.G. Pragasam, S.J. Aristotle, Prabu Ramasubramanian, M.T. George, Kavita K.T., Raj Kumar Mehta, Revathy Raghavan, A. Subhashini, Radha Shyam Jena, Mukesh K. Giri, Dilip Kr. Sharma, Vishwajit Singh, Rajesh Srivastava, Anil K. Jha, Arun K. Sinha, G.S. Chatterjee, Raja Chatterjee, Sachin Das, Sunil

Kumar Jain, Janaranjan Das, C.D. Singh, Abhinanya Singh, Sunny Choudhary, P.I. Jose, Sneha Kalita, Siba Sanker Mishra, Ajay Kumar Jha, Pradeep Misra, Manish Kumar Saran, G. Prakash, Sameer Parekh, (for Parekh and Co.), Gopal Prasad, Naresh K. Sharma, P.V. Yogeswaran, S. Sukumaran, Anand Sukumar, Bhupesh Kumar Pathak, Meera Mathur, S.M. Jadhav, Ashok K. Srivastava, Kuldip Singh, Jayesh Gaurav, Soumitro G Choudhury, Abhijit Sengupta, B.P. Yadav, Anima Kujur, Sampa Sengupta, A. Ramakrishna, Irshad Ahmad, Sunil Fernandes, Krishanu Adhikary, Astha Sharma, K. Enatoli Sema, Edward Belho, Amit Kumar Singh, G.N. Reddy, C. Kannan, Ravi Shankar, R. Sathish, Tarjit Singh, Kamal Mohan Gupta, Sanjay Kharde, Asha G. Nair, Venkateswara Rao Anumolu, Prabhakar Parnam, AVS Raju, T.N. Singh, Rajeev Dubey, Kamlendra Mishra, Sunil Kr. Jain, Parmatma Singh, B. Sridhar, K. Ram Kumar, Atul Jha, Sandeep Jha, D.K. Sinha, Abhimanyu Singh, Noopur Singhal, T. Kanaka Durga, Gaichang Pou Gangmei, D. Siri Rao, Sridhar Potaraju, G. Ramarishna Prasad, B. Suyodhan, Bharat J. Joshi, Shibashish Misra, P.S. Sudheer, Rishi Maheswari, Shiv Ram Sharma, D, Bharthi Reddy, Jagjit Singh Chhabra for the appearing parties.

The Judgment of the Court was delivered by

**SWATANTER KUMAR, J.** 1. Leave granted in the all the above SLPs..

2. The Writ Petition being CWP No. 5740 of 2001 titled *Brij Mohan Lal v. Union of India and Ors.* was filed in the High Court of Punjab and Haryana at Chandigarh under Article 226/ 227 of the Constitution of India praying for issuance of a writ in the nature of quo warranto and prohibition, requiring the respondents to stop the scheme and policy of appointment of the retired District and Sessions Judges as *ad hoc* Judges of the Fast Track Courts (hereinafter referred to as the 'FTCs') in the State Judicial Services. It was also prayed in that petition that in order to maintain the standards of judicial system, the



scheme of appointing the retired Judges, as opposed to the regular appointment of Judges to the posts of District and Sessions Judges from the members of the Bar or from the lower judiciary, should be given up. The principal submission made in the writ petition was that the constitutional scheme contained under Articles 233 to 235 read with Articles 308 and 309 of the Constitution do not contemplate and permit appointment of retired judges as *ad hoc* District and Sessions Judges. Even otherwise, there is no constitutional provision which empowers the authorities concerned to make such appointments. The purpose of this petition obviously was to ensure that only the members of the Bar are appointed by direct recruitment to the post of *ad hoc* District and Sessions Judges.

3. A writ petition being Writ Petition No.8903 of 2001 titled Bar Council of *Andhra Pradesh v. Union of India* also came to be filed before the High Court of Andhra Pradesh at Hyderabad praying that the Court may issue appropriate order, writ or direction declaring that constitution of the FTCs and 32 presiding officers in the State of Andhra Pradesh and the G.O.M. Nos. 38 Law (LA & J. Courts.C) Department, dated 27th March, 2001 and G.O. Rt. No. 412, Law (LA & J. SC.F) Department dated 27th March, 2001 was unconstitutional and consequently should be set aside.

4. The Union of India filed two transfer petitions before this Court being Transfer Petition Nos.331-332 of 2001 for transfer of both the Brij Mohan Lal case and the Bar Council of *Andhra Pradesh* case (supra) from the High Courts of Punjab and Haryana and Andhra Pradesh respectively, to the Supreme Court. These petitions came to be allowed vide order dated 3rd August, 2001. By the same order, a Bench of this Court even permitted the intervention by other parties who might have filed similar petitions in different High Courts of the country.

5. Both these writ petitions upon transfer to this Court were numbered as Transferred Cases Nos. 22 and 23 of 2001, respectively.

6. On 6th May, 2002, a detailed order was passed by this Court in Transferred Case No.22 of 2001 and the directions issued therein read as under :

"1. The first preference for appointment of judges of the Fast Track Courts is to be given by ad-hoc promotions from amongst eligible judicial officers. While giving such promotion, the High Court shall follow the procedures in force in the matter of promotion to such posts in Superior/ Higher Judicial Services.

2. The second preference in appointments to Fast Track Courts shall be given to retired judges who have good service records with no adverse comments in their ACRs, so far as judicial acumen, reputation regarding honesty, integrity and character are concerned. Those who were not given the benefit of two years extension of the age of superannuation, shall not be considered for appointment. It should be ensured that they satisfy the conditions laid down in Article 233(2) and 309 of the Constitution. The concerned High Court shall take a decision with regard to the minimum-maximum age of eligibility to ensure that they are physically fit for the work in Fast Track Courts.

3. No Judicial Officer who was dismissed or removed or compulsorily retired or made to seek retirement shall be considered for appointment under the Scheme. Judicial Officers who have sought voluntary retirement after initiation of Departmental proceedings/inquiry shall not be considered for appointment.

4. The third preference shall be given to members of the Bar for direct appointment in these Courts. They should be preferably in the age group of 35-45 years, so that they could aspire to continue against the regular posts if the Fast Track Courts cease to function. The question of their continuance in service shall be reviewed periodically by the High Court based on their performance. They may be



absorbed in regular vacancies, if subsequent recruitment takes place and their performance in the Fast Track Courts is found satisfactory. For the initial selection, the High Court shall adopt such methods of selection as are normally followed for selection of members of the Bar as direct recruits to the Superior/Higher Judicial Services.

5. Overall preference for appointment in Fast Track Courts shall be given to eligible officers who are on the verge of retirement subject to they being physically fit.

6. The recommendation for selection shall be made by a Committee of at least three Judges of the High Court, constituted by the Chief Justice of the concerned High Court in this regard. The final decision in the matter shall be taken by the Full Court of the High Court.

7. After ad-hoc promotion of judicial officers to the Fast Track Courts, the consequential vacancies shall be filled up immediately by organizing a special recruitment drive. Steps should be taken in advance to initiate process for selection to fill up these vacancies much before the judicial officers are promoted to the Fast Track Courts, so that vacancies may not be generated at the lower levels of the subordinate judiciary. The High Court and the State Government concerned shall take prompt steps to fill up the consequential as well as existing vacancies in the subordinate Courts on priority basis. Concerned State Government shall take necessary directions within a month from the receipt of the recommendations made by the High Court.

8. Priority shall be given by the Fast Track Courts for disposal of those Sessions cases which are pending for the longest period of time, and/or those involving under-trials. Similar shall be the approach for Civil cases i.e. old cases shall be given priority.

9. While the staff of a regular Court of Additional District and Sessions Judge includes a Sessions Clerk and an office Peon, work in Fast Track Courts is reported to be adversely affected due to shortage of staff as compared to regular Courts performing same or similar functions. When single Orderly or Clerk proceeds on leave, work in Fast Track Courts gets held up. The staff earmarked for each such Court are a Peshkar/ Superintendent, a Stenographer and an Orderly. If the staff is inadequate, the High Court and the State Government shall take appropriate decision to appoint additional staff who can be accommodated within the savings out of the existing allocations by the Central Government.

10. Provisions for the appointment of Public Prosecutor and Process Server have not been made under the Fast Track Courts Scheme. A Public Prosecutor is necessary for effective functioning of the Fast Track Courts. Therefore, a Public Prosecutor may be earmarked for each such Court and the expenses for the same shall be borne out of the allocation under the head 'Fast Track Courts'. Process service shall be done through the existing mechanism.

11. A State Level Empowered Committee headed by the Chief Secretary of the State shall monitor the setting up of earmarked number of Fast Track Courts and smooth functioning of such Courts in each State, as per the guidelines already issued by the Government of India.

12. The State Governments shall utilize the funds allocated under the Fast Track Courts Scheme promptly and will not withhold any such funds or divert them to other uses. They shall send the utilization certificates from time to time to the Central Government, who shall ensure immediate release of funds to the State Governments on receipt of required utilization certificates.

13. At least one Administrative Judge shall be nominated



in each High Court to monitor the disposal of cases by Fast Track Courts and to resolve the difficulties and shortcomings, if any, with the administrative support and cooperation of the concerned State Government. State Government shall ensure requisite cooperation to the Administrative Judge.

14. No right will be conferred on Judicial Officers in service for claiming any regular promotion on the basis of his/her appointment on ad-hoc basis under the Scheme. The service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre. In case any Judicial Officer is promoted to higher grade in the parent cadre during his tenure in Fast Track Courts, the service rendered in Fast Track Courts will be deemed to be service in such higher grade.

15. The retired Judicial Officers who are appointed under the Scheme shall be entitled to pay and allowances equivalent to the pay and allowance they were drawing at the time of their retirement, minus total amount of pension drawn/payable as per rules.

16. Persons appointed under the Scheme shall be governed, for the purpose of leave, reimbursement of medical expenses, TA/DA and conduct rules and such other service benefits, by the rules and regulations which are applicable to the members of the Judicial Services of the State of equivalent status.

17. The concerned High Court shall periodically review the functioning of the Fast Track Courts and in case of any deficiencies and/or shortcoming, take immediate remedial measures, taking into account views of the Administrative Judge nominated.

18. The High Court and the State Government shall ensure that there exists no vacancy so far as the Fast Track Courts

are concerned, and necessary steps in that regard shall be taken within three months from today. In other words, steps should be taken to set up all the Fast Track Courts within the stipulated time."

7. As is evident from the above directions, the appointments to FTCs were to be made on *ad hoc* basis. Primarily, there were three sources of recruitment, firstly by promotion from amongst the eligible judicial officers, secondly by appointment of retired judges with good service records and lastly by direct recruitment from amongst the members of the Bar between the age group of 35 to 45 years. In the last category, the selection was to be made in the manner similar to that of direct recruitment to the Higher Judicial Services. It was also considered desirable that the eligible officers on the verge of retirement, be appointed with overall preference, subject to their physical fitness and as recommended by a Committee of at least three judges, constituted by the Chief Justice of the concerned High Court and as approved by the Full Court of that High Court. This Court had foreseen the possibility of the closure of the Fast Track Courts Scheme (FTC Scheme). It directed that the service in the FTCs will be deemed as service of promoted Judicial Officers rendered in the parent cadre. However, no right would accrue to such recruits promoted/posted on *ad hoc* basis from the lower judiciary for regular promotion on the basis of such appointment. For direct recruits, continuation in service will be dependant on review by the High Court and there could be possibility of absorption in the regular vacancy if their performance was found to be satisfactory. Besides these two aspects, the directions also dealt with the management of FTCs, timely and appropriate utilization of funds and monitoring of smooth functioning of the FTCs by the State Level Empowered Committee headed by the Chief Secretary of the State; the disposal of cases was to be monitored by one Administrative Judge, nominated by the High Court. It was expected that each FTC will at least have one Public Prosecutor earmarked. This was the sum and substance of the directions issued by this Court



while disposing of both these transferred cases. However, this Court still directed regular filing of quarterly status reports before this Court and held that the matter would remain alive to that extent.

8. The quarterly status reports have been filed from time to time about the functioning of the FTCs in the entire country. In the meanwhile, some writ petitions came to be filed directly before this Court under Article 32 of the Constitution and some special leave petitions were also filed against various judgments of different High Courts. Thus, it will be useful for us to at least take a note of all the cases which are pending before this Court.

9. As opposed to the prayer made in the cases of *Brij Mohan Lal* (supra) and *Bar Council of Andhra Pradesh* (supra), two separate writ petitions were filed in this Court being Writ Petition (Civil) No. 152 of 2011, *All India Judges' Association Through V.N. Shah, Working President v. Union of India & Ors.* and Writ Petition (Civil) No. 140 of 2005, *All Media Journalists Association v. Union of India* with the prayer that the Court should issue appropriate writ or direction to the respondents to extend the FTC Scheme for another five years or even till 31.03.2015 and to release the necessary funds for that purpose.

10. It was also prayed in the latter petition that five years' time to utilize the funds should be considered from the date of actual starting of the first FTC and also that a Committee should be appointed to make suggestions with respect to further strengthening the FTC Scheme to get better results.

11. In both these writ petitions, the prayer was similar that the FTC Scheme should be continued for a further period of five years, from 2005 in one and from 2011 in the other.

12. It is the case of the petitioners in these writ petitions that the FTC Scheme has proven a success in Tamil Nadu and

even in other States and, therefore, the extension of the FTC Scheme is necessary. Another issue that has been raised in these petitions is that the persons who were appointed as direct recruits from the Bar were, at the relevant time, in the age group of 35-45 years and while serving in the FTCs have become overage for re-employment in permanent posts. Also, as per the Bar Council of India Rules (Rule 7), they would now be ineligible to practice in any Court lower than the High Court. Therefore, this would seriously jeopardize the interests of the persons appointed as *ad hoc* judges of the FTCs and it would be an additional and appropriate reason for further continuing the FTC Scheme.

13. On somewhat similar lines is another writ petition filed in this Court, being Writ Petition (Civil) No. 28 of 2011 titled *Roshan Lal Ahuja v. Union of India & Ors.,* wherein the petitioner has raised a challenge to a part of the letter dated 11th March, 2010. Vide this letter, though the extension of the petitioner as FTC Judge was recommended by the Chief Justice of the High Court of Punjab and Haryana, yet it was said that if the recommendation to continue the FTC Scheme is accepted, the services of the officer would be liable to be terminated only on 7th March, 2011 and if the scheme was discontinued, he would be terminated on 31st March, 2010 itself.

14. In that very Writ Petition, challenge was also raised to the decision of the Union of India to discontinue the FTC Scheme beyond 31st March, 2011. This decision was said to be arbitrary, discriminatory and violative of the fundamental rights under Article 21 of the Constitution.

15. The appointment of the judicial officers in that case had been made under Rules 8 and 9 of the Punjab Superior Judicial Service Rules, 1963 and selections were made under Rule 5 of the Haryana Additional District and Sessions Judges *Ad hoc* Services Rules, 2001. The petitioners, therefore,



claimed a right to the post and prayed that the FTC Scheme be continued.

16. There are a bunch of Special Leave Petitions which are directed against the judgments of the Gujarat High Court. All the petitioners before the High Court were direct recruits from the Bar and were appointed to the posts of *ad hoc* Additional District Judges under the FTC Scheme on different dates, all between 2002 to 2004. The term of some of them had initially been extended but later their services were terminated. For example, vide order dated 25th September, 2009 their services were extended but vide order dated 14th December, 2009, services of the same officers stood terminated. For either of these orders, one hardly finds any reason recorded on the file.

17. As per the facts noticed by the High Court in the impugned judgment, services of 53 FTC Judges came to be terminated. By orders dated 12th October, 2006 services of six Judicial Officers were terminated on the ground of 'having not been found suitable', by orders dated 8th February, 2007, services of seven other officers were terminated on the same ground, by orders dated 28th April, 2008, the services of 2 FTC Judges were discontinued again on the same ground. Still vide order dated 25th September, 2009, the services of 12 directly recruited FTC *ad hoc* Additional District Judges were terminated by the State with effect from 30th September, 2009, on the recommendation of the High Court. Vide order dated 8th October, 2009, services of another 11 Judicial Officers working under the FTC Scheme were terminated by the State on the recommendation of the High Court, w.e.f 15th October, 2009 and, lastly, vide order dated 14th December, 2009, services of 13 officers were terminated on the recommendation of the High Court on the ground of 'having not been found suitable'. By these orders, services of only the direct recruits were terminated. Out of the 66 persons appointed as direct recruits, some persons had either left or died and only these 53 remained in service. The High Court, vide its judgment

dated 11th August, 2010 dismissed the writ petition as far as 18 officers were concerned, returning a finding that in the face of the service record of these officers, the recommendation of the High Court and the consequent order issued by the State Government cannot be faulted with. With regard to the six Judicial Officers whose services were terminated vide order dated 12th October, 2006, the High Court came to the conclusion that they had no right to the post and those petitioners could not derive any benefit from the provisions of Article 311(2) of the Constitution of India and declined to interfere with the order of termination. Thus, only with respect to 12 officers did the High Court remand the matter to the administrative side of the High Court for reconsideration with reference to the service records of these officers. The High Court also noticed that certain complaints which had been received against these officers had been dropped, after conducting fact finding enquiry or because the allegations were found to be vague. For these reasons, the High Court concluded that the decision on the administrative side of the High Court was not based on record and was prima facie illogical and, therefore, referred the matter back to the High Court. Rest of the writ petitions also came to be dismissed by the High Court.

18. In furtherance to the judgment of the High Court, the Full Court of the Gujarat High Court reconsidered the matter on the administrative side. It found that only the cases of six petitioners deserved favourable reconsideration, while the remaining six were without merit and its earlier decision, in recommending termination of their services needed to be reiterated. The six officers who were dismissed being dissatisfied with the order of the High Court as communicated to them by the Principal District Judge vide order dated 5th March, 2011, again approached the Gujarat High Court on its judicial side, praying for quashing the said order and continuation of their services under the FTC Scheme. When these writ petitions came up before the High Court for hearing, the argument was that there was no adverse remarks against



these officers and, therefore, they were entitled to continue in employment on the basis of the decision of this Court in the case of *Smt. Madhumita Das & Ors. v. State of Orissa & Ors.* [2008 AIR SCW 4274], wherein this Court had held that yardstick for assessing the performance of direct recruit FTC Judges on the one hand and the members of the regular judicial services on the other, could not be different as they discharge similar functions.

19. The High Court, while declining the relief prayed for, concluded as under :

> "10. Having heard the learned counsel for the parties, as we find that the central Government Scheme for Fast Track Court has come to an end from 1.4.2011 and the petitioners cannot be accommodated against the regular post in the regular cadre of the District Judges, including the 100 Courts of Additional District Judges created for one year in the regular cadre, which are to be filled up on the basis of a separate rules, we are of the view that no relief can be granted in favour of the petitioners, the scheme of Fast Track Court having abolished.
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> 11. So far as their appointment in the regular service post of the Additional District Judge including 100 posts of Additional District Judge is concerned, we may only mention that as per the earlier judgment rendered in the case of the petitioners dated 11.8.2010 in SCA No.148 of 2010 and analogous cases, it having observed that the petitioners cannot be absorbed in the regular service of the State and in absence of any provision made in the Gujarat Judicial Services Rules for appointment by way of absorption from amongst the Fast Track Court Judge, as they cannot be absorbed, we hold that the petitioners cannot even claim straightway absorption in the regular service of Gujarat Judicial Services including the temporary posts of Additional District Judges created by resolution dated 30.3.2011. However, as per the decision

of the Supreme Court in the case of *Brij Mohanlal* (Supra) (AIR 2002 SC 2096), the petitioners may apply for appointment by selection, if normal rule is followed for selection of members from Bar as direct recruits to the Superior/Higher Judicial services, subject to their eligibility."

20. Thus, the petitioners whose writ petitions were originally dismissed by the Gujarat High Court vide its judgment dated 11th August, 2010 and those whose petitions were subsequently dismissed vide judgment dated 21st June, 2011, have challenged the same before this Court in the above-mentioned Special Leave Petitions.

21. Now, we may notice another group of cases where the prayer made is diametrically opposite to that made in the case of *Brij Mohan Lal* (supra). The petitioners in Writ Petition (C) No.261 of 2008 titled *Sovan Kumar Dash & Ors. v. State of Orissa & Anr.* have approached this Court directly under Article 32 of the Constitution with a prayer that they should be absorbed against vacant posts in the regular cadre as per the directions contained in *Brij Mohan Lal* Case (supra). They further made a prayer that the notification dated 11th April, 2008 issued by the State of Orissa calling for applications from eligible candidates for direct recruitment from the Bar to the cadre of the District Judge be quashed. These petitioners have taken the plea that they have already crossed the eligibility condition of age. Similarly, another set of petitioners have also filed Writ Petition (C) No.250 of 2008 titled *Madhumita Das & Ors v. State of Orissa & Ors.* The petitioners therein were working as FTC Judges. While invoking the writ jurisdiction of this Court under Article 32 of the Constitution, they prayed that they be absorbed against the regular vacancies of the State cadre of District Judges. They further prayed that the abovementioned advertisement dated 11th April, 2008, inviting applications for all the posts of District Judges including the posts against which the petitioners were working, be quashed. It is the contention of the petitioners in this petition that they



have already attained an age more than the higher age limit prescribed while working as *ad hoc* Judges of the FTCs. Also, while judging the performance of the FTC Judges, the condition of completion of eight sessions trials per month cannot be imposed as it has not so been imposed against the judges who are forming the regular cadre of the State services.

22. In this petition, no final order has been passed by this Court. However, at the interim stage, when the Writ Petition came up for hearing on 11th June, 2008, this Court passed the following order :

"Issue notice.

Challenge in these writ petitions is to the Advertisement No.1 of 2008 issued by the Orissa High Court. The petitioners have been selected to function as *ad hoc* Additional District Judges in terms of the judgment of this Court in *Brij Mohan Lal vs. Union of India and Ors.* [(2002) 5 SCC 1]. It is their grievance that 16 posts advertised also include the 9 posts presently held by the petitioners in the two writ petitions. It is pointed out that the eligibility criterion fixed in the advertisement rules out the present petitioners. Firstly, some of them are above the maximum age of 45 years and secondly, being Judicial Officers, they cannot apply for posts advertised for members of the Bar. It is also pointed out that in terms of what has been stated by this Court in *Brij Mohan's* case (supra), at paragraph 10, direction No.4, they are to be continued (in the *ad hoc* posts) belonging to Fast Track Courts, and, thereafter, in respect of regular posts available, after the Fast Track Courts cease to function. Their cases are to be considered subject to their performance being found satisfactory. Their stand is that they have been continued from time to time. Obviously, their performance was found to be satisfactory. Presently, we are not concerned with that question which may have relevance only at the time of considering their absorption in respect of the regular

vacancies. It is submitted by Mr. Uday U. Lalit, learned senior counsel that while assessing the performance, there cannot be different yardsticks, i.e. same parameters have to be adopted while judging the performance of the petitioners viz-a-viz those which are recruited from another source, i.e. from amongst the Judicial Officers. We find substance in this plea also. Therefore, we direct that the process of selection pursuant to the Advertisement No.1 of 2008 may continue but that shall only be in respect of 7 posts, and not in respect of 9 posts presently held by the petitioners. It is pointed out that the High Court, after the advertisement has been issued has issued certain letters regarding the non-disposal of adequate number of cases. The petitioners have given reasons as to why there could not be adequate disposal of the cases. Needless to say, the High Court shall consider the stand taken in the responses while judging their suitability for appointment on regular basis. The petitioners shall continue to hold the posts until further orders, for which necessary orders shall be passed by the High Court. It is made clear that as and when regular vacancies arise, cases of the petitioners shall be duly considered. There shall not be any need for them to appear in any examination meant for recruitment to the cadre of District Judge."

23. As is evident from the above order, the cases of the petitioners were directed to be considered as and when the regular vacancies arose and they did not need to appear in any examination meant for recruitment to that post. This order of the Court has been relied upon by all the petitioners in different matters before this Court who are or were working as FTC Judges and are praying for their regularization in the service. This was an interim order subject to the final order that the Court would pass while disposing of the writ petition finally.

24. Writ Petition (C) No. 254 of 2008 titled *Prakash Kumar Rath v. State of Orissa* is again a petition invoking the writ jurisdiction of this Court under Article 32 of the Constitution,



wherein the petitioner's case is that he had been selected as per the Judicial Services Rules of the State but had later been appointed as *ad hoc* Additional District and Sessions Judge to the FTC. Having been selected in the regular cadre and as per the regular process, his services could not be dispensed with and the communication dated 4th April, 2008 and the advertisement dated 11th April, 2008 seeking to fill up vacancies in the regular cadre, are liable to be quashed and the petitioner is entitled to be absorbed regularly in the State service cadre.

25. Writ Petition (C) No. 203 of 2010 titled *M.K. Sharma & Ors. v. Rajasthan High Court & Anr.* involves the cases where the members of the regular service cadre, i.e., Civil Judge, Senior Division, had been promoted as *ad hoc* FTC Judges and had worked for more than five years in that post. The State of Rajasthan issued a Notification dated 15th April, 2010 inviting applications for promotion to 22 posts in the cadre of District Judges, by limited competitive examination, in accordance with the provisions of the Rajasthan Judicial Services Rules, 2010. The respondents, vide this notification, required the petitioners also to appear in the limited competitive examination for promotion to the cadre. According to the petitioners, they had already been promoted in accordance with the 2010 Rules as Additional District Judges and, therefore, they are not liable to take the limited competitive examination. It is the case of the petitioners that they be treated as regular members of the State Judicial Service and be given equal treatment with other Judicial Officers as in the case of *Smt. Madhumita Das* (supra).

26. Civil Appeal No. 1276 of 2005 titled *Smt. G.V.N. Bharatha Laxmi & Ors. v. State of Andhra Pradesh & Ors.* is an application questioning the correctness of the judgment of the High Court of Andhra Pradesh dated 13th July, 2004, passed in Writ Petition (C) No.11273 of 2004, wherein the High Court declined to grant the prayer of the petitioners, who were appointed as the Presiding Officers in the FTC under the

Andhra Pradesh State Higher Judicial Service Special Rules for *Ad hoc* Appointments, 2001, that they be granted absorption in the regular cadre of District and Sessions Judges created in the State of Andhra Pradesh. The plea of the petitioners was that they had been appointed under the Rules and have gained sufficient experience as *ad hoc* Judges under the FTC Scheme and are liable to be regularized in that scale.

27. It is appropriate for us to refer to the Rules before we venture to discuss the merits of various cases. It is undisputed that there are Rules in place in all the States, with which we are concerned, for appointment to the Superior Judicial Services, as for example, the Punjab Superior Judicial Services Rules, 2007 in the State of Punjab. Besides these Rules, some of the States like, Andhra Pradesh, Gujarat, Orissa and Jharkhand had enacted separate sets of Rules for appointment as *ad hoc* Judges under the FTC Scheme or otherwise. The State of Andhra Pradesh framed the Rules which were called as The Andhra Pradesh State Higher Judicial Service Special Rules for Adhoc Appointments, 2011 (Andhra Rules). Orissa enacted Orissa Judicial Service (Special Scheme) Rules, 2001 (Orissa Rules), Jharkhand enacted Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules 2001 (Jharkhand Rules) and Gujarat framed Gujarat State Judicial Service Rules, 2005 (Gujarat Rules) which were applicable only to the officers in service.

28. Appointments to the post of *ad hoc* Judges under the FTC Scheme have been made by different States in different manners either with the aid of the regular Rules for appointment to the Higher Judicial Services/Superior Judicial Services without following the due and complete process under those Rules or under the temporary rules enacted by the respective States for this purpose. Some of the States have not taken recourse to any of these Rules, but have made appointments by issuing general orders.

29. It will be useful to refer to the Rules solely enacted for



this purpose and relating to temporary appointments. In the case of Orissa, Rule 3 of the Orissa Rules provides that notwithstanding anything contained in the Orissa Superior Judicial Service Rules, 1963 and Orissa Judicial Service Rules, 1994, the appointment of Additional District Judges on *ad hoc* and purely temporary basis for implementation of the FTC Scheme will be made under these Rules. Rule 4 contemplates that the appointment made under these Rules shall be purely on *ad hoc* and temporary basis and was liable to be terminated at any time without any prior notice. This was amended by the Orissa Judicial Service (Special Scheme) Amendment Rules, 2003 to permit the selection of members from the Bar by way of direct recruitment. The amendments of 2003 were necessitated by virtue of the directions issued by this Court on 6th May, 2002 in the case of *Brij Mohan Lal* (supra). According to all these Rules, the retired District Judges, retired Additional District Judges, in-service Chief Judicial Magistrates having three years of service remaining and the members from the Bar who were eligible to be considered for appointment as FTC Judges by direct recruitment or judicial officers eligible for promotion, as the case may be may be, appointed to the FTCs. All these Rules provided that the appointment shall be purely on *ad hoc* and temporary basis. Rule 7 clearly stated that in-service judicial officers shall not claim regular promotion in the regular cadre on the basis of his/her appointment made under the FTC Scheme. These Rules also provided for disqualification, pay and other allowances payable to the FTC Judges.

30. These Rules clearly indicate that the appointment to the post of FTC Judges under the FTC Scheme was purely *ad hoc* and temporary, without giving any right to the persons so appointed.

31. Similarly, the Legal Department of the State of Gujarat also issued a notification bringing into force the Rules for *ad hoc* and purely urgent temporary appointment of Judicial

Officers and the members of staff in the State of Gujarat for implementing the FTC Scheme. The committee for selection of such officers was, again, a committee of Judges constituted by the Chief Justice of the concerned High Court. The nature of the appointment and eligibility criteria were provided for under this Notification as follows:

"4. The appointment made under these Rules shall be purely on *ad hoc* and urgent temporary basis and such appointments shall be liable to be terminated at any time without any notice.

5. (i) The appointments on *ad hoc* basis for the posts of District and Sessions Judges as the Presiding Officer of the Fast Track Courts shall be made by the Governor on recommendation of the High Court either by promotion or transfer or by recruitment from amongst-

(a) Retired District & Sessions or retired Assistant Judges/retired City Civil and Sessions Judges or

(b) Judicial Officers eligible to be appointed as Assistant Judges, or

(c) Advocates eligible to be appointed as District and Sessions Judges,

(ii) District and Sessions udges or City Civil and Sessions judges or Assistant Judges, who retired on attaining the age of superannuation or who took voluntary retirement in normal course but have not attained the age of 63 years at the time of appointment shall be eligible to be considered for such *ad hoc* appointment subject to fitness and suitability.

6. No right is conferred on any Judicial officer in service for claiming any regular promotion on the basis of his appointment on *ad hoc* basis under the Scheme and these Rules."



32. The State of Andhra Pradesh, in exercise of the powers conferred under Article 233 and proviso to Article 309 of the Constitution, framed Rules which were called the Andhra Pradesh State Higher Judicial Service Special Rules for *Ad hoc* Appointments, 2001 (Andhra Rules). In terms of Rule 2, notwithstanding anything contained in the Special Rules of Andhra Pradesh State Higher Judicial Services, 1958, the appointment of District and Sessions Judges on *ad hoc* basis shall be made by direct recruitment from the members of the Bar, by transfer from amongst Senior Civil Judges in the State Service or by re-employment of retired District Judges, provided that 33$^{1}$/3 per cent of the total number of *ad hoc* posts shall be filled by direct recruitment. The rule of reservation of posts was to apply to direct recruitment. The qualification prescribed for appointment of persons from the Bar to category II post under Rule 3 of the Special Rules for Andhra Pradesh State Higher Judicial Services, 1958 was to apply mutatis mutandis to the direct recruitment from the Bar under the Andhra Rules. Nevertheless, in terms of Rule 7(1)(b), a person appointed under Rule 2(i) shall not be regarded as a member of the permanent cadre covered under Rule 2 of the Special Rules for Andhra Pradesh State Higher Judicial Service, 1958 and shall not be entitled to any preferential right to any other appointment to this service or any other service and their service shall not be treated as regular or permanent under the State Government. The Andhra Pradesh Civil Services (CC&A) Rules, 1991 were applicable to all the services under these Rules.

33. In the case of State of Rajasthan, this Court is primarily concerned with the officers who were members of the Judicial Services of the State and who had been appointed as Additional District Judges in terms of Rule 22 of the Rajasthan

Higher Judicial Services Rules, 1969 (Rajasthan Rules). These Rules provided for temporary or officiating appointments. Relying upon the Rajasthan Rules, the petitioners claim regularization without taking the written examination.

34. We may also notice the challenge to the various Rules by the petitioners from different States. As is evident, the petitioners are praying for absorption and regularization of their services as members of the regular service cadre of that State with reference to the Rules of the respective States. However, there is also a challenge raised to the constitutional validity of Rules 4 and 6 of the Gujarat Rules, under which the candidates were appointed as *ad hoc* Judges for the FTC Scheme. Rule 4 provided for the pure *ad hoc* and urgent temporary nature of these posts and specified that their services were terminable without any notice while Rule 6 put an embargo upon the petitioners from claiming any regularization on the basis of such *ad hoc* service. The High Court had repelled the challenge to both these provisions and, in fact, had come to a positive conclusion that the petitioners had no right to these posts.

35. We may now summarise the contentions which have been raised before us in this bunch of cases by the petitioners, States and the Union of India. Wherever the services of the petitioners have been terminated, they have argued that such termination is arbitrary and without any basis. The contention by the petitioners from the State of Gujarat is that, in fact, the termination is stigmatic inasmuch as their services have been dispensed with on the ground of their 'having not been found suitable'. Such discontinuation in the service, therefore, amounts to termination which itself is punitive in nature. It is also the contention of these petitioners that there was nothing adverse in their record which could justify the taking of such decision. Besides acting in such an arbitrary manner, the State Government and the High Court have added insult to the injury, as the Bar Council of India Rules debar the petitioners from practicing in the District Courts and Courts equivalent or lower



to the FTCs where they had been practicing prior to their appointment as *ad hoc* Judges under the FTC Scheme. Now, except in the High Courts and the Supreme Court, all doors of practicing law are closed for them. To demonstrate their plea of arbitrariness in termination, they argued that the chart of confidential report shown at page 31 to 32 of SLP (C) No.26148 of 2011 against the name of P.D. Gupta has been marked as 'good' under the column 'knowledge of law and procedure' but then a note has been made that she should improve. Similarly, the remarks recorded against others also do not tally with what has been stated in the main chart. There appear to be some mistakes, typographical or otherwise, in relation to entries in the Confidential Reports and even the grades of the persons to whom they refer.

36. In other cases, the contention is that the advocates had been appointed by following the due procedure prescribed under the Rules/Notification and, therefore, keeping in view the judgments of this Court in the cases of *Brij Mohan and Madhumita Das* (supra), the petitioners are entitled to continue in service and to be regularized in the service. In fact, their rights under Articles 14 and 16 of the Constitution have been violated. It is also contended that as a one-time exercise, the regularization can take place, as was directed by this Court in the case of *Secretary, State of Karnataka & Ors. v. Uma Devi* (3) & Ors. [(2006) 4 SCC 1].

37. In addition to these contentions raised on the factual matrix of the case, challenge to the constitutional validity of Rules 4 and 6 of the Gujarat Rules was made by the appointees whose cases, even upon reconsideration by the Full Court of the Gujarat High Court, were not favourably considered.

38. The State of Gujarat and other States have taken the stand that they are not prepared to take upon themselves the financial burden of continuation of the FTC Scheme, particularly when the Central Government has decided not to extend the Scheme any further beyond 31st March, 2011. Though they

conceded that provision of fair and expeditious trial is the obligation of the State, which nevertheless is subject to financial limitations of the State. On behalf of the State of Gujarat, the main contender, it has been argued that the petitioners have no right to the post and in terms of the Gujarat Rules also, no right is vested in the petitioners. Discontinuation of services of these petitioners had not caused any stigma upon the petitioners as they have not been held guilty of any misconduct.

39. The stand of the Union of India is that it had initially created the FTCs for a limited period of five years. However, subsequently with the intervention of this Court, it was extended by another five years and finally, it stood extended upto March, 2011. Till that date, the Central Government has discharged all its liabilities relating to infrastructure and finances. In fact, the Central Government has principally taken these financial liabilities on its shoulders while the appointments and all the other matters fall in the domain of the State Governments. The 13th Finance Commission has provided Rs.5,000 crores under different heads relating to the Judiciary. This amount is inclusive of allocations for Gram Nyayalayas and Evening Courts. Under the 11th Finance Commission, 1734 FTCs were created and there has been a successful reduction in total number of cases. Nevertheless, because of more legislations, there has been an increase in pendency. The Finance Commission and its functions are duly provided under Articles 264, 280 and 281 of the Constitution. The sharing of expenditure at the end of every five years is to be declared by the Finance Commission.

40. The fact that this financial aid and the responsibility of the Central Government to run the FTC Scheme would eventually come to an end was a fact known to all the State Governments and the High Courts right from the inception of the FTC Scheme and as such, the action of the Central Government in not continuing the FTC Scheme cannot be faulted with. The Cabinet Note was prepared on 7th July, 2010



in relation to continuation of the Scheme of Central assistance to the States for FTCs for another one year and the same was approved vide letter dated 9th August, 2010 and the said letter read as under :

> "I am directed to say that the matter of continuation of central assistance to the State Governments for the operation of the Fast Track Courts was under consideration of Government. In this regard, attention is invited to Shri S.C. Srivastava, Joint Secretary's D.O. letter No.15017/5/2008-JUS(M) dated 31.3.2010 to Law Secretaries of all the State Governments.
>
> 2. Government has now decided to continue providing central assistance for funding the Fast Track Courts all over the country for one more year beyond 31.3.2010 i.e. up to 31.3.2011 at the rate of Rs.4.80 lakh per court for meeting the recurring expenditure on these courts. Any expenditure in excess of this amount will have to be borne by the State Government out of their own resources.
>
> 3. It has also been decided that there will be no central funding for Fast Track Courts beyond 31.3.2011.
>
> 4. The central assistance for Fast Track Courts for 2010-11 will be made available to a maximum of 1562 Fast Track Courts that were reported operational on 31.3.2005 when the scheme of central assistance was continued beyond 31.3.2005 for a further period of five years. Accordingly, the maximum number of Fast Track Courts for which central assistance will be provided to Arunachal Pradesh will be 3."

41. Having taken this decision, the Union of India does not wish to continue the FTC Scheme beyond the specified period. The two important aspects which emerge from the submissions of the parties, with particular reference to the Union of India, are, firstly, that the Ministry of Law and Justice, Union of India declared a Vision Statement on 24th October, 2009. In that

statement, it was declared publicly that the Ministry of Law and Justice shall ensure that 15,000 judge positions are established within two years to dispose of the cases expeditiously and to provide speedy trial. Secondly, one aspect which has been heavily relied upon by the petitioners is that even in the Chief Justices and Chief Ministers Conference held on August 16, 2009 at New Delhi, the work of expeditious disposal of cases by the FTCs under the FTC Scheme was highly appreciated and it was assured that the said Scheme shall continue till 2015 and neither any of the States nor the Centre raised the plea of financial limitations at that time. Once this was the definite view of such a high level meeting, it was expected of the Central Government as well as the State Governments, to follow the said directive. But, on the contrary, they have taken a decision to discontinue the Scheme with effect from 31th March, 2011. Some of the States have urged before this Court that they can continue with the FTC Scheme only if the Central Government continues to provide 100 per cent funding for the same. In response, the Union of India has also stated that it has no objection, if, within their own means, each State Government carries on with the FTCs already established in the respective States. Consequently, there is a state of impasse, which has emerged from these opposing stands taken by the State Governments, on the one hand and the Central Government, on the other.

42. However, the State and the Centre, both, have taken the stand that it is not permissible for this Court to issue a mandamus directing either the State Governments or the Central Government to either continue the FTC Scheme or to provide the funds for the FTC Scheme. Articles 112, 264, 280 and 281 of the Constitution detail the budgeting provisions and presentation of annual financial statements before the Parliament. Thus, it will not be appropriate for this Court to step into the functions of the Executive, as specific powers under the Constitution are vested with the latter in relation to finances of the States.



43. Learned *Amicus Curiae,* Mr. P.S. Narsimha, Senior Advocate contended with some vehemence that there are various decisions of this Court to support the proposition that the writ of *mandamus* could be issued by this Court in such circumstances. However, the formulation of such directions would be a point of fine construction by the Court. A large number of cases are pending, so this Court would have to take judicial notice of such heavy pendency and it will be well within its jurisdiction to pass orders and directions with respect to reduction of pendency. What should be the strength of judges in the country is again a matter where the Courts may not directly comment as there may be many policy considerations that would influence the Government's decision. The Court can express a hope that the Government of India will periodically review the strength of Judges in each State and appoint as many Judges as required for the purpose of disposing of the arrears of pending cases. However, the Court, while exercising restraint, with minimum encroachment on the Executive field and within the contours of the reasonable extent of jurisdiction even in the given circumstances, may issue *mandamus* directing the States to incur expenditure in order to maintain the independence of judiciary and to ensure fair trial. It is also contended by the learned amicus that even under the American justice delivery system, the Courts have gone to the extent of passing such directions, for example, in the case of *Commonwealth ex rel. Carroll v. Tate et al.* (442 Pa.45; 274 A.2d 193) where Judge Montgomery issued a mandamus order against the defendants therein to appropriate and pay an amount of US $2,458,000 and made final his injunctive order dated 27th July, 1970 against adjustment. The Court took the above view in exercise of its inherent powers, it being a basic precept of the Constitutional form of Republic Government that the Judiciary is an independent and co-equal branch of Government along with the Executive and Legislative Branches. On the strength of this American case and various judgments of this Court in the cases of *All India Judges' Association v. Union of India & Ors.* [(1992) 1 SCC 119]; *All India Judges'*

*Association v. Union of India & Ors.* [(1993) 4 SCC 288]; *Record Association v. Union of India & Ors.* [(1993) 4 SCC 441]; and *All India Judges' Association v. Union of India & Ors.* [(2002) 4 SCC 247], the contention is that this Court should direct continuation of the FTC Scheme as the expenses have already been incurred and 1562 Courts are functional.

44. The First National Judicial Pay Commission, in the year 1999, noticed the statistics of pending cases in the country. It mentioned that nearly 1.30 crore cases are disposed of while 1.45 crore fresh cases are filed every year. Thus, the backlog of cases increases every year. To put it simply, the existing backlog was stated to be two crores, increased by nearly 12 to 15 lakh cases per year. This Commission took note of the fact that there were nearly 340 Central legislations which created offences and matters allied thereto, triable by the Court of Magistrate. These legislations were also increasing with the passage of time. It was felt desirable that, at the minimum, double the present number of judicial officers were required to handle the problem of pendency of cases in the country.

45. The 120th Report of the Law Commission, 1987 brought out another very significant drawback in the justice administration system of the country. In terms of this report, the proportion of judicial officers in India was 10.5 officers per million population, in the year 1987. This percentage, in comparison to other developed countries in the world, was probably the lowest. Australia had 41.6 judicial officers per million population, Canada 75.2, England 50.9 and the United States of America 107 per million population.

46. The National Crime Record Bureau, Ministry of Home Affairs, also published a Report on Crime in India. According to this report, approximately 49 lakh criminal cases under the IPC and 36 lakh criminal cases under the special or local laws were pending at the end of the year 2000. Realizing the gravity of the problem, the then Minister of Law and Justice, Government of India had evolved the FTC Scheme, primarily



to deal with the pendency of sessions cases. This was termed as a "long-term road map" for judicial reforms that was being chattered out by the Government. The FTC Scheme originally contemplated establishment of five Courts per district in approximately 600 districts, thus making a total of 3000 Courts in the country. Instead of employing new Judges, services of retired Judges were to be utilised. The supporting staff was to be appointed on re-employment basis and it was estimated that Rs. 2.16 lakhs annual expenditure was likely to be incurred while taking only 50 per cent of the normal salary for the serving employees. The recurring cost per Court per year was Rs.3.32 lakhs and non-recurring cost was Rs.4.6 lakh per court per year. However, this proposed FTC Scheme was curtailed to some extent, by the 11th Finance Commission which only recommended 1,734 Courts at the rate of Rs.29 lakh expenditure per court. Out of this, non-recurring expenditure per Court was estimated at Rs.5,00,000/- and recurring expenditure at Rs.4.8 lakhs. The total expenditure estimated for the period of five years was Rs.509 crores. The purpose primarily was to reduce the pendency of criminal cases pending in the respective courts. The anticipated benefits of the FTC Scheme, as projected, were - speedy trial, elimination of pendency in the district courts, enormous saving of expenses incurred on under-trials, etc. There was a further possibility of saving of funds on account of public prosecutors, manpower for running jails and even on behalf of the under-trials with regard to fees that they spend on advocates. In the case of *All India Judges Association v. Union of India* (1993) 4 SCC 288, this Court took note of the fact that the Judiciary had been included as a plan subject by the Planning Commission. The Court directed that the infrastructure, including the Courts and residential complexes for the Judges should be built in consultation with the respective High Courts and the High Courts should take due interest in such construction. In compliance with the said judgment, the Eighth, Ninth and Tenth Plan earmarked Rs.110 crores, Rs.385 crores and Rs.700 crores, respectively, for infrastructure for the Judiciary. It may

be usefully noticed here that on the one hand, the Central Government has taken the decision to discontinue the FTC Scheme for reasons best known to it and, on the other hand, it has sanctioned funds of Rs.2500 crores as per the 13th Finance Commission Report for commencement and running of Morning/Evening/Special/Judicial/Metropolitan/Shift Courts for the period 2010-11 to 2014-15, amongst other heads of expenditure. But no funds appear to have been allocated for judicial infrastructure.

47. The 11th Finance Commission under Article 275 of the Constitution allocated Rs.502.90 crores in the year 2000 for the FTC Scheme. It was stipulated that there shall be a time-bound utilization of these funds within the five years of the FTC Scheme, the term of which was to end on 31st March, 2005.

48. The FTC Scheme was challenged by different persons before various High Courts. The Union of India took a clear stand that appointment of retired judges was not a mandatory requirement and additionally, the FTC Scheme also contemplated *ad hoc* appointment of Judicial Officers, as well as direct recruitment from the Bar. Though the FTC Scheme was contemplated to be for a definite period of five years, it came to be extended and remained into force under the judgment of this Court in the case of *Brij Mohan Lal* (supra) and even under certain other directions passed in the case of *Madhumita Das* (supra). It is the conceded position before us that the Central Government had decided not to finance the FTC Scheme beyond 31st March, 2011. Out of the funds of Rs.502.90 crores, which were allocated by the 11th Finance Commission, a balance of Rs. 83.87 crores was lying with the Central Government, as only Rs. 420.03 crores had been disbursed as on 31st March, 2005. It was ordered by this Court that this amount will not lapse and will be disbursed for the implementation of the FTC Scheme. But from the record before us, it appears that neither the amount has been disbursed nor spent under the FTC Scheme. On the recommendation made by the Chief Justices and the Chief Ministers Conference, the



Cabinet Committee on Economic Affairs vide its decision dated 7th April, 2005 extended the FTC Scheme for a period of another five years with 100 per cent Central funding. Again, the FTC Scheme was extended by the decision of the Central Government till 31st March, 2011 but thereafter the Union of India had taken a conscious decision not to extend the financing of FTC Scheme beyond 31st March, 2011.

49. Despite discontinuation of the FTC Scheme by the Union of India, a number of States have decided to continue with the FTC Scheme, at least for the present. This decision of the concerned States needs to be noticed with appreciation. In the State of Orissa, the State Government has taken a decision to keep the FTC Scheme in force till 31st March, 2013, however, the State has not taken any decision as to what would happen thereafter. The State of Gujarat, on the other hand, has decided not to continue with the Scheme beyond 31st March, 2011 and the Judicial Officers appointed directly from the Bar on a temporary basis have been relieved. As already noticed, a number of writ petitions have been filed challenging the above-mentioned actions of the State.

50. The State of Andhra Pradesh, on the recommendation of the High Court, has also taken a conscious decision to continue the FTC Scheme till 31st March, 2012. State of Haryana has taken a tentative view to continue the FTC Scheme till March 2016, subject to a final decision to be taken by the competent authority in the State hierarchy. The State of Rajasthan has decided to continue the FTC Scheme till 29th February, 2013.

**Whether any of the appointees to the post of *ad hoc* judges under the FTC Scheme have a right to the post in context of the facts of the present case?**

51. The first and foremost question that requires the consideration of this Court at this very stage is whether the appointees have a right to the post. In order to answer this

question, we must first refer to the letters of appointment which were issued to the appointees, particularly the appointees in the States of Gujarat, Rajasthan, Orissa, Andhra Pradesh and, on somewhat similar lines, even in other States.

52. In the State of Gujarat, the Notification dated 12th November, 2003 and other notifications vide which advocates were appointed directly as *ad hoc* Judges, FTCs under the FTC Scheme, are similarly worded. The relevant part of the Notification dated 12th November, 2003 reads as under:-

> "No. Fast Track Court/102002/270/ 270/D :- Following practicing Advocates who are selected for the appointment of Ad-hoc basis under rule 5(1) (C) of "The ad-hoc and purely urgent temporary appointment of Judicial Officers and members of the Staff in the State of Gujarat for implementing the Special Scheme of Fast Track Courts (Sponsored by Central (Govt.) for elimination of arrears Rule, 201 are appointment for a period of two years from the day they over charge of the said posts as on Ad-hoc and purely temporary basis as Joint District Judges to preside over the Fast Track Courts."

53. A bare reading of the above Notification clearly shows that they were appointed under the FTC Rules, on *ad hoc* basis and on purely urgent temporary appointment, for a period of two years from the date they took over the charge of the said posts. The entire emphasis of the Notification was on the appointments being temporary, *ad hoc* and terminable at any time. These appointments were made under the "*Ad hoc* and purely urgent temporary appointment of Judicial Officers and the members of staff in the State of Gujarat for implementing the Special Scheme of Fast Track Courts (sponsored by the Central Government) for elimination of arrears Rules 2001". These Rules, in turn, referred to the expression "Committee" which means the Committee of the Judges of the High Court constituted by the High Court or the Chief Justice. 'Fast Track Court' means the Court created under the FTC Scheme as



sponsored by the Central Government and for all other words and definitions, one has to refer to the Gujarat Judicial Services Recruitment Rules, 1961. Rule 3 of the said Rules prescribed that the appointments were on *ad hoc* and on purely urgent temporary basis for implementing the FTC Scheme and the Rules were notwithstanding the Gujarat Judicial Service Recruitment Rules, 1961. These appointments were made by the Governor on the recommendation of the High Court either by promotion or transfer of Judicial Officers or by recruitment from amongst retired District and Sessions Judges/Judicial Officers and advocates eligible to be directly appointed as District and Sessions Judges. The selection of the candidates for such *ad hoc* appointment was to be made by the Committee on the basis of the procedure and criteria laid down. Rule 6 of the Gujarat Rules clearly stated that no right is conferred on any Judicial Officer in service for claiming any regular promotion on the basis of his appointment on *ad hoc* basis under the Scheme. Further, Rule 4 of the Gujarat Rules provided for termination of their services.

54. For all other conditions of service, these officers were to be governed by the conditions of service applicable to the Judicial Officers of the State.

55. In the State of Orissa, advocates were appointed temporarily as *ad hoc* Additional District Judges in the pay scale of Rs. 10,650-325-15350 by direct recruitment to the FTCs which had been established under the grant of 11th Finance Commission. In terms of the notification of appointment, their service conditions were to be governed by the Orissa Rules, as amended from time to time. All other appointees were appointed by similar notification of different dates. Therefore, reference to the Orissa Rules becomes necessary.

56. These Rules were pari materia to the Judicial Service Rules framed by the Orissa State except that the appointments were initially for a period of one year and subject to termination

without notice. Clause 4 of the said Rules reads as under :-

"4(1) The appointment made under these rules shall be on *ad hoc* and temporary basis.

(2) The appointment shall be made initially for a period of one year and shall be liable to be terminated at any time without any prior notice.

(3) During the term of such appointment the appointees will be under the administrative and disciplinary control of the High Court."

57. These Rules were framed by the State of Orissa notwithstanding the Orissa Superior Judicial Services Rules, 1963 and the Orissa Judicial Service Rules, 1994. Any right to regular promotion in the regular cadre was also specifically denied under Rule 7 of the Orissa Rules.

58. In the State of Andhra Pradesh also, under Rule 2 of the Andhra Rules, the advocates were directly appointed as Additional District Judges to preside over FTCs vide Notification dated 6th October, 2003. These appointments were also *ad hoc* and temporary, for a limited period. These Rules were framed notwithstanding anything contained in the Special Rules for Andhra Pradesh State Higher Judicial Service, 1958 and provided the same categories of recruitment to the FTCs as were provided under the Rules of two above-mentioned States. It duly prescribed for the qualifications, seniority, posting and transfer of the appointees. Under the terms and conditions of service, Rule 7(1)(b) specifically contemplated that a person appointed under the Andhra Rules shall not be entitled to any preferential right to any other appointment to this service or any other service. It was also contemplated that their services shall neither be treated as regular or permanent under the State Government nor shall it be a bar for the appointment to posts covered by the other Rules in that State. Under Rule 2(4), all appointments made



from time to time under the Andhra Rules were to cease on 31st March, 2005, i.e., the period for which the FTC Scheme was created at the first instance.

59. All the petitioners/candidates in the State of Rajasthan were members of the regular Judicial Services of that State. They were promoted on *ad hoc* basis to officiate as Additional District Judges (Fast Track) and they had been functioning as such for a considerable period. They were given extension of service vide Notification issued by the State. Now, they have been asked to take the Limited Competitive Examination for being promoted on regular basis to the Higher Judicial Services of the State. This has been challenged by them on different grounds, as already noticed above. But, we must notice that initially when they were appointed as Additional District Judges, they had not taken any written examination as prescribed under the Rules and the judgment of this Court in the case of *All India Judges Association* (supra). Further, in fact, they have not taken such an examination till date.

60. Upon an analysis of the above-stated Rules relating to the different States, the appointment letters issued to the appointees and the methodology that was adopted for appointment of the FTC Judges, it becomes clear that the appointees cannot be said to have any legal, much less an indefeasible, right to the posts in question. Firstly, the posts themselves were temporary, as they were created under and within the ambit and scope of the FTC Scheme sponsored by the Union of India, which was initially made only for a limited period of five years. Now, financing of the FTC Scheme has already been stopped by the Central Government with effect from 31st March, 2011. No permanent posts were ever created. In other words, their appointments were temporary appointments against temporary posts. The relevant Rules of the States clearly postulate that the appointments made under the Rules were purely on *ad hoc* basis and urgent temporary basis and were terminable without notice. The Rules as well as the respective notifications of appointment issued to these

appointees, unambiguously stated that no right would be conferred upon the appointees for regular promotion on the basis of working on *ad hoc* basis under the FTC Scheme. The notifications vide which the judges/candidates/petitioners were appointed, particularly in the State of Gujarat, clearly specified these appointments to be temporary and for a period of two years on *ad hoc* basis. The cumulative effect of the notifications appointing the petitioners to the said posts under the FTC Scheme and the relevant Rules governing them clearly demonstrate that these were temporary and, in some cases, even time-bound appointments, terminable without prior notice. It is difficult for the Court to accept the contention of these petitioners that there was any indication, in the above noted Rules or otherwise, that the said appointments were permanent and that the appointees were entitled to be absorbed regularly in those posts.

61. Normally, there are three kinds of posts that may exist in a cadre - (1) permanent posts; (2) temporary posts; and (3) quasi permanent posts. Accordingly, there can be a temporary employee, a permanent employee or an employee in quasi permanent capacity. In the case of *Indian Drugs and Pharmaceuticals Ltd. v. Workmen* [(2007) 1 SCC 408], this Court, while elucidating upon the distinction between temporary and permanent employees stated that such distinction is well settled. Whereas a permanent employee has a right to the post, a temporary employee has no right to the post. It is only the permanent employee who has a right to continue in service till the age of superannuation. As regards a temporary employee, there is no age of superannuation because he has no right to the post at all. Thus, it follows that for a person to have a right to the post, the post itself has to be a permanent post duly sanctioned in the cadre. The person should be permanently appointed to that post. Normally, it is only under these circumstances that such an employee gets a right to the post, but even when a temporary employee is appointed against a permanent post, he could get a right to the post provided he



had at least acquired the status of a quasi permanent employee under the relevant Rules. Where neither the post is sanctioned nor is permanent and, in fact, the entire arrangement is *ad hoc* or is for an uncertain duration, it cannot create any rights and obligations in favour of the appointees, akin to those of permanent employees. The appointees in the present case had been appointed not only on *ad hoc* and temporary basis but the entire FTC Scheme itself was *ad hoc* and for a duration of five years only as declared by the Central Government. Despite that, some of the States declared the FTC Scheme for two years only. In these circumstances, it is not possible for this Court to hold that the appointees had any right to the post.

62. Decades ago, this Court, in the case of *Parshotam Lal Dhingra v. Union of India* [AIR 1958 SC 36], was seized with a matter where the appellant had been granted promotion from Class III Service in the Indian Railways to Class II, but, in view of the adverse remarks in his Confidential Report, the same was not effected. The action of the State was challenged before the High Court. The learned Single Judge took the view that this action of the State was punitive. However, the judgment was reversed by the Division Bench of the High Court. A Constitution Bench of the Supreme Court allowed the appeal, while holding as under :

> "12. In the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice to him. An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold the post for the entire period of his tenure and his tenure

cannot be put an end to during that period unless he is, by way of punishment, dismissed or removed from the service. Except in these two cases the appointment to a post, permanent or temporary, on probation or on an officiating basis or a substantive appointment to a temporary, on probation or on an officiating basis or a substantive appointment to a temporary post gives to the servant so appointed no right to the post and his service may be terminated unless his service had ripened into what is, in the service rules, called a quasi-permanent service…"

63. In the case of *Champaklal Chimanlal Shah v. Union of India* [AIR 1984 SC 1854], this Court held that where a Government servant had completed three years service and the Rules provided for declaration of his service thereafter as a quasi-permanent employee, the Government servant would become a quasi-permanent employee only if such declaration was actually made. Similar view was also taken earlier in the case of *Jaswant Singh v. State of Haryana* [(1979) 4 SCC 440].

64. Therefore, the above principles clearly show that there should be a right vested in an employee, which is duly recognized and declared in accordance with the Rules governing the conditions of service of such employee before such relief is granted. Unless the Government employee holds any status as afore-indicated, it may not be possible to grant relief to the Government employee, particularly, when such relief is not provided under the relevant Rules.

65. We may even consider this from a different point of view. These Rules had been framed under Article 309 of the Constitution and had the force of law. Of course, in some of the petitions, i.e., in some of the matters relating to the State of Gujarat, there is challenge raised to the constitutional validity of Rules 4 and 6 of the Gujarat Rules, which we shall shortly proceed to discuss, but in all other cases arising from different States, there is no challenge to the validity of the Rules



governing these appointments.

66. Right to a post is not a fundamental right but is a civil or a statutory right. That the creation of a post, absorption and payment of salaries on regular pay scales are purely Executive functions and under the Doctrine of Separation of Powers well left are these functions to the Executive, was the view expressed by this Court in the case of *P.U. Joshi v. Accountant General* [(2003) 2 SCC 632]. To take another example, where a person is sent on deputation to a post even after consultation with the Union Public Service Commission but for a limited period, after the expiry of the said period, the deputationist can neither claim a right to continue in that post, nor can he claim absorption on permanent basis as he had no right to the post. This view was stated by this Court, in the case of *Union of India v. S.N. Panicker* [(2001) 10 SCC 520]. It is primarily the nature of the post, the method and manner of appointment to the said post and the Rules governing the conditions of service of that post which would be the precepts to deal with such situations.

67. Article 310 of the Constitution is concerned with the tenure of office of persons serving the Union or a State. Except as expressly provided by the Constitution, every person who is a member of a defence service or a civil service of the Union or State or an all-India service or holds any post connected with defence or any civil post under the Union, holds such office during the pleasure of the President or during the pleasure of the Governor of the State, as the case may be. However, Article 311 of the Constitution carves out an exception to Article 310 and states that no person who is a member of a civil service of the Union shall be dismissed or removed by an authority subordinate to that by which he was appointed and then, only after holding of an enquiry and opportunity of being heard and making a representation in respect of those charges and on penalty proposed. Proviso to Articles 311(2) and 311(3) provide further exceptions to the operation of Article 311 itself. The doctrine of pleasure, under our Constitution, deals with

three different categories of posts. First, offices which are held during the pleasure of the President or Governor, as the case may be; second, offices held during pleasure of the President or Governor but subject to some restrictions against removal; and third, offices held for a specified term but with immunity against removal, except by impeachment. The third category of posts is not subject to the doctrine of pleasure. Having regard to the Constitutional scheme, it is not possible to extend the type of protection against removal granted to one category of officers, to another category. In India, contrary to the law in England, even the doctrine of pleasure has limitations and restrictions.

68. It is believed that, where Rule of Law prevails, there can be nothing like unfettered discretion or unaccountable action. The degree of reasoning required in support of the decision may vary. The degree of scrutiny during judicial review may vary. But the need for reasoning exists. As a result, when the Constitution of India provides that some offices will be held during the pleasure of the President, without any express limitations or restrictions, this power should, however, necessarily be read as being subject to the fundamentals of constitutionalism. {Refer *B.P. Singhal v. Union of India* [(2010) 6 SCC 331]}. We must also notice another settled position of law, stated by this Court in the case of *Union of India & Anr. v. Tulsiram Patel* [(1985) 3 SCC 398], that the origin of Government services is contractual. There is an offer and acceptance in every case. But once appointed to his post or office, the Government servant acquires a status and his rights and obligations are no longer determined by the consent of both the parties, but by statute or statutory rules as framed and unilaterally altered by the Government. In other words, the legal position of a Government servant is more one of status than that of contract.

69. Therefore, the appointees do not have an absolute right to the post, but we would have to consider the effect of the



judgments of this Court in the cases of *Madhumita Das* (supra) and *Brij Mohan Lal* (supra) to examine if the petitioners in these cases are entitled to any relief or not. Before we enter into discussion upon that aspect of the case, it will be necessary for us to deliberate on the question whether writ of mandamus can at all be issued in this case and, if so, its scope. Needless to say, the origin of the FTC Scheme was in a policy decision by the Central Government. The Central Government had taken a decision to implement the FTC Scheme, particularly to deal with the arrears of criminal cases in the country and it had taken unto itself the burden of financing the entire scheme. It was to incur all infrastructural and recurring expenditures for implementation of the FTC Scheme. Examined from any point of view, it was a policy decision of the Union of India, which was accepted by the various State Governments, which in turn implemented this policy by appointing *ad hoc* Judges to preside over FTCs. These appointments were made by three different methods: from amongst the retired Judges, by promotion from Civil Judges (Senior Division), and by direct recruitment from the Bar.

70. The Central Government then has taken a decision not to finance the FTC Scheme beyond 31st March, 2011. However, some of the State Governments have still taken a decision at their own level to continue with the FTC Scheme, for the time being. None of the States appearing before us have stated that, as a matter of policy or otherwise, they have decided to continue the FTC Scheme at their own expense as a permanent feature of Justice Administration System. It is a settled principle of law that matters relating to framing and implementation of policy primarily fall in the domain of the Government. It is an established requirement of good governance that the Government should frame policies which are fair and beneficial to the public at large. The Government enjoys freedom in relation to framing of policies. It is for the Government to adopt any particular policy as it may deem fit and proper and the law gives it liberty and freedom in framing

the same. Normally, the Courts would decline to exercise the power of judicial review in relation to such matters. But this general rule is not free from exceptions. The Courts have repeatedly taken the view that they would not refuse to adjudicate upon policy matters if the policy decisions are arbitrary, capricious or mala fide. In bringing out the distinction between policy matters amenable to judicial review and those where the Courts would decline to exercise their jurisdiction, this Court, in *Bennett Coleman & Co. and Others. v. Union of India and Others* [(1972) 2 SCC 788], held as under :

> "100. The argument of the petitioners that Government should have accorded greater priority to the import of newsprint to supply the need of all newspaper proprietors to the maximum extent is a matter relating to the policy of import and this Court cannot be propelled into the unchartered ocean of Government policy."

71. We must examine the cases where this Court has stepped in and exercised limited power of judicial review in matters of policy. In *Asif Hameed v. State of Jammu & Kashmir and Anr.* [1989 Suppl.(2) SCC 364], this Court noticed that, where a challenge is to the action of the State, the Court must act in accordance with law and determine whether the State has acted within the powers and functions assigned to it under the Constitution. If not, it must strike down the action, of course, with due caution. Normally, the Courts do not give directions or advise in such matters. This Court held as under: -

> "19. *When a State action is challenged, the function of the court is to examine the action in accordance with law* and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of



> a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an Appellate Authority. *The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."*
>
> (emphasis supplied)

72. It is also a settled cannon of law that the Government has the authority and power to not only frame its policies, but also to change the same. The power of the Government, regarding how the policy should be shaped or implemented and what should be its scope, is very wide, subject to it not being arbitrary or unreasonable. In other words, the State may formulate or reformulate its policies to attain its obligations of governance or to achieve its objects, but the freedom so granted is subject to basic Constitutional limitations and is not so absolute in its terms that it would permit even arbitrary actions. Certain tests, whether this Court should or not interfere in the policy decisions of the State, as stated in other judgments, can be summed up as:

(I) If the policy fails to satisfy the test of reasonableness, it would be unconstitutional.

(II) The change in policy must be made fairly and should not give impression that it was so done arbitrarily on any ulterior intention.

(III) The policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc.

(IV) If the policy is found to be against any statute or the Constitution or runs counter to the philosophy behind these provisions.

(V) It is dehors the provisions of the Act or Legislations.

(VI) If the delegate has acted beyond its power of delegation.

73. Cases of this nature can be classified into two main classes: one class being the matters relating to general policy decisions of the State and the second relating to fiscal policies of the State. In the former class of cases, the Courts have expanded the scope of judicial review when the actions are arbitrary, mala fide or contrary to the law of the land; while in the latter class of cases, the scope of such judicial review is far narrower. Nevertheless, unreasonableness, arbitrariness, unfair actions or policies contrary to the letter, intent and philosophy of law and policies expanding beyond the permissible limits of delegated power will be instances where the Courts will step in to interfere with government policy.

74. In the case of *Mohd. Abdul Kadir and Anr. v. Director General of Police, Assam and Ors.* [(2009) 6 SCC 611], this Court, while declining regularization of the persons employed in a particular project under a temporary Scheme, though the same had been continued for a long time, commented upon the scope of interference in the policy relating to Prevention of Infiltration of Foreigners Additional Scheme, 1987 and considered it appropriate to draw the attention of the authorities to the issues involved in the case by directing as under: -

> "22. We are conscious of the fact that the issue is a matter of policy having financial and other implications. But where an issue involving public interest has not engaged the attention of those concerned with policy, or where the failure to take prompt decision on a pending issue is likely to be detrimental to public interest, courts will be failing in their duty if they do not draw attention of the authorities concerned to the issue involved in appropriate cases. While courts cannot be and should not be makers of



> policy, they can certainly be catalysts, when there is a need for a policy or a change in policy."

75. The correct approach in relation to the scope of judicial review of policy decisions of the State can hardly be stated in absolute terms. It will always depend upon the facts and circumstances of a given case. Furthermore, the Court would have to examine any elements of arbitrariness, unreasonableness and other Constitutional facets in the policy decision of the State before it can step in to interfere and pass effective orders in such cases. A challenge to the formation of a State policy or its subsequent alterations may be raised on very limited grounds. Again, the scope of judicial review in such matters is a very limited one. One of the most important aspects in adjudicating such a matter is that the State policy should not be opposed to basic Rule of Law or the statutory law in force. This is what has been termed by the courts as the philosophy of law, which must be adhered to by valid policy decisions.

76. The independence of the Indian Judiciary is one of the most significant features of the Constitution. Any policy or decision of the Government which would undermine or destroy the independence of the judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution. It has to be clearly understood that the State policies should neither defeat nor cause impediment to discharge of judicial functions. To preserve the doctrine of separation of powers, it is necessary that the provisions falling in the domain of judicial field are discharged by the Judiciary and that too, effectively.

77. This Court has consistently held that the writ of mandamus can be issued, perhaps not as regards the manner of discharge of public duty but with respect to the due exercise of discretion in the course of such duty. In the case of *S.P. Gupta v. Union of India* [(1981) Supp. SCC 87], this Court issued directions to the Union of India to determine, within a

reasonable time, the strength of permanent Judges required for disposal of cases instituted in the High Courts and to take tests to fill up the vacancies after making such determination. While stating that the appointment of judges was considered to be a power coupled with duty, the Court in held as under: -

> "In a parliamentary democracy with a written Constitution in which three organs of the Governments are clearly marked out, it becomes a primary duty of the State to provide for fair and efficient administration of justice. Justice must be within the easy reach of the lowest of the lowliest. Rancour of injustice hurts an individual leading to bitterness, resentment and frustration and rapid evaporation of the faith in the institution of judiciary. Two vital limbs of the Justice system are that Justice must be within the easy reach of the weaker sections of the society and that it must be attainable within a reasonably short-time, in other words, speedily. Leaving aside other factors contributing to the arrears in courts, it cannot be gainsaid that in each High Court adequate number of Judges must be appointed and the situation in each High Court must be regularly reviewed by the President so as to efficiently discharge the duty cast on him by Article 216. In the course of hearing a statement was made on behalf of the Union of India that the Government is taking steps to review the strength of each High Court to determine the adequate strength of each High Court and then to take steps to make appointments according to the targets so devised. As this statement is a solemn undertaking to this Court, it may be reproduced in extenso:
>
> The Union Government has decided to increase the number of posts of permanent judges in the various High Courts keeping in view the load of work, the guidelines prescribed and other relevant considerations. In fact in 1980 itself, on the basis of institution, disposal and arrears of cases and the guidelines prescribed, the Governments of seven States where the problem was more acute, had



> been addressed to consider augmentation of the Judge strengths of their High Courts. It has been decided that where necessary the guidelines prescribed will be suitably relaxed by taking into account local circumstances the trend of litigation and any other special or relevant factors that may need consideration. The Union Government will take up the matter with the various State Governments so that after consulting the Chief Justices of the High Courts, they expeditiously send proposals for the conversion of a substantial number of posts of Additional Judges into those of permanent judges.
>
> 2. The Union Government has also decided that ordinarily further appointments of Additional Judges will not be made for periods of less than one year.
>
> But to say that a litigant who wants his case to be disposed of as early as possible being convinced that his case is not handled by the Court for want of adequate number of judges can bring an action to issue a mandamus to the Government to appoint adequate number of judges requires more elaborate arguments and in view of the statement it is not necessary to deal with the submission.
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> XXX XXX XXX
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> 1251. Notwithstanding the principle of separation of powers found entrenched in the Constitution of the United States of America, as can be seen from the last part of para 141 of Vol. 52 of the American Jurisprudence 2d. under the title 'Mandamus' if it is the constitutional or statutory duty of a governor or the President to exercise his discretion with respect to a certain matter he may be required by mandamus to do so but the manner in which he has to discharge that duty cannot be directed by the courts. As observed in the English decisions referred to above it is manifest that a statutory discretion is not necessarily or indeed usually absolute, it may be qualified

by express and implied legal duties to comply with substantive and procedural requirements before a decision . is taken, whether to act and how to act. I am of the view that the power conferred on the President by Article 216 of the Constitution to appoint sufficient number of Judges is a power coupled with a duty and is not merely a political function. In the instant case ordinarily the court would have been reluctant to issue any mandamus to the Government to comply with the duty of determination of the strength of Judges of High Courts. But having regard to the undisputed total inadequacy of the strength of Judges in many High Courts, it appears to be inevitable that the Union Government should be directed to determine within a reasonable time the strength of permanent Judges required for the disposal of cases instituted in them and to take steps to fill up the vacancies after making such determination."

78. Thereafter, even in the case of *All India Judges' Association v. Union of India & Ors.* (1992) 4 SCC 288, this Court not only issued a mandamus but even directed the acceptance of the Justice Shetty Commission Report and consequently ordered the State Governments to fix grades of pay, grant appropriate pay scales as well as make amendments in the age of retirement and other conditions of service, as necessary, in order to maintain the independence of judiciary. Again, in a subsequent judgment taken up in the year 2002, in the same case *All India Judges' Association v. Union of India* [(2002) 4 SCC 247], this Court held as under :

"21. The next question which arose for consideration is whether the Shetty Commission was justified in recommending that 50 per cent of the expense should be borne by the Central Government. It has been contended by the learned Advocate-General for the State of Karnataka as well as on behalf of the other States that the judicial officers working in the States deal not only with the



State laws but also with the federal laws. They, therefore, submitted that, in fairness of things, the Central Government should bear half of the expenses of the judiciary.

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25. An independent and efficient judicial system is one of the basic structures of our Constitution. If sufficient number of Judges are not appointed, justice would not be available to the people, thereby undermining the basic structure. It is well known that justice delayed is justice denied. Time and again the inadequacy in the number of Judges has adversely been commented upon. Not only have the Law Commission and the Standing Committee of Parliament made observations in this regard, but even the Head of the judiciary, namely, the Chief Justice of India has had more occasion than one to make observations in regard thereto. Under the circumstances, we feel it is our constitutional obligation to ensure that the backlog of the cases is decreased and efforts are made to increase the disposal of cases. Apart from the steps which may be necessary for increasing the efficiency of the judicial officers, we are of the opinion that time has now come for protecting one of the pillars of the Constitution, namely, the judicial system, by directing increase, in the first instance, in the Judge strength from the existing ratio of 10.5 or 13 per 10 lakh people to 50 Judges per 10 lakh people. We are conscious of the fact that overnight these vacancies cannot be filled. In order to have additional Judges, not only will the posts have to be created but infrastructure required in the form of additional courtrooms, buildings, staff etc., would also have to be made available. We are also aware of the fact that a large number of vacancies as of today from amongst the sanctioned strength remain to be filled. We, therefore, first direct that the existing vacancies in the subordinate courts at all levels should be filled, if possible

latest by 31-3-2003, in all the States. The increase in the Judge strength to 50 Judges per 10 lakh people should be effected and implemented with the filling up of the posts in a phased manner to be determined and directed by the Union Ministry of Law, but this process should be completed and the increased vacancies and posts filled within a period of five years from today. Perhaps increasing the Judge strength by 10 per 10 lakh people every year could be one of the methods which may be adopted thereby completing the first stage within five years before embarking on further increase if necessary."

79. Such is not the practice in India alone, but it is prevalent even in the United States of America. In the case of *Commonwealth ex rel. Carroll v. Tate et al.* (supra), Judge Montgomery of the Supreme Court of Pennsylvania upheld the order of mandamus issued against the defendants for appropriation and payment of the amounts needed for infrastructure and other requirements for proper running of the Courts. The Court held that it is a basic precept of the Constitutional form of Republican Government that the Judiciary is an independent and co-equal Branch of the Government along with Executive and Legislative Branches and the amount that had been recommended by the Mayor for utilization by the Judiciary was found to be inadequate to meet the reasonable needs of the Court for the fiscal year. Thus, the Court, while reducing the amount originally ordered by Judge Montgomery, nevertheless upheld the issue of mandamus, affirming the earlier order earlier with some modification.

80. It is, thus, clear that it is the constitutional duty of this Court to ensure maintenance of the independence of Judiciary as well as the effectiveness of the Justice Delivery System in the country. The data and statistics placed on record, of which this Court can even otherwise take judicial notice, show that certain and effective measures are required to be taken by the State Governments to bring down the pendency of cases in the



lower Courts. It necessarily implies that the Government should not frame any policies or do any acts which shall derogate from the very ethos of the stated basic principle of judicial independence. If the policy decision of the State is likely to prove counter-productive and increase the pendency of cases, thereby limiting the right to fair and expeditious trial to the litigants in this country, it will be tantamount to infringement of their basic rights and constitutional protections. Thus, we have no hesitation in holding that in these cases, the Court could issue a mandamus. The extent of such power, we shall discuss shortly hereinafter.

81. Thus, we have no hesitation in coming to the conclusion that in the cases at hand, this Court is possessed of the jurisdiction and is competent to issue a writ of mandamus and/or appropriate directions. However, the scope and dimensions of such directions is a matter of further deliberation, which we shall shortly proceed to discuss.

**Right to Practice**

82. Article 19(1)(g) of the Constitution provides a fundamental right to practice any profession or to carry on any occupation, trade or business. This right is subject to the limitations contained under Article 19(6) of the Constitution. The State is empowered to make any law imposing, in the interest of general public, reasonable restrictions on the exercise of the rights conferred by the said sub-clause. This power specifically refers to the professional or technical qualifications necessary for practicing any profession or carrying on any occupation. The right to practice law is not an absolute right and is subject to the possession of requisite qualifications as contemplated under the Advocates Act, 1961. This right to practice is further subject to the limitations prescribed in and the regulatory regime of the Bar Council of India Rules. Therefore, the argument that once a lawyer possesses the requisite qualifications, he has an unrestricted and unregulated right to practice, is not tenable.

83. The appointees in the present case argued that in terms of the Bar Council of India Rules, after they cease to be judges of the FTCs for any reason whatsoever, they shall be debarred from practicing in the district and subordinate courts. Their right to practice is abridged with respect to the courts in which they acted as judges and courts of the equivalent or lower grade. They can still practice in the higher courts, i.e., permissible Tribunals, High Courts and the Supreme Court of India. Thus, there is no complete and absolute restriction on their right to practice. It is only a partial restriction which is based upon securing the larger public interest and the interest of ensuring transparency in the administration of justice. This by itself, therefore, cannot be a consideration for compelling the Government to continue their appointments, if they are otherwise not entitled under law to continuation. This question, in somewhat similar circumstances, came up for consideration of this Court when the retired members of the Custom, Excise and Service Tax Appellate Tribunal (for short "the CESTAT") were not permitted to practice before the same Tribunal on the strength of Rule 7 Chapter III, Part VI of the Bar Council of India Rules. This Court not only upheld the validity of the said Rules, but also held that this did not amount to an absolute and unreasonable bar on the right to practice of the past members of the Tribunal. Upon an objective analysis of the principles stated therein, this Court held that except where a challenge is made on the grounds of legislative incompetence or the restriction imposed is ex facie unreasonable, arbitrary and violative of Part III of the Constitution, the restriction would be held to be valid and enforceable. We may refer to the following paragraph of the judgment of this Court, in the case of *N.K. Bajpai v. Union of India & Anr.* (CA No. 2850 of 2012 arising out of SLP(C) No. 8479 of 2010), to which one of us, Swatanter Kumar, J was a member, decided on 15th March, 2012, which reads as under:-

> "29. An objective analysis of the above principles makes it clear that except where the challenge is on the grounds of legislative incompetence or the restriction imposed was ex facie unreasonable, arbitrary and violative of Part III of the Constitution of India, the restriction would be held to be valid and enforceable."



84. For the reasons afore-noticed and the law indicated above, we do not find any merit in the contention raised on behalf of the appointees/petitioners that they would suffer an irreparable loss by termination of their services as FTC judges and that the restriction contained in Rule 7 of the Bar Council of India Rules amounts to an absolute unreasonable restriction upon their right to practice in the event of such termination.

**Scope of Judicial Review**

85. The power of judicial review to examine the validity of a legislation falls within a very limited compass. It is treated by the Courts with greater restraint and on a much higher pedestal than examination of the correctness or validity of State policies. In the present case, the Union of India had framed a policy, which was termed as the FTC Scheme. This was a conscious policy decision taken by the appropriate Government, the implementation whereof in regard to financial infrastructure, capital or recurring expenditure was primarily that of the Union of India. Some of the State Governments framed Rules to fill up the posts of Judges who were to preside over the FTCs, while others just took a policy decision with respect to the existing statutory Rules for recruitment to the regular Higher Judicial Services cadre of that State. As already noticed, the FTC Scheme contemplated three different sources for recruitment of judges, i.e. by direct recruitment, promotion and appointment of retired Judges. The work done by the FTCs over long period had been appreciated by all concerned. To demonstrate this aspect, we may refer to certain statistics which have been placed on record by different States.

86. As per the latest data placed on record, the State of Andhra Pradesh had sanctioned 108 posts of FTC Judges, out

of which 72 are stated to be in place as on the financial year 2010-2011. These courts disposed of 20,696 cases in the period from 01.01.2011 to 30.11.2011 and the pendency as on 30.11.2011 in these courts was 35,290 cases. In Bihar, 183 posts were created and 138 judges are presently in position. 18,222 cases have been disposed of in the period from 01.01.2011 to 31.12.2011, and 13,149 cases transferred to regular courts leaving arrears of 75,868. The State of Gujarat has claimed, for the same year, that 166 judicial posts were sanctioned and functioning, and they had disposed of 38,426 cases in the period from 01.01.2011 to 31.12.2011 leaving arrears/ pendency of 86,755 cases.

87. In Himachal Pradesh, there were nine judicial posts, out of which five are presently filled and 8607 cases were disposed of in the period from 01.01.2011 to 31.12.2011 leaving pendency of 5852 cases. Jharkhand had 39 presiding officers in place out of the 89 sanctioned posts and they had disposed of 1406 cases in the period from 01.01.2011 to 31.03.2011, leaving a pendency of 22,238 cases as on 31.03.2011.

88. In Kerala, 25 posts out of 38 sanctioned posts were functioning. 9,925 cases were disposed of in the period from 01.01.2011 to 31.12.2011, leaving a pendency of 13,809 cases.

89. In Karnataka, 92 out of 93 sanctioned posts are functioning. They have disposed of 39,800 cases in the period from 01.01.2011 to 31.12.2011, leaving a pendency of 33,661 cases. In Madhya Pradesh, 44 out of 59 judicial posts are filled and they have disposed of 61,866 cases in the period from 01.01.2011 to 31.12.2011, leaving a pendency of 36,284 cases. In Maharashtra, out of 100 sanctioned posts, 91 judicial officers have been appointed. They have disposed of 25235 cases, leaving a balance of 54398 in the year 2010-2011. In Orissa, 34 courts out of 72 are functioning. They have disposed



of 7007 cases leaving a balance of 5275 upto the year 2010-2011.

90. In Punjab and Haryana, out of 18 courts, 15 courts and out of 16 courts, seven courts are working. They have disposed of 7376 cases leaving a balance of 13202 cases. In Rajasthan, 42 courts out of 43 are functioning. They have disposed of 9680, having a total pendency of 17,474 cases upto the year 2010-2011. In Tamil Nadu, 43 out of 49 posts are functional. They have disposed of 65,877 cases in the period from 01.01.2011 to 31.12.2011 leaving arrears of 50,386. In Uttar Pradesh, 153 posts, out of the sanctioned 156 were functioning. They have disposed of 16,640 cases in the period from 01.01.2011 to 31.03.2011 leaving a pendency of 53,117 cases as on 31.08.2011. In West Bengal, 150 posts out of 151 sanctioned are in place and have disposed of 10,499 cases in the period from 01.01.2011 to 31.12.2011 leaving a pendency of 32,648 cases upto the year 2010-2011.

91. There were 1734 FTCs under the FTC Scheme out of which 1281 Courts are in place in the entire country. They have disposed nearly 32.34 lakh cases right from the date of their establishment till the year 2010-2011. The above stated pendency details of criminal cases in the country as on 30 March, 2011 is only with regard to Sessions cases. If we take the total figure of pendency of criminal cases before the Sessions Courts, as well as the Magisterial Courts, there shall be a total pendency of approximately 6.56 lakh cases.

92. The above data clearly shows that the pendency of criminal cases in the country has increased at a rapid pace, despite a good rate of disposal of cases being maintained by the FTCs. This experiment has been tried over a long period, i.e., it was started in the year 2001 for an initial period of five years. However, it was subsequently extended and the Central Government agreed to finance the FTC Scheme uptil 30th March, 2011. Thereafter, the various State Governments have either decided to wind up the FTC Scheme or have extended

the FTC Scheme at their own expense. Thus, there is no unanimity between the Union Government and the States either on continuation or the closure of the FTC Scheme.

93. The Union of India, of course, has stated that it would not, in any case, finance expenditure of the FTC Scheme beyond 30th March, 2011 but some of the States have resolved to continue the FTC Scheme upto 2012, 2013 and even 2016. A few States are even considering the continuation of the FTC Scheme as a permanent feature in their respective States. This, to a large extent, has created an anomaly in the administration of Justice in the States and the entire country. Some of the States would continue with the FTC Scheme while others have been forced to discontinue or close it because of non-availability of funds.

94. On the one hand, the Central Government has communicated its decision not to finance the FTC Scheme to the State Governments, but on the other hand and quite strangely, it has provided substantial funds for the starting of Evening Courts and Gram Nyalayas, etc. Again, this is a policy decision and though the Government has the jurisdiction to decide on such policy matters, there has to be some rationale and reasonableness in the same. They cannot be so arbitrary and patently erroneous that it becomes necessary for the Court to interfere with the same.

95. Some of the States, like the State of Gujarat, have decided to terminate the services of the appointees directly recruited from the Bar. However, in some cases, the High Court on its judicial side has quashed the notice of termination. In the case of Orissa, although the FTC Scheme is continuing upto 30th March, 2013, they have still dispensed with the services of some of the direct recruits from the Bar.

96. In Chhatisgarh, the FTC Scheme itself has been discontinued with effect from 1st April, 2011.



97. In some of the other States, the appointees have prayed for regularization of their services.

98. In some of the States, the FTC Scheme is being continued on *ad hoc* basis and without any final decision being taken in that behalf. The appointees have therefore, prayed for continuation of the FTC Scheme as well as regularization of their services in the regular cadre of the State Judicial Services.

99. The policy decision of the State should be in public interest and taken objectively. Adhocism or uncertainty in the State policy particularly relating to vital factors of governance, may not bring the requisite dividend. Reasons for taking a policy decision would squarely fall in the domain of the State, but it should be free from element of arbitrariness and mala fide. There are three basic pillars of our constitutional governance i.e. the Executive, the Legislature and the Judiciary. The doctrine of separation of powers demarcates the area of their respective operation. Normally, the Government exercises various controls over its instrumentalities and the organizations involved in the governance of the State. This would be through financial, administrative or managerial and functional controls. These parameters of control may be applied to determine whether or not a particular organization or a body is a State within the meaning of Article 12 of the Constitution. We have noticed these aspects primarily with the purpose of demonstrating that judicial functions and judicial powers are one of the essential attributes of a sovereign State and on considerations of policy, the State transfers its judicial functions and powers, mainly to the courts established by the Constitution, but that does not affect competence of the State to, by appropriate measures, transfer a part of its judicial functions or powers to Tribunals or other such bodies. This view is expressed by this Court, in the case of Associated Cements Co. Ltd. v. P.N. Sharma [AIR 1965 SC 1595]. However, as far as functioning of the courts, i.e., dispensation of justice by Courts is concerned, the Government has no control whatsoever over the courts. Further,

in relation to matters of appointments to the Judicial Services of the States and even to the Higher Judiciary in the country, the Government has some say, however, the finances of Judiciary are entirely under the control of the State. It is obvious that these controls should be minimized to maintain the independence of the Judiciary. The courts should be able to function free of undesirable administrative and financial restrictions in order to achieve the constitutional goal of providing social, economic and political justice and equality before law to its citizens.

100. Article 21 of the Constitution of India takes in its sweep the right to expeditious and fair trial. Even Article 39A of the Constitution recognizes the right of citizens to equal justice and free legal aid. To put it simply, it is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to Justice so that every person is able to receive an expeditious, inexpensive and fair trial. The plea of financial limitations or constraints can hardly be justified as a valid excuse to avoid performance of the constitutional duty of the Government, more particularly, when such rights are accepted as basic and fundamental to the human rights of citizens.

101. In the case of High Court of Judicature at *Bombay, Through its Registrar v. Shirishkumar Rangrao Patil and Anr.* [(1997) 6 SCC 339], this Court articulated the above-mentioned principles unambiguously in the following words:-

> "13. The question then is whether the High Court is justified in recommending to the Governor the respondent's dismissal from service on the basis of the material on record and whether the evidence on record was not sufficient to conclude the misconduct of having demanded illegal gratification. In a democracy governed by rule of law, under a written constitution, judiciary is the sentinel on the qui vive to protect the fundamental rights and poised to keep even scales of justice between the citizens and



the States or the States inter se. Rule of law and judicial review are basic features of the Constitution. As its integral constitutional structure, independence of the judiciary is an essential attribute of rule of law. Judiciary must, therefore, be free from pressure or influence from any quarter. The Constitution has secured to them, the independence. The concept of "judicial independence" is a wider concept taking within its sweep independence from any other pressure or prejudice. It has many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judge belongs. Independent judiciary, therefore, is most essential to protect the liberty of citizens. In times of grave danger, it is the constitutional duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived), undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own. (Vide C. Ravichandran Iyer v. Justice A.M. Bhattacharjee) The Constitution of India has delineated distribution of sovereign power between the legislature, executive and judiciary. The judicial service is not service in the sense of employment. The Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the Council of Ministers and the members of the legislature. It is an office of public trust and in a democracy, such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State. What is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. The Judges, at whatever level they may be, represent the State and its authority, unlike the bureaucracy or the members

of the other service. [Vide All India Judges' Assn. v. Union of India [SCC paras 7 and 9] (second case).] The Judges do not do an easy job. They repeatedly do what the rest of us seek to avoid, i.e., make decisions. Judges, though are mortals, they are called upon to perform a function that is utterly divine in character. The trial Judge is the kingpin in the hierarchical system of administration of justice. He directly comes in contact with the litigant during the day-to-day proceedings in the court. On him lies the responsibility to build a solemn atmosphere in the dispensation of justice. The personality, knowledge, judicial restraint, capacity to maintain dignity, character, conduct, official as well as personal and integrity are the additional aspects which make the functioning of the court successful and acceptable. Law is a means to an end and justice is that end. But in actuality, law and justice are distant neighbours; sometimes even strangely hostile. If law shoots down justice, the people shoot down the law and lawlessness paralyses development, disrupts order and retards progress. [Vide *All India Judges' Assn. v. Union of India*[9]) which quoted with approval the statement of law by Krishna Iyer, J.] Fourteenth Report of the Law Commission, extracted and approved by this Court in the above judgment (SCC p. 134, para 44), postulates thus:

> "If the public is to give profound respect to the judges the judges should by their conduct try and observe it; not by word or deed should they give cause for the people that they do not deserve the pedestal on which we expect the public to place them. It appears to us that not only for the performance of his duties but outside the court as well a judge has to maintain an aloofness amounting almost to self-imposed isolation."

14. Therein also, it was further observed that what is required of a Judge is "a form of life and conduct far



more severe and restricted than that of ordinary people" and though unwritten, it has been most strictly observed. The judicial officers are at once privileged and restricted; they have to present a continuous aspect of dignity and conduct. If the rule of law is to efficiently function under the aegis of our democratic society, Judges are expected to nurture an efficient, strong and enlightened judiciary. To have it that way, the nation has to pay the price, i.e., to keep them above wants, provide infrastructural facilities and services. There was a time when a Judge enjoyed a high status in society. A Government founded on anything except liberty and justice cannot stand and no nation founded on injustice can permanently stand. Therefore, dispensation of justice is an essential and inevitable feature in the civilized democratic society. Maintenance of law and order requires the presence of an efficient system of administration of criminal justice. A sense of confidence in the court is essential to maintain the fabric of ordered liberty for free people and it is for the subordinate judiciary by its action and the High Court by its appropriate control of subordinate judiciary and its own self-imposed judicial conduct, on and off the bench, to ensure it. If one forfeits the confidence in the judiciary of its people, it can never regain its lost respect and esteem. The conduct of every judicial officer, therefore, should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamour, regardless of public praise, and indifferent to private, political or partisan influences; he should administer justice according to law, and deal with his appointment as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity. If he tips the scales of justice, its rippling effect would be disastrous and deleterious. Obviously, therefore, this Court in All India

Judges' Assn. attempted to ensure better uniform conditions of service for subordinate judiciary throughout the country, it recommended the superannuation of the subordinate judicial officers at the age of 60 years; and ensured amelioration of their service conditions by giving diverse directions. In 2nd All India Judges' Assn. this Court dealt with the status of the judicial officers as a class and held that they are above the personnel working in other constitutional functionaries, viz., the executive and the legislature. Directions were issued by this Court for ensuring due implementation for their better service conditions. Three years' minimum service at the Bar was recommended to be eligible to be a judicial officer in All India Judges' Assn. v. Union of India (third case). In *All India Judges' Assn. v. Union of India* (fourth case), direction was issued to ensure accommodation."

102. As is evident from the above extract, which makes reference to a number of other judgments of this Court, judicial review is recognized as a basic feature of the Constitution and independence of judiciary is integral to the constitutional structure, as an essential attribute of the Rule of law. Judiciary must, therefore, be free from pressure and influences from any quarter. The heart of judicial independence is judicial individualism. The judiciary is not a disembodied abstraction. It is composed of men and women who work primarily on their own. Thus, it can be stated with certainty that any impediments to the continued and independent functioning of the Judiciary would result in damaging the institution of Justice as well as adversely affecting the faith of the public in the functioning of the Courts/Tribunals. Only if continued judicial independence is assured, would the Courts/Tribunals be able to discharge their functions in an impartial manner. It is fundamental that members of the Courts/Tribunal be independent persons. They should resemble the courts and not bureaucratic Boards {Ref. *Union of India v. R. Gandhi, President, Madras Bar Association* [(2010) 11 SCC 1]}.



103. In the above-mentioned case, this Court also expressed the view that persons exercising quasi-judicial powers should be vested and possessed with the independence, security and capacity as is associated with the courts.

104. It is a frequently stated principle that making the Judiciary free from control of the Executive and the Legislature is essential, as there exists a right to have claims decided by Judges who are free from domination by other branches of the Government.

105. These principles have withstood the test of time and have been frequently applied by the courts. Even in the case of *Union of India & Ors. v. Pratibha Bonnerjea & Anr.* [(1995) 6 SCC 765], this Court stated that the Judicial Officers belonging to the subordinate services are placed under the protective umbrella of the High Court and that it had no hesitation in concluding that the relationship between the Government and the High Court is not that of master and servant. The Judicial Officers cannot be said to be holding a post under the Union or the State.

106. It is in this context that this Court, in the case of *Ashoka Kumar Thakur v. Union of India & Ors.* [(2008) 6 SCC 1], while dealing with Right to Education in terms of Article 21A of the Constitution, held that financial constraints upon the State cannot be a ground to deny fundamental rights to citizens.

107. On a proper examination of the above principles, it can be stated without hesitation that wherever the right which is being affected is a basic or a fundamental right, the State cannot be permitted to advance an argument of financial constraints in such matters. The policy of the State has to be in the larger public interest and free of arbitrariness. Adhocism and uncertainty are the twin factors which are bound to adversely affect any State policy and its results. The State cannot in, an *ad hoc* manner, create new systems while

simultaneously giving up or demolishing the existing systems when the latter have even statistically shown achievement of results.

108. In reference to the cases at hand, the Central Government had taken a decision to stop financing and consequently to wind up the FTC Scheme. However, at the same time, it has allocated Rs.2500 crores for operation of the Morning, Evening and Shift Courts in the country besides providing funds under other heads, as per the 13th Finance Commission Report for the period 2010-2011 to 2014-2015.

109. It may not be appropriate for this Court to decide upon a comparative analysis of the policy decisions as to which policy has greater merit and which policy the Government should adopt, but certainly whichever policy is eventually taken up by the State, it has to be fair, in public interest and also satisfy the constitutional limitation of ensuring independence of Judiciary.

110. Another very important aspect, which has often been noticed by this Court, is that the Legislature, in exercise of its power, has enacted various Central and State laws. The disputes arising under these laws are to be adjudicated upon by the Courts. It is a known fact that such legislations are not preceded by Judicial Impact Assessment by the concerned authorities.

111. To take an example, in 1988 the Legislature amended the provisions of the Negotiable Instruments Act, 1881, inserting Chapter XVII (Section 138 to Section 142) by the Amending Act 66 of 1988. Again, vide the Amending Act 55 of 2002, the punishment prescribed under Section 138 of that Act was amended and the period of notice was also reduced to 15 days from the one month period prescribed earlier. These amendments resulted in filing of unexpected number of cases in the courts of the learned Magistrate. As per the 213th Law Commission Report, the pendency in 2008 of



Section 138 cases alone in the country is 3.8 million cases in the trial courts.

112. Similarly, with the passage of time, owing to the tremendous growth in the population of the country and greater awareness among citizens of their rights, civil and criminal litigation before the Courts have increased manifold, without there being an equivalent increase in the strength of Judges and enhancement in the infrastructure of the Courts. Thus, it is essential that some kind of consistent and systematized approach is adopted by all the concerned Governments, including the Union of India, so as to take effective measures to remedy this situation as well as to prevent further undesirable increase in the pendency of cases before the Courts. Expeditious disposal of cases is obviously the first answer to this multifarious problem.

**The Conference of the Chief Ministers of the States and the Chief Justices of the High Courts**

113. In order to resolve various administrative and allied issues relating to the administration of justice in the States, it has been the practice to hold the Chief Justices and Chief Ministers Conference, which is presided over by the Chief Justice of India. In these meetings, various steps are discussed, for which an agenda is circulated and suggestions from the High Courts as well as the State Governments are invited. This Conference is normally attended by the Chief Ministers and/or the Law Ministers of the State, Chief Justices of the High Courts and various other authorities from the bureaucracy and the High Courts. Upon due deliberations, decisions are taken, whereafter Minutes of the same are prepared and circulated. The decisions are recorded and circulated to the States and the Union of India specifically for their information and further action. Unfortunately, the practice has shown that these decisions have hardly been implemented by the concerned authorities.

114. One such Conference was held on 16th August, 2009 in which various matters were discussed. Item 3 of the Agenda and the decision taken thereunder reads as follows:-

**"3. Progress made in setting-up of fast track courts of magistrates and fast track civil courts and continuation of fast track courts.**

There was unanimity amongst all the participants that Fast Track Courts of Magistrates and Fast Track Civil Courts be set up on the lines of Fast Track Courts of Sessions for the purpose of expeditious disposal of cases pending in the Magisterial Courts. They were unanimous on the aspect that huge accumulation of arrears of cases cannot be arrested unless strength of Judicial Officers is raised. All the speaker were ad idem with the proposal of continuing Fast Track Courts of Sessions for a further period of five years beyond 31st March, 2010, as they were set-up with a laudable object and a large number of cases have been disposed of by these courts. However, the speakers cited financial constraints and desired that the allocation of funds for this purpose be made by the Central Government.

**DECISION**

a] Fast Track Civil Courts and Fast Track Courts of Magistrates be set-up in order to arrest accumulation of arrears of cases in such courts.

b] Fast Track Courts of Sessions be continued for a further period of five years beyond 31st March, 2010.

c] Priority be given to the retired Judicial Officers for appointment to the Fast Track Courts having unblemished service record of integrity, probity and ability as also on the basis of physical and mental fitness. A reasonable amount of remuneration be paid to the retired Judicial Officers appointed for the purpose."



115. The matter in regard to setting up of Evening, Morning and Shift Courts was also discussed and it was required that the State Government shall set up at least one Family Court in each district. Other items which may have some bearing on the matter before us are Item nos. 8 and 13 which read as under:-

**"8] Steps required to be taken for reduction of arrears and ensuring the speedy trial**

There was complete unanimity amongst the participants that cases are not being disposed of within a reasonable time-schedule and they were of the view that strength of Judges at all levels need to be enhanced in order to arrest accumulation of arrears of cases and to provide speedy, efficient and effective justice to the citizens. The speakers also stressed upon the need to evolve methods to arrest arrears of cases and to ensure speedy disposal of cases. The participants also impressed upon the fact that unfilled vacancies be filled up at the earliest which will contribute to reducing the backlog of cases.

**DECISION**

The High Courts will make scientific and rational analysis as regards accumulation of arrears and devise a roadmap for itself and jurisdictional courts to arrest arrears of cases taking into account average institution, pendency and disposal of cases and to ensure speedy trial within a reasonable time-schedule.

**13] Judicial Impact Assessment**

The proposal of 'Judicial Impact Assessment' was welcomed at the Conference and need was felt that it be assessed on a continual basis. It was suggested that a scientific study be made to estimate the additional case-load on the courts on account of a new legislation.

**DECISION**

A judicial impact office at the National and State levels on continual basis for making assessment of impact of legislations on judicial work load be constituted."

116. There is nothing placed on record before us to show that the FTCs at the level of the Magistrate Courts have no further efficacy. All the concerned governments, including the Union of India, which duly participated in the Conference, had decided to extend the FTCs for a period of five years beyond 31st March, 2010 i.e. till 31st March, 2015. It was further contemplated in the above decisions that other measures should also be taken by the respective State Governments and Union of India to tackle the problem of arrear of cases. Hardly any decision in that regard was implemented, but on the other hand, a decision contrary to the minutes has been taken with certainty and has been placed before us that the FTC Scheme would not be financed by the Central Government beyond 31st March, 2011. The question that arises is whether it is justified for the Central Government, or any other Government, to brush aside the above Minutes and recommendations of such a high level meeting in a most casual manner or whether such Minutes require favourable consideration by all concerned and proper and complete policy decisions taken in furtherance thereto and such minutes form the foundation for major policy decisions relating to judiciary.

117. The latter perspective demands an affirmative answer as these decisions and recommendations should be favourably considered by all concerned. Rather, they should form the basis of the policy decisions relating to the administration of justice. The Chief Justices and the Chief Ministers are the constitutional heads of the Judiciary and the Executive, respectively. The matters are discussed by all States, Union of India and Judiciary. The decisions are taken on the basis of the collective wisdom. One can hardly comprehend a constitutional body of a higher normative significance than the Chief Justices and the



Chief Ministers of the respective High Courts/States to take such policy decisions at the National level. The meeting is held under the umbrella of the Union of India and is presided over by the Chief Justice of India, Union Minister for Law and Justice and other high dignitaries to deliberate upon issues which relate to the justice delivery system, ultimately affecting the basic and fundamental rights of the citizens of this country at large.

118. It will not only be unfair but unacceptable that these Minutes be placed in the shelves of the Government archives without attaching any significance to them. In our considered view, it will neither be fair nor proper for any level in the bureaucratic hierarchy of the Government to reject such suggestions at the threshold, that too, without any proper reasoning in support thereof. At least, the Cabinet of the Government of India or the State Government, as the case may be should take into consideration the decisions and recommendations of this meeting. We hasten to add that due weightage should be attached to these recommendations and preferably, they should form the basis of the policy decision by the State or the Central Government in relation to the matters concerning Judicial administration.

**Merits of the Respective Cases**

119. We have already noticed that in the case of the State of Gujarat, a number of persons were appointed as Judicial Officers to preside over the FTCs by way of direct recruitment from the Bar. Their services have been terminated on the ground of unsatisfactory performance. The High Court had, vide its judgment dated 1st August, 2010, declined to set aside the termination of services of most officers, except 12 officers whose cases were remanded to the High Court for reconsideration on the administrative side. Out of these 12 officers, the High Court reinstated six officers and declined reinstatement of six others. In this way, 47 officers have challenged their termination orders. In the impugned judgment, the High Court has noted unsatisfactory performance as the

cause for termination of their services. Entries of their service records have been reproduced in the judgment. All these officers had been appointed as *ad hoc* and temporary FTC Judges. At no point of time was anything done, directly or indirectly, by the State to give rise to a legitimate expectation of the appointees that their services will be regularized and they will be absorbed in the regular cadre. On the basis of the Confidential Records referred to by the High Court, in its judgment, it is difficult for us to take any different view, particularly when these judicial officers were only temporary and *ad hoc* appointees with no vested right to the post. Certainly, this is not a case of mala fide termination. In the subsequent writ petitions before the High Court only one reason has been given for the termination, i.e., the Central Government has refused to extend the FTC Scheme and so, the State Government of Gujarat has also decided not to extend the FTC Scheme beyond 31st March, 2011. This probably was not a valid reason to dismiss the Writ Petitions because the Court ought to have examined the prayer of those officers for regularization of their services and absorption against the regular cadre posts. This aspect of the Writ Petition was not even discussed by the High Court and the writ petitions were dismissed. However, the High Court, while noticing that 100 posts of Additional District Judges have been created, concluded that the FTC Judges would not be adjusted or absorbed against those vacancies and that the they could not claim absorption against those posts. The High Court merely granted leave to the petitioners to apply for selection to the new posts or the regular posts, in light of the judgment of this Court in the case of *Brij Mohan Lal* (supra).

120. These petitioners have also raised a challenge to Rules 4 and 6 of the Gujarat Rules under which they were appointed, on the ground that the same are arbitrary and discriminatory. Firstly, the Rules under which the petitioners were appointed after 2001 themselves were to be in force only till 31st December, 2005. Till 2005, none of the appointees



challenged these Rules. For these four years, they, in fact, took full advantage of their appointment under these Rules and received different service benefits thereunder. We are unable to appreciate the contention that these Rules were arbitrary or discriminatory. The Rules themselves were temporary and were enacted to meet an emergency situation. The appointments were made purely on *ad hoc* and urgent temporary basis for a period of two years, terminable without any prior notice. A temporary appointment, which itself was made for a period of two years, can hardly be equated to a tenure appointment and must be construed on such terms. These appointments were to come to an end by lapse of time. Such an appointment obviously cannot vest or confer any right upon the appointees to be absorbed in the permanent cadre, as they were not appointed in accordance with the provisions of the Gujarat Judicial Service Recruitment Rules, 1961. The expression 'liable to be terminated at any time without any notice' could be susceptible to objections if it was used in the case of a quasi permanent or permanent employee of a Government servant. However, we have already noticed that there were no permanent posts contemplated under the FTC Scheme. The entire FTC Scheme was *ad hoc* and formulated to operate only until the year 2005. It was continued beyond that period in accordance with the directions of this Court but now a decision has been taken not to continue the FTC Scheme beyond 31st March, 2011. Even if, for the sake of argument, we accept the contention that the expression 'liable to be terminated at any time without any notice' is arbitrary and opposed to the basic Rule of Law, it still has to satisfy the twin tests laid down in the case of *Parshotam Lal Dhingra* (supra), i.e., firstly, whether the Government servant being terminated or reduced in rank thereby had a right to the post or to the rank, as the case may be and, secondly, whether he had been visited with evil consequences. Both of these tests have to be answered in the negative, in the facts and circumstances of the present case. We have already held above that these officers had no right to their posts and, consequently, discontinuation of their services

in the facts of the present case cannot be construed as punitive or one visiting the petitioners with civil consequences. This holds true even though in some cases, it has been recorded that the performance of these appointees was found to be unsatisfactory but that is not the lone reason given by the High Court for dispensing with their services. It is the discontinuation of the FTC Scheme itself that is the principal reason for terminating the services of all these officers. In the present case, the Rules themselves were temporary and were bound to cease to have force of law after 2005. The posts created were temporary and *ad hoc*. The appointments were made on *ad hoc* and urgent temporary basis for a limited period of two years and terminable without notice. In these circumstances, neither can it be stated that there existed posts which had permanent or quasi-permanent character and were the duly sanctioned posts of the regular cadre of the State Government nor that the appointees had any right to these posts. Similar views were expressed by this Court in the case of *Mohd. Abdul Kadir* (supra) holding that the appointments made under a scheme, which was extended from time to time could still be terminated or discontinued as the temporary or *ad hoc* engagements or appointments were in connection with a particular project or a specific scheme only. Such appointments would come to an end with the scheme itself.

121. Writ Petitions have been filed by some of the appointees from the State of Orissa praying for quashing of the caution dated 4th April, 2008 issued to some officers, including Smt. Madhumita Das, which had informed them that they were required to dispose of eight sessions trials every month which, so far, they had not been able to achieve and that if they still failed to achieve the said target, their services would be liable to be terminated. The State of Orissa had issued an advertisement for direct recruitment to the Higher Judicial Services of the State dated 11th April, 2008. The appointees to the FTCs prayed that this advertisement be quashed and they be absorbed against the regular vacancies. Amongst



others, one Shri Prakash Kumar Rath, petitioner in Writ Petition (C) No.254 of 2008 has approached this Court under Article 32 of the Constitution on the ground that he had earlier been placed in the waiting list of the candidates selected for regular appointment to the Higher Judicial Services of the State of Orissa under the Orissa Superior Judicial Service Rules, 1963 though after sometime, his appointment was made under the Orissa Judicial Service (Special Scheme) Rules, 2001 relating to temporary appointment for FTCs. According to this petitioner, he ought to be treated as a regular candidate as his selection was under the regular service cadre and, therefore, he should be absorbed against those vacancies.

122. The correctness of the above-mentioned caution is primarily challenged on the ground that it is violative of Articles 14 and 16 of the Constitution inasmuch as no such restriction or limitation of disposing eight Session Trials every month is applied to the members of the State Higher Judicial Services and that the same yardstick should uniformly be applied to the direct recruits appointed under the Rules as well as to the Judicial Officers promoted/transferred to the FTCs. This argument is misconceived. The Judicial Officers appointed under the regular cadre of the State Higher Judicial Services are subject to various restrictions and limitations of judicial conduct as imposed by the High Court and under the relevant Rules in force. Without exception, unit system for disposal of cases prevails and is applicable to the courts presided over by such officers. They are required to dispose of certain given number of cases as that is one of the main parameters for recording the Annual Confidential Reports of the officers and placing them in the categories of 'Outstanding', 'Very Good', 'Good', 'Average', etc. On the contrary, the FTC Judges are to deal only with session trials. This was the very purpose for which the Scheme was created and, as such, they cannot claim that the imposition of such a condition is ex facie unreasonable, arbitrary or discriminatory. In fact, in the writ petitions filed before us, no data has been provided to substantiate that it is

neither practicable nor possible for these courts to dispose of eight Session Trials, as contemplated under this caution letter dated 4th April, 2008. It is not that every sessions trial requires examination of large number of witnesses and other evidence. There are a considerable number of sessions cases where the trial may not really take prolonged period for disposal. In the absence of any specific data and even otherwise, we are unable to accept this contention raised on behalf of the petitioners-appointees. Similarly, we also find no merit in the contention that this Court should quash the advertisement issued by the State of Orissa for making selections to the Orissa Higher Judicial Services on the basis of the claims for regularization of the petitioners against such posts. There are two different sets of Rules, applicable in different situations, to these two different classes of officers and further they are governed by different conditions of service. They cannot be placed at par. The process of their appointments is distinct and different. These petitioners have no right to the post. Thus, it would neither be permissible nor proper for the Court to halt the regular process of selection on the plea that these petitioners have a right to be absorbed against the posts in the regular cadre.

123. The prayer for regularization of service and absorption of the petitioners-appointees against the vacancies appearing in the regular cadre has been made not only in cases involving case of State of Orissa, but even in other States. Absorption in service is not a right. Regularization also is not a statutory or a legal right enforceable by the persons appointed under different rules to different posts. Regularization shall depend upon the facts and circumstances of a given case as well as the relevant Rules applicable to such class of persons. As already noticed, on earlier occasions also, this Court has declined the relief of regularization of the persons and workmen who had been appointed against a particular scheme or project. A Constitution Bench of this Court has clearly stated the principle that in matters of public employment, absorption,



regularization or permanent continuance of temporary, contractual or casual daily wage or *ad hoc* employees appointed and continued for long in such public employment would be de hors the constitutional scheme of public employment and would be improper. It would also not be proper to stay the regular recruitment process for the concerned posts. [refer *Uma Devi* (3) (supra)].

124. It is not necessary for us to deliberate on this issue all over again in view of the above discussion. Suffice it to notice that the petitioner-appointees have no right to the posts in question as the posts themselves were temporary and were bound to come to an end by efflux of time. With reference to the letters of their appointment and the Rules under which the same were issued, it is clear that these petitioners cannot claim any indefeasible right either to regularization or absorption. It may also be noticed that under the Orissa Superior Judicial Services and Judicial Service Rules, 2007, there is no provision for absorption or regularization of *ad hoc* Judges.

125. The petitioners from the State of Andhra Pradesh have also prayed for identical relief claiming that the advertisement dated 28th May, 2004 issued for filling up the vacancies in the regular cadre should be quashed and not processed any further and the petitioners instead should be absorbed against those vacancies. In view of the above discussion, we find no merit even in these submissions.

126. We have already noticed that the FTC Judges were appointed under a separate set of Rules than the Rules governing the regular appointment to the State Higher Judicial Services. It has been clearly stipulated that such appointments would be *ad hoc* and temporary and that the appointees shall not derive any benefit from such appointments.

127. In the case of State of Rajasthan, it is the Judicial Officers from the cadre of Civil Judge, Senior Division, who were promoted as FTC Judges. They have continued to hold

those posts for a considerable period. According to these petitioners, they were promoted to the Higher Judicial Services as per Rules and, therefore, keeping in view the order of this Court in the case of *Madhumita Das* (supra) as well as the very essence of the FTC Scheme, they should be absorbed as members of the regular cadre of Higher Judicial Services of the State of Rajasthan. The State Government had issued a directive that they should undertake the limited competitive examination for their regular promotion/absorption in the higher cadre. These officers questioned the correctness of this directive on the ground that they were promoted as Additional Sessions Judges (FTC) under the Rules and, therefore, there was no question of any further requirement for them to take any written examination after the long years of service that they have already put in in the Higher Judicial Services.

128. The Rajasthan Higher Judicial Service Rules, 2010 are in force for appointment to the Higher Judicial Services of the State. The judgment of this Court in *All India Judges' Association* case (2002) (supra) as well as the relevant Rules contemplate that a person who is to be directly appointed to the Higher Judicial Services has to undergo a written examination and appear in an interview before he can be appointed to the said cadre. As far as appointment by promotion is concerned, the promotion can be made by two different modes, i.e., on the basis of seniority-cum-merit or through out of turn promotion wherein any Civil Judge, Senior Division who has put in five years of service is required to take a competitive examination and then to the extent of 25 per cent of the vacancies available, such Judges would be promoted to the Higher Judicial Services. It was admitted before us by the learned counsel appearing for the petitioner that these officers who were promoted as *ad hoc* FTC Judges had not taken any written competitive examination before their promotion to this post under the Higher Judicial Services. In other words, they were promoted on *ad hoc* basis depending on the availability of vacancy in the FTCs. Once the Rules required a particular



procedure to be adopted for promotion to the regular posts of the Higher Judicial Services, then the competent authority can effect the promotion only by that process and none other. In view of the admitted fact that these officers have not taken any written examination, we see no reason as to how the challenge made by these Judicial Officers to the directive issued by the State Government for undertaking of written examination may be sustained. Thus, the relief prayed for cannot be granted in its entirety.

129. In the case of the States of Punjab and Haryana, the appointees were directly appointed as FTC Judges by way of direct recruitment from the Bar and they prayed for regularization of their services and absorption in the regular cadre as well as for continuation of the FTC Scheme till their absorption. For the reasons already recorded by us in relation to other States mentioned above, we do not think that the relief of regularization/absorption can be granted to these petitioners also in the manner in which they have prayed. They too have no right to the post. Admittedly, these candidates also did not pass any written competitive examination and were appointed solely on the basis of an interview and must now undergo the requisite examination.

**The effect of *Madhumita Das* (supra) and *Brij Mohan Lal* (supra) and the directions that this Court is required to issue in light thereof**

130. The issues arising for the consideration of this Court under this head, though ancillary, are of significant importance. Having held that the petitioners/appointees to the FTCs do not have any right to the post and such appointments were temporary, *ad hoc* and on urgent basis for a limited period, we have yet to examine whether these petitioners would at all be entitled to some relief within the framework of law, with particular reference to certain constitutional provisions. The independence of the Judiciary forms part of the basic structure of our Constitution. In the Indian Democracy neither

administration of justice nor functioning of the courts can be rendered irrelevant by actions of other organs of the State. Article 13 of the Constitution prescribes that if relevant laws are inconsistent with Part III of the Constitution, when enacted, they shall thereafter be held to be void to the extent of such inconsistency. The power of the Legislature, thus, is limited by the very fundamental restriction prescribing that it cannot enact laws inconsistent with the fundamental rights of the citizens. With the development of law, Article 21 has been given a very wide connotation. It covers various facets of life. Right to life encompasses the right to live with dignity. Life or personal liberty cannot be taken away except according to the procedure established by law. Such procedure established by law also has to be reasonable, fair and just. On failure to satisfy these parameters, such deprivation would be found violative of the fundamental right guaranteed under Article 21 of the Constitution and would be liable to be struck down. One such rudiment stated by this Court is the right to fair and speedy trial.

131. The right to speedy trial is an essential ingredient of such reasonable, fair and just procedure. The State cannot be permitted to deny the constitutional right to speedy trial to the accused on the ground that the State does not have adequate financial resources to incur the necessary expenditure needed, for improving the administrative and judicial apparatus to ensure speedy trial. Usefully, we can refer to the words of Judge Blackmum in *Jackson v. Bishop* [404 F Supp. 2d 571] who proclaimed that 'humane considerations and constitutional requirements are not, in this day, to be measured by dollar considerations'. In the case of *Hussainara Khatoon and Others (IV) v. Home Secretary, State of Bihar, Patna* [(1980) 1 SCC 98], this Court held that:

> "10. ….it is also the constitutional obligation of this Court, as guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action such as augmenting and strengthening investigative machinery, setting up new courts, building new court houses, providing, providing more staff and equipment to the courts, appointment of additional Judges and other measures calculated to ensure speedy trial."



132. This Court, in the case of *Sheela Barse (II) and Ors. v. U.O.I. and Ors.* [(1986) 3 SCC 632], while expressing its anguish over mounting arrears of criminal cases, particularly in relation to retarded, abandoned or destitute children who were facing trial and lodged in protection homes for years, issued various directions and held as under:-

> "3. ..We are, therefore, firmly of the view that every State Government must take necessary measures for the purpose of setting up adequate number of courts, appointing requisite number of judges and providing them the necessary facilities. It is also necessary to set up an institute or academy for training of Judicial Officers so that their efficiency may be improved and they may be able to regulate and control the flow of cases in their respective courts. The problem of arrears of criminal cases in the courts of magistrates and Additional Sessions Judges has assumed rather disturbing proportions and it is a matter of grave urgency to which no State Government can afford to be oblivious. But, here, we are not concerned with the question of speedy trial for an accused who is not a child below the age of 16 years. That is a question which may have to be considered in some other case where this Court may be called upon to examine as to what is reasonable length of time for a trial beyond which the court would regard the right to speedy trial as violated…."

133. It is a known fact that besides the above judgment, in a number of decisions including all the cases titled *All India Judges' Association* (supra), the *Salem Advocate Bar Association v. Union of India* [(2003) 1 SCC 49] and various

other public interest litigations, this Court has used all legally permissible judicial tools, to pass appropriate directions of a generic nature and required the Governments to duly take requisite policy decisions, in furtherance of public duties as would be the requirement of law and the Constitution. {Ref. *Prakash Singh Badal v. State of Punjab and Others* [(2006) 8 SCC 1]}. The Constitution confers certain rights upon the citizens and they are entitled to full enforcement of such rights.

134. The present case has two significant aspects with which the Court is concerned. One relates to the grant or refusal of the relief claimed by various writ petitioners in these petitions while the other enjoins a duty upon the Court to test the merits or otherwise of the policy decision taken by the Government as opposed to the rights of the under trials or accused as well as the right of the public at large to demand speedy and fair trial. The former may have limited but the later certainly has far reaching consequences. This Court would fail in its duty if it declines to exercise its jurisdiction in the latter class of cases, solely on the ground that it was a policy decision and, thus, is beyond the limits of judicial review, being a matter primarily within the domain of the Government. Keeping in view its constitutional duty, the constitutional rights of citizens of this country at large and with reference to the facts of a given case, this Court may be duty bound to amplify and extend the arm of justice in accordance with the principle Est boni Judicls ampliare Justiciary non-Jurisdictionem. The argument that matters of policy are, as a rule, beyond the power of judicial review has to be dispelled in light of the consistent view of this Court. This Court would be required to take unto itself the task of issuing appropriate directions to ensure that the Rule of Law prevails and the constitutional goals are not defeated by inaction either when the law requires action or when the policy in question is so arbitrary that it defeats the larger public interest.

135. Now, we may examine certain essential features



which have compelled us to state the directions with candour :

(a) The right of the citizens, undertrials or convicts to a speedy and fair trial.

(b) Persistent deadlock between the Union and the State Governments in regard to continuation or otherwise of the FTC Scheme .

(c) Uncertainty and adhocism in planning, implementation and financing of the FTC Scheme.

(d) The legitimate expectation of the large number of FTC Judges, that their services would be regularized in the Higher Judicial Service of the respective State or that the FTC Scheme would be made a permanent feature.

(e) The element of arbitrariness that appears to have crept into the decision-making process of the Government and its hierarchy.

(f) Why due weightage was not given to the decision and recommendation of the Minutes of the Chief Justices and Chief Ministers Conference held in the year, 2009 at New Delhi?

(g) Whether the decision of the Government was data based and taken objectively?

(h) There is an inbuilt contradiction in this policy decision inasmuch as, on the one hand, lack of finances is one of the grounds taken for discontinuance of the FTC Scheme, funds to the tune of Rs.2500 crore have been allocated for starting of the morning, evening and shift courts on the other.

136. These are the features of the case which stand out

and oblige the Government of India to clarify its stand. The Union of India has failed to place any material on record to justify its decision taken vide letter dated 14th September, 2010 deciding to stop financing the FTC Scheme with effect from 31st March, 2011. We are quite prepared to accept the contention of the Union of India that it will not be a case where this Court should venture to issue a mandamus directing continuation of the Scheme and reverse the policy decision taken by the Union of India. While we are not oblivious of the principle that policy decisions should be interfered with rarely by the court, we are fully conscious of the fact that the present case is certainly one where the Court should issue certain directions to ensure that the fundamental rights and protections available to the citizens are not violated and at the same time, the decision of the Government of India does not undermine the independence of judiciary. It may not be mandatory, but is always desirable that the policy decision in relation to administration of justice should be made by Union of India in consultation with the Supreme Court and/or the respective High Courts of the State. The recommendation of bodies like the Law Commission of India or other special commissions appointed in relation to administration of justice delivery system ought to be taken into consideration. But, we are unable to accept the view that the recommendations given by one of the important organs of the State, the judiciary, are not given effective consideration and due weightage in framing and implementation of the policies making relating to matters of administration of justice.

137. It will neither be appropriate nor logical for the Union of India and/or the State Governments to raise an argument that this Court may not issue any directions or mandamus to the concerned Government, as it may have far reaching consequences. This argument does not impress us at all. Firstly, the Union of India and the State Governments are not expected to raise such issue and secondly, it can hardly be disputed that the Governments have not been able to successfully perpetrate any stable and result-oriented solution



to reduce the huge pendency of criminal cases before the courts. The finances, infrastructure and existence of adequate posts are the prime considerations which would weigh with any Authority or Court while taking any policy decisions or passing necessary directions in that behalf.

138. What appears to have weighed with the Central Government for not continuing the FTC Scheme after 31.03.2011 is that the 13th Finance Commission has recommended a grant of Rs. 5,000 Crores to the States for improving the justice delivery system in the country with a specific objective of reducing the arrears significantly and out of this amount of Rs.5,000 crore a sum of Rs.2,500 crore has been allotted for morning/evening/shift courts and no amount has been allotted for FTCs. The recommendations of the 13th Finance Commission under the head "Improving Justice Delivery" which are relevant are extracted hereinbelow:

> "12.76 The improvement of justice delivery is a critical component of the initiative to ensure better outputs and outcomes. This can be done by supporting the judiciary, while simultaneously strengthening the capacity of the law enforcement arm. We discuss here the support required to improve judicial outcomes. There are over 3 crore cases pending in various courts in the country today. At the very least, current filings need to be disposed off, to prevent accumulation of arrears. The enormous delay in disposal of cases results not only in immense hardship, including those borne by the large number of under-trials, but also hinders economic development.
>
> 12.77 The Department of Justice has identified a number of initiatives which are part of this action plan and need support. The first is increasing the number of court working hours using the existing infrastructure by holding morning/evening/shift courts. The second entails enhancing support to Lok Adalats to reduce the pressure on regular courts. The third initiative involves providing additional funding to

State Legal Services Authorities to enable them to enhance legal aid to the marginalised and empower them to access justice. The fourth is promoting the Alternate Dispute Resolution (ADR) mechanism to resolve pat of the disputes outside the court system. The fifth is enhancing capacity of judicial officers and public prosecutors through training programmes. The sixth relates to supporting creation of a judicial academy in every state to facilitate such training.

12.78 The department has also proposed creation of the post of Court Managers in every judicial district to assist the judiciary in their administrative functions. A number of courts in each state are housed in heritage buildings, which reflect the cultural heritage of the arrears. It is proposed that a grant be provided for maintaining these buildings.

12.79 The Commission, after careful consideration has agreed to support the proposals made by the Department of Justice by approving a grant of Rs.5,000 Crores to be allocated as describe below. These allocations may be released in two annual instalments subject to accounts being maintained and Utilisation Certificates (UCs)/ Statements of Expenditure (SOEs) provided as per General Financial Rules (GFR 2005).

12.80 Operation of morning/ evening/ special judicial-metropolitan magistrate/ shift courts: The present 14,000 district and subordinate courts in the country are disposing off both important as well as petty cases. The pressure on judicial time on account of the petty cases can be relieved by allotting them to morning/evening courts/ courts of special judicial/metropolitan magistrates. These courts will be staffed either by the regular judiciary on payment of additional compensation, or by retired officers. The morning courts in Andhra Pradesh and the evening courts in Gujarat have demonstrated the feasibility of such models. It is expected that about 14,825 such courts can



dispose off 225 lakh pending as well as freshly filed cases of a minor nature within a year. This aggregates to 1125 lakh cases over the period 2010-2015. An amount of Rs.2,500 crore is being provided to facilitate setting up of such courts, which has been allocated to each state in accordance with the number of sanctioned courts. "

139. It will be clear from the aforesaid extracts from the recommendations of the 13th Finance Commission that the recommendations were based on the proposals of the Department of Justice, Government of India for setting up morning/evening and shift courts because the morning courts in Andhra Pradesh and the evening courts in Gujarat had demonstrated the feasibility of morning and evening courts. The morning and evening courts, however, may not be feasible in the other States in India due to various local conditions prevailing in the States. Moreover, as mentioned in paragraph 12.77 of the recommendations of the 13th Finance Commission, the idea behind having morning/evening/ shift courts is that sufficient infrastructure such as court rooms were not available for regular courts and with the same infrastructure more hours of judicial work could be done through morning/ evening and shift courts. The fact, however, remains that with the help of funds allotted by the 11th Finance Commission, the States have already established additional court rooms for the FTCs. These relevant aspects have not been considered by the Central Government while rejecting the recommendations in the Conference of Chief Ministers of the States and Chief Justices of the High Courts for continuing the FTC Scheme after 31.03.2010. The State Governments and the High Courts of different States should have been consulted and their views should have been taken before the Central Government took the final decision to reject the proposal at the Conference of the Chief Ministers of States and Chief Justices of the High Courts to continue the FTC Scheme. We, however, find that the policy-decision of the Central Government to discontinue the FTC Scheme beyond 31.03.2011 in its letter dated 14.09.2010

has already been given effect to and for this reason we are not inclined to strike down the aforesaid policy-decision of the Union of India to discontinue the FTC scheme beyond 31.03.2011.

140. Nonetheless, it will be clear from paragraph 12.76 of the recommendations of the 13th Finance Commission that there are over 3 crores pending cases in various courts in the country and there is enormous delay in disposing of the cases resulting in immense hardship, including those borne by large number of under-trials. If the FTC *ad hoc* direct recruits who have over the years gained a lot of judicial experience are regularised and absorbed in the regular cadre of Additional District Judges in different States, the problem of arrear of cases can be handled to some extent. The State Governments, however, may not have the funds to bear the salary and allowances of additional posts of Additional District Judges and therefore may not be in a position to regularise the *ad hoc* FTC Judges. To meet the cost disability of some of the State Governments, the 13th Finance Commission has provided funds for different projects, grant-in-aid and infrastructural expenditure relating to establishment and running of courts. This will be clear from paragraphs 12.1 and 12.2 of the recommendations of the 13th Finance Commission which are quoted hereinbelow:

> "12.1 Our terms of Reference (ToR) require us to make recommendations on the principles that should govern the grants-in-aid of the revenues of states out of the Consolidated Fund of India and the sums to be paid to states which are in need of assistance by way of grants-in-aid of their revenues under Article 275 of the Constitution, for purposes other than those specified in the provisos to Clause (1) of that article.
>
> 12.2 Grants-in-aid are an important component of Finance Commission transfers. The size of the grants has varied from 7.7 per cent of total transfers under FC-VII to 26.1 per



> cent of total transfers under FC-VI. Grants recommended by FC-XII amounted to 18.9 per cent of total transfers. In their memoranda to us, a few states have argued that grants should be restricted to only a small portion of the states' share in FC transfers. They have argued that grants have been directed to particular sectors and with conditionalities that restrict the expenditure options of the states. In our assessment, grants-in-aid are an important instrument which enable the Commission to make its scheme of transfers more comprehensive and address various issues spelt out in the ToR. *Grants also allow us to make corrections for cost disabilities faced by many states which are possible to address only to a limited extent in any devolution formula. The Commission has accordingly suggested several categories of grants-in-aid amounting in aggregate to Rs.3,18,581 crore which constitutes 18.03 per cent of total transfers."*

141. To meet the expenses of the State Government for improving the Justice Delivery System, the 13th Finance Commission has, therefore, recommended a total grant of Rs.5,000 crores under the following specific heads:

(i) Operation of morning/ evening/ special judicial-metropolitan magistrate/ shift courts - Rs.2,500 crores

(ii) Establishing ADR Centres and training of mediators/conciliators - Rs.750 crores

(iii) Lok Adalat - Rs.100 crores

(iv) Legal Aid - Rs.200 crores

(v) Training of Judicial Officers - Rs.250 crores

(vi) State Judicial Academies - Rs.300 crores

(vii) Training of Public Prosecutors - Rs.150 crores

(viii) Creation of posts of Court Managers - Rs.300 crores

(ix) Maintenance of heritage court buildings - Rs.450 crores

142. On account of the aforesaid allocations of grants-in-aid to specific heads, the State Governments will not be able to utilise the allocations made in their favour for additional posts of Additional District Judges for regularising the FTC Judges. We are, thus, of the considered opinion that the Central Government should, in consultation with the State Governments and the High Courts of the different States, reconsider allocating some amount out of the grant of Rs.5000 crores and for such additional amount for meeting the initial expenses of increase in cadre strength of Additional District Judges for absorbing the direct recruits of the FTC Scheme by way of regularisation.

143. In terms of Articles 141 and 144 of the Constitution, the law declared by the Supreme Court of India is binding on all Courts and all authorities which are to act in aid of the law so declared. The framers of the Constitution, in no uncertain terms, declared that the judgments of this Court are binding on all. In fact, there is a duty upon the Authorities and all other Courts to act in aid of such decisions. In the case of *Brij Mohan Lal* (supra), this Court vide its judgment dated 6th May, 2002 after noticing various judgments of this Court, issued number of directions in relation to establishment and functioning of the FTCs. It referred to the Report of the Eleventh Finance Commission. While repelling the challenge to the FTC Scheme, this Court directed that steps should be taken within three months from the date of that judgment. The modes of appointment of Judges to the FTCs were also provided in this judgment. The judgment itself said that no right will be conferred on the Judicial Officers in service for claiming any regular promotion on the basis of serving as FTC Judges. While stating the order of preference for appointment to these Courts, this



Court held that the first preference would be given to judges from amongst the eligible judicial officers by *ad hoc* promotion, the second preference would be given to the retired judges with good service records and the third preference would be given to the members of the Bar by direct recruitment.

144. Thereafter, this Court passed a detailed order in the case of *Madhumita Das* (supra), finding some substance in the plea that while assessing the performance, there cannot be different yardsticks, i.e. the same parameters have to be adopted while judging the performance of the petitioners viz-a-viz. those which are recruited from another source, i.e. from amongst the Judicial Officers. However, in the interim order, this Court made a specific direction that the petitioners will continue to hold the post until further orders, which it directed the High Court to pass. It was also stated therein that as and when regular vacancies would arise, the cases of the petitioners shall be duly considered and there shall not be any need for them to appear in any examination meant for recruitment to the cadre of District Judge.

145. Thus, these two orders must be seen in light of the fact that the Union of India, as well as the State Governments of their own, extended the FTC Scheme for another five years i.e. till 2010 and thereafter, by another year. The Central Government ultimately took the decision not to finance the FTC Scheme with effect from 30th March, 2011. Even thereafter, a number of States have taken the decision to continue the FTC Scheme while retaining the appointees thereto till 2012, 2013 and even till 2016. The State of Haryana has even thought of making it as a permanent feature of dispensation of justice in the State. The cumulative effect of all these factors is that the petitioners had a legitimate expectation that either their services would be continued as the FTC Scheme would be made a permanent feature of the justice administration in the concerned State or they would be absorbed in the regular cadre. But mere expectation or even legitimate expectation of absorption cannot

be a cause of action for claiming the relief of regularization, particularly when the same is contrary to the Rules and letters of appointment. In *Madhumita Das* (supra), the protection was granted in an interim order and we also feel that such directions cannot be issued, if they are contrary to the enacted statute. When all these facts, circumstances and the judgments of this Court are harmoniously construed with an intention to do complete justice as well as to protect the fundamental rights and protections available to the public at large, it would appear necessary that this Court passes certain directions.

146. Without any intent to interfere with the policy decision taken by the Governments but, unmistakably, to protect the guarantees of Article 21 of the Constitution, improve the Justice Delivery System and fortify the independence of judiciary, while ensuring attainment of constitutional goals as well as to do complete justice to the lis before us, in terms of Article 142 of the Constitution, we pass the following orders and directions :

1. Being a policy decision which has already taken effect, we decline to strike down the policy decision of the Union of India vide letter dated 14th September, 2010 not to finance the FTC Scheme beyond 31st March, 2011.

2. All the States which have taken a policy decision to continue the FTC Scheme beyond 31st March 2011 shall adhere to the respective dates as announced, for example in the cases of States of Orissa (March 2013), Haryana (March 2016), Andhra Pradesh (March 2012) and Rajasthan (February 2013).

3. The States which are in the process of taking a policy decision on whether or not to continue the FTC Scheme as a permanent feature of



administration of justice in the respective States are free to take such a decision.

4. It is directed that all the States, henceforth, shall not take a decision to continue the FTC Scheme on *ad hoc* and temporary basis. The States are at liberty to decide but only with regard either to bring the FTC Scheme to an end or to continue the same as a permanent feature in the State.

5. The Union of India and the State Governments shall re-allocate and utilize the funds apportioned by the Thirteenth Finance Commission and/or make provisions for such additional funds to ensure regularization of the FTC judges in the manner indicated and/or for creation of additional courts as directed in this judgment.

6. All the decisions taken and recommendations made at the Chief Justices and Chief Ministers Conference shall be placed before the Cabinet of the Centre or the State, as the case may be, which alone shall have the authority to finally accept, modify or decline, implementation of such decisions and, that too, upon objective consideration and for valid reasons. Let the Minutes of the Conference of 2009, at least now, be placed before the Cabinet within three months from the date of pronouncement of this judgment for its information and appropriate action.

7. No decision, recommendation or proposal made by the Chief Justices and Chief Ministers Conference shall be rejected or declined or varied at any bureaucratic level, in the hierarchy of the Governments, whether in the State or the Centre.

8. We hereby direct that it shall be for the Central

Government to provide funds for carrying out the directions contained in this judgment and, if necessary, by re-allocation of funds already allocated under the 13th Finance Commission for Judiciary. We further direct that for creation of additional 10 per cent posts of the existing cadre, the burden shall be equally shared by the Centre and the State Governments and funds be provided without any undue delay so that the courts can be established as per the schedule directed in this judgment.

9. All the persons who have been appointed by way of direct recruitment from the Bar as Judges to preside over the FTCs under the FTC Scheme shall be entitled to be appointed to the regular cadre of the Higher Judicial Services of the respective State only in the following manner :

(a) The direct recruits to the FTCs who opt for regularization shall take a written examination to be conducted by the High Courts of the respective States for determining their suitability for absorption in the regular cadre of Additional District Judges.

(b) Thereafter, they shall be subjected to an interview by a Selection Committee consisting of the Chief Justice and four senior-most Judges of that High Court.

(c) There shall be 150 marks for the written examination and 100 marks for the interview. The qualifying marks shall be 40 per cent aggregate for general candidates and 35 per cent for SC/ST/OBC candidates. The examination and interview shall be held in



accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services.

(d) Each of the appointees shall be entitled to one mark per year of service in the FTCs, which shall form part of the interview marks.

(e) Needless to point out that this examination and interview should be conducted by the respective High Courts keeping in mind that all these applicants have put in a number of years as FTC Judges and have served the country by administering Justice in accordance with law. The written examination and interview module, should, thus, be framed keeping in mind the peculiar facts and circumstances of these cases.

(f) The candidates who qualify the written examination and obtain consolidated percentage as afore-indicated shall be appointed to the post of Additional District Judge in the regular cadre of the State.

(g) If, for any reason, vacancies are not available in the regular cadre, we hereby direct the State Goverments to create such additional vacancies as may be necessary keeping in view the number of candidates selected.

(h) All sitting and/or former FTC Judges who were directly appointed from the Bar and are desirous of taking the examination and interview for regular appointment shall be given age relaxation. No application shall be rejected on the ground of age of the applicant being in excess of the prescribed age.

10. The members of the Bar who have directly been appointed but whose services were either dispensed with or terminated on the ground of doubtful integrity, unsatisfactory work or against whom, on any other ground, disciplinary action had been taken, shall not be eligible to the benefits stated in clause 5 of the judgment.

11. Keeping in view the need of the hour and the Constitutional mandate to provide fair and expeditious trial to all litigants and the citizens of the country, we direct the respective States and the Central Government to create 10 per cent of the total regular cadre of the State as additional posts within three months from today and take up the process for filling such additional vacancies as per the Higher Judicial Service and Judicial Services Rules of that State, immediately thereafter.

12. These directions, of course, are in addition to and not in derogation of the recommendations that may be made by the Law Commission of India and any other order which may be passed by the Courts of competent jurisdiction, in other such matters.

13. The candidates from any State, who were promoted as FTC Judges from the post of Civil Judge, Senior Division having requisite experience in service, shall be entitled to be absorbed and remain promoted to the Higher Judicial Services of that State subject to :

(a) Such promotion, when effected against the 25 per cent quota for out-of-turn promotion on merit, in accordance with the judgment of this Court in the case of All India Judges' Association (2002) (supra), by taking and being selected through the requisite



examination, as contemplated for out-of-turn promotion.

(b) If the appointee has the requisite seniority and is entitled to promotion against 25 per cent quota for promotion by seniority-cum-merit, he shall be promoted on his own turn to the Higher Judicial Services without any written examination.

(c) While considering candidates either under category (a) or (b) above, due weightage shall be given to the fact that they have already put in a number of years in service in the Higher Judicial Services and, of course, with reference to their performance.

(d) All other appointees in this category, in the event of discontinuation of the FTC Scheme, would revert to their respective posts in the appropriate cadre.

147. In view of these orders, Writ Petition (Civil) No. 152 of 2011 has been rendered infructuous and is dismissed as such.

148. We appreciate the valuable and able assistance rendered by learned Amicus Curiae and all other senior counsel and assisting counsel appearing in the present writ petition.

149. All interim orders passed in any of the above petitions shall automatically stand vacated in terms of this order. With the above directions, all the appeals and other writ petitions are partially allowed while leaving the parties to bear their own costs.

N.J. Appeals and Writ Petitions partly allowed.

UNION OF INDIA & ANR.
*v.*
TALWINDER SINGH
(Civil Appeal No. 3686 of 2012)

APRIL 20, 2012

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

*Pension Regulations of the Army, 1961, Part I – Paragraph 179 – Disability pension – Entitlement to – Respondent enrolled in Army, suffered from injury at his home when on annual leave – Respondent operated for his left eye and discharged and placed in low medical category BEE (permanent) – Claim of respondent for disability pension – Opinion of the Medical Board that disability was 30% for life but the said disability was neither attributable to, nor aggravated by medical service – Rejection of the said claim by the Competent Authority as also the trial court and first appellate court – However, claim allowed by the High Court – On appeal, held: In case the injury suffered by military personnel is attributable to or aggravated by military service after discharge, he becomes entitled for disability pension – Person claiming disability pension must establish that the injury suffered by him bears a causal connection with military service – Opinion of the Medical Board which is an expert body should be given primacy in deciding cases of disability pension and the court should not grant such pension brushing aside the opinion of the Medical Board – It must be given due weight, value and credence – On facts, the injury suffered by the respondent could not be attributable to or aggravated by the military service, thus, he is not entitled for disability pension – Order passed by the High Court set aside and that of the trial court and the first appellate court restored.*





*Union of India and Anr. v. Baljit Singh* **(1996) 11 SCC 315: 1996 ( 7 ) Suppl. SCR 626;** *Union of India & Ors. v. Dhir Singh China, Colonel (Retd.),* **(2003) 2 SCC 382: 2003 (1) SCR 779;** *Controller of Defence Accounts (Pension) and Ors. v. S. Balachandran Nair* **AIR 2005 SC 4391;** *Union of India and Ors. v. Keshar Singh* **(2007) 12 SCC 675: 2007 (5 ) SCR 408;** *Union of India and Ors. v. Surinder Singh Rathore* **(2008) 5 SCC 747: 2008 (4) SCR 909;** *Union of India and Ors. v. Jujhar Singh* **AIR 2011 SC 2598;** *Secretary, Ministry of Defence and Ors. v. Ajit Singh* **(2009) 7 SCC 328: 2009 (8 ) SCR 934 – relied on.**

*The Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity and Ors.* **AIR 2010 SC 1285;** *The University of Mysore v. C.D. Govinda Rao and Anr.* **AIR 1965 SC 491;** *Secretary, Ministry of Defence and Ors. v. A.V. Damodaran (dead) through L.Rs. and* Ors. **(2009) 9 SCC 140: 2009 (13) SCR 416;** *Regional Director, ESI Corporation and Anr. v. Francis De Costa and Anr.* **AIR 1997 SC 432 – referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1996 (7) Suppl. SCR 626** | **Relied on** | **Para 7** |
| **2003 (1) SCR 779** | **Relied on** | **Para 7** |
| **AIR 2005 SC 4391** | **Relied on** | **Para 7** |
| **2007 (5 ) SCR 408** | **Relied on** | **Para 7** |
| **2008 (4 ) SCR 909** | **Relied on** | **Para 7** |
| **AIR 2010 SC 1285** | **Referred to** | **Para 8** |
| **AIR 1965 SC 491** | **Referred to** | **Para 8** |
| **AIR 2011 SC 2598** | **Relied on** | **Para 9** |
| **2009 (13) SCR 416** | **Referred to** | **Para 9** |

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|---|---|---|
| **AIR 1997 SC 432** | **Referred to** | **Para 9** |
| **2009 (8) SCR 934** | **Relied on** | **Para 10** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3686 of 2012.

From the Judgment & Order dated 11.11.2009 of the High Court of Punjab & Haryana at Chandigarh in R.S.A. No. 599 of 2009.

H.P. Rawal, ASG, Shalini Kumar, R. Bala, B.V. Balram Das, Anil Katiyar for the the Appellant.

Vivek Gupta, Satyendra Kumar for the Respondent.

The Judgment of the Court was delivered by

**O R D E R**

1. Leave granted.

The present appeal has been filed against the judgment and order dated 11.11.2009 passed by the High Court of Punjab & Haryana at Chandigarh in RSA No.599 of 2009 by which the High Court has reversed the judgment and order of the Trial Court as well as the First Appellate Court and granted the relief of disability pension to the respondent.

2. Facts and circumstances giving rise to this appeal are that the respondent was enrolled in the Infantry (Sikh Regiment) on 23.5.1987. He proceeded on annual leave on 31.3.1990 for a period of two months to his home town. During his leave period, the respondent suffered injuries being hit by a small wooden piece "Gulli" in the play of children and thus, his left eye was seriously damaged. He was admitted to Command Hospital, Chandimandir and remained there from 1.4.1990 to 25.4.1990. The respondent was operated upon twice and, subsequently, was discharged giving him sick leave from 26.4.1990 to 6.6.1990 and was placed in low medical category



'BEE' (permanent).

3. The investigation/enquiry was conducted by Army Authorities and the court of inquiry vide order dated 13.7.1990 came to the conclusion that injuries sustained by the respondent were not attributable to military service. The respondent was kept in sheltered appointment upto 31.5.2003 for giving him an opportunity to complete his terms of engagement. The respondent was examined by the Release Medical Board (RMB) on 14.2.2003 for assessment of degree and attributability/aggravation factors of the disability 'Perforating Injury Left Eye' and it came to the conclusion that disability was 30% for life, however, the Board further declared that the said disability was neither attributable to nor aggravated by military service. In view thereof, the claim of the respondent for disability pension was rejected by the competent authority vide order dated 7.8.2003.

4. The respondent filed Suit No.312 of 2004 before Civil Judge (Senior Division) Sangrur, Punjab, seeking the relief of disability pension which was dismissed vide judgment and decree dated 25.9.2006. Aggrieved, respondent preferred Civil Appeal No.150 of 2006 which was dismissed by the learned Additional District Judge, Sangrur vide judgment and decree dated 2.9.2008. Respondent, not being satisfied, preferred RSA No.599 of 2009 before the High Court of Punjab & Haryana challenging the aforesaid judgments and decree. Learned Single Judge reversed the concurrent finding of facts by two courts below and allowed the appeal decreeing the suit issuing direction to the appellants/ defendants to release payment of disability pension alongwith 8% interest per annum from 31.5.2003, within a period of 3 months.

Hence, this appeal.

5. Shri H.P. Raval, learned ASG appearing on behalf of Union of India, has submitted that the High Court committed an error allowing the appeal and reversing the judgments and

decree of the courts below as the case of the respondent could not fall within the provisions of paragraph 179 of the Pension Regulations of the Army, 1961, Part-I, (herein after called the `Regulations') as well as the findings and opinion of the Medical Board, a finding that the injury suffered by the respondent could neither be attributable to, nor could be aggravated by the military service. Therefore, the appeal deserves to be allowed. The judgment and decree of the High Court is liable to be set aside.

6. On the contrary, Shri Vivek Gupta, learned counsel appearing for the respondent, has contended that the High Court has decided the case in correct perspective and correctly interpreted the statutory provisions and therefore, no interference is required. The appeal lacks merit and is liable to be dismissed.

7. We have considered the rival submissions made by learned counsel for the parties and perused the record.

The sole question involved in this appeal is that if a person enrolled in Army suffers from injury at his home when on leave, whether such injury can be held to be attributable to or aggravated by the military service.

The issue involved herein is no more res integra. It is not in dispute that in case the injury suffered by military personnel is attributable to or aggravated by military service after discharge, he becomes entitled for disability pension. It is also a settled legal proposition that opinion of the Medical Board should be given primacy in deciding cases of disability pension and the court should not grant such pension brushing aside the opinion of the Medical Board.

(See: *Union of India & Anr. v. Baljit Singh,* (1996) 11 SCC 315; *Union of India & Ors. v. Dhir Singh China, Colonel (Retd.),* (2003) 2 SCC 382; *Controller of Defence Accounts (Pension) & Ors. v. S. Balachandran Nair,* AIR 2005 SC 4391;



*Union of India & Ors. v. Keshar Singh*, (2007) 12 SCC 675; and *Union of India & Ors. v. Surinder Singh Rathore,* (2008) 5 SCC 747).

8. In *The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors.,* AIR 2010 SC 1285, this Court while placing reliance upon a large number of earlier judgments including Constitution Bench judgment in *The University of Mysore v. C.D. Govinda Rao & Anr.,* AIR 1965 SC 491, held that ordinarily, the court should not interfere with the order based on opinion of experts on the subject. It would be safe for the courts to leave the decision to experts who are more familiar with the problems they face than the courts generally can be.

9. This Court recently decided an identical case in *Union of India & Ors. v. Jujhar Singh,* AIR 2011 SC 2598, and after reconsidering a large number of earlier judgments including *Secretary, Ministry of Defence & Ors. v. A.V. Damodaran (dead) through L.Rs. & Ors.,* (2009) 9 SCC 140; *Baljit Singh's (supra); Regional Director, ESI Corporation & Anr. v. Francis De Costa & Anr.,* AIR 1997 SC 432, came to the conclusion that in view of Regulation 179, a discharged person can be granted disability pension only if the disability is attributable to or aggravated by military service and such a finding has been recorded by Service Medical Authorities. In case the Medical Authorities records the specific finding to the effect that disability was neither attributable to nor aggravated by the military service, the court should not ignore such a finding for the reason that Medical Board is specialised authority composed of expert medical doctors and it is a final authority to give opinion regarding attributability and aggravation of the disability due to the military service and the conditions of service resulting in the disablement of the individual. A person claiming disability pension must be able to show a reasonable nexus between the act, omission or commission resulting in an injury to the person and the normal expected standard of duties

and way of life expected from such person. As the military personnel sustained disability when he was on an annual leave that too at his home town in a road accident, it could not be held that the injuries could be attributable to or aggravated by military service. Such a person would not be entitled to disability pension.

10. This view stands fully fortified by the earlier judgment of this Court in *Secretary, Ministry of Defence & Ors. v. Ajit Singh,* (2009) 7 SCC 328.

11. The instant case is squarely covered by the ratio of the aforesaid judgment in *Jujhar Singh* (supra).

We are of the view that the opinion of the Medical Board which is an expert body must be given due weight, value and credence. Person claiming disability pension must establish that the injury suffered by him bears a causal connection with military service. In the instant case, as the injury suffered by the respondent could not be attributable to or aggravated by the military service he is not entitled for disability pension.

12. In view of the above, the appeal is allowed. The judgment and order of the High Court dated 11.11.2009 passed in R.S.A. No. 599 of 2009 is set aside and the judgment and order of the Trial Court and that of First Appellate Court are restored. No order as to costs.

N.J. Appeal allowed.



PRAKASH CHANDRA

*v.*

NARAYAN

(Civil Appeal No. 8102 of 2012)

APRIL 23, 2012

**[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA]**

*Specific Relief Act, 1963 - s. 20(2)(b) - Suit for specific performance - Defence of hardship under - Held: In a case of specific performance, hardship is a good defence provided such defence is taken by the defendant and evidence in support of such defence is brought on record - On facts, trial court finding all issues with regard to appellant's entitlement to relief for specific performance of agreement for sale of land in favour of the appellant, decreed the suit - First appellate court, though answered all the issues in favour of the appellant but set aside the decree as it factually found that the respondent would be landless as against the appellant who is having various businesses as well - Order upheld by the High Court in second appeal - Trial court and the first appellate court did not frame issue relating to the hardship of the respondent - No such defence was taken nor any evidence was brought on record in its support by the respondent - Question as to whether the grant of relief for specific performance would cause hardship to the defendant within the meaning of Clause (b) of subsection (2) of Section 20, is a question of fact - First appellate court without framing such an issue erred in reversing the finding of the trial court while concurring with it on all other issues with regard to the appellant's entitlement to relief for specific performance of contract - High Court also erred in dismissing the second appeal - Thus, the appellant is entitled to the specific*

*performance of agreement for sale - Order passed by the High Court and the first appellate court set aside.*

**Appellant filed a suit for specific performance of agreement for sale of agricultural land against respondent and alternatively to refund the earnest money. The trial court decreed the suit for specific performance. The respondent filed an appeal. The first appellate court though answered all the issues in favour of the appellant but set aside the decree allowing discretion in favour of the respondent by directing him to pay earnest money, since it factually found that the respondent would be landless as against the appellant who is having various business as well. The appellant then filed second appeal. The Single Judge of the High Court dismissed the same. Therefore, the appellant filed the instant appeal.**

**Allowing the appeal, the Court**

**HELD: 1.1 From the materials on record and the agreement dated 18th April, 1996 and from the judgment of the trial court and the first appellate court, it is evident that no issue relating to the hardship of the respondent was framed. In a case of specific performance, hardship is a good defence provided such defence is taken by the defendant and evidence in support of such defence is brought on record, while in this case no such defence was taken by the respondent and no evidence was brought on record in its support. [Para 13] [451-C-E]**

**1.2 The appellant specifically pleaded that the respondent possessed agricultural land which was not denied by the respondent. The appellant proved that an agreement was reached between the parties on 18th April, 1996 to sell southern portion of land by making an east-west boundary for the consideration of Rs. 51,000/- for which appellant had paid Rs.39,000/- to the respondent**



**as earnest money. The appellant also proved that he was always ready and willing to perform his part of the contract. These issues were decided in favour of the appellant. During cross examination the respondent stated that he sold only part of land during the pendency of the case, thereby remaining 2.25 cultivable and 0.88 uncultivable land is still available with the respondent. [Para 14] [451-E-H]**

**1.3 The question as to whether the grant of relief for specific performance would cause hardship to the defendant within the meaning of Clause (b) of subsection (2) of Section 20 of the Specific Relief Act, 1963, being a question of fact, the first appellate court without framing such an issue ought not to have reversed the finding of the trial court while concurring with it on all other issues with regard to the appellant's entitlement to relief for specific performance of contract. The High Court in the second appeal failed to notice that the respondent had not taken any defence of hardship and no such issue was framed and in absence of any such evidence on record, the first appellate court held that he would be landless should the decree for specific performance be granted. [Para 15] [452-A-C]**

**1.4 The appellant is entitled to the specific performance of agreement for sale, as ordered and decreed by the trial court and the same is affirmed. The order passed by the High Court in the second appeal and the judgment and decree passed by the first appellate court are set aside. The appellant is allowed two months to pay the balance consideration to the respondents. [Para 16] [452-D-F]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8102 of 2012.

From the Judgment & Order dated 06.03.2007 of the High

Court of Judicature at Mumbai, Nagpur Bench, Nagpur in Second Appeal No. 198 of 2006.

Dr. Monika Gusain, Hariom Yaduvanshi for the Appellant.

Anagha S. Desai for the Respondent.

The Judgment of the Court was delivered by

**SUDHANSU JYOTI MUKHOPADHAYA, J.** 1. Leave was granted on 22.9.2011.

2. This appeal has been preferred by the appellant-plaintiff against the judgment and order dated 6th March, 2007 passed by the learned Single Judge of the High Court of Judicature of Mumbai, Nagpur Bench in Second Appeal No.198 of 2006, whereby the judgment and decree passed by the District Court, Pandharkawada (Kelapur) in Regular Civil Appeal No.129 of 2002 came to be confirmed.

3. The first appellate court by the aforesaid judgment and decree reversed the judgment and decree dated 23rd September, 1998 and 3rd October, 1998 in Special Civil Suit No.175 of 1997 which was preferred by the appellant-plaintiff for specific performance.

4. The suit in question was filed by the appellant against the respondent for specific performance of agreement for sale dated 18th April, 1996 in respect of agricultural land admeasuring 1 H. 61Are. at a price of Rs.51,000/-. It was the case of the appellant that he had paid the earnest money of Rs.39,000/- while the balance amount was to be paid on the date of execution of the sale deed which was fixed for 18th March, 2007, but despite the appellant being present for the purpose of completion of the formalities of agreement for sale, the respondent did not turn up. Consequently, the appellant purchased a stamp paper of Rs.100/- on 18th March, 1997 and issued a notice to the respondent on 2nd April, 1997 and called upon him to execute the sale deed dated 21st April, 1997 but



a false reply was given by the respondent on 15th April, 1997. As the respondent refused to perform his part of the contract, the appellant filed Special Civil Suit No.175 of 1997 for specific performance of contract, and alternatively to refund the earnest money.

5. The respondent contested the case claiming that his signatures were obtained on a blank stamp paper for the outstanding money of Rs.12,000/- for the purchase of fertilizers and clothes etc. The trial court by its judgment dated 23rd September, 1998 and decree dated 3rd October, 1998 decreed the suit for specific performance.

6. On appreciation of the material on record, the trial court held that the appellant had proved that the respondent agreed to sell the suit land for consideration of Rs.51,000/- by executing an agreement for sale on 18th April, 1996 and that he had paid earnest money of Rs.39,000/- to the respondent. The respondent failed to prove that he had signed on a blank Stamp paper in the presence of Vithal Sitaram Thaori. On the other hand there is sufficient material on record to show that the appellant was ready and willing to perform his part of the contract and, therefore, the appellant is entitled to the decree for specific performance of contract while the alternative prayer needs no consideration. The respondent is not entitled to compensatory cost. All the six issues were decided in favour of the appellant and against the respondent with a direction to the respondent to execute the sale deed on or before 31st August, 1998 in respect of the suit land i.e. southern portion of the land admeasuring 1 H 61Are having Gat No.1/2 situated at village Khadki on payment of the balance consideration of Rs.12,000/-. The Court also directed the respondent to deliver the possession of the suit land to the appellant with the clear condition that in the event of the respondent failing to execute the sale deed on or before the fixed date, the appellant will deposit the balance amount in the Court to get the sale deed executed.

7. The respondent took up the matter vide first appeal before the District Court. The following questions were framed for determination:

(1) Whether the defendant has agreed to sell and the plaintiff has agreed to purchase the suit property for consideration of Rs.51,000/- on 18.4.1996?

(2) Whether the defendant has signed Ex.25 blank Stamp paper in lieu of the credit amount of the plaintiff towards the clothes and fertilizers?

(3) Whether the plaintiff was and is ready and willing to perform his part of the contract?

(4) Whether the defendant has failed to perform his part of the contract?

(5) Whether it is necessary to interfere with the impugned judgment and decree?

(6) What order and relief?"

8. The first appellate court on hearing the parties and on appreciation of the material on record answered all the issues in favour of the appellant but reversed the judgment and decree thereby allowing discretion in favour of the respondent by directing him to pay the earnest money with interest.

Referring Clause (b) of sub-section (2) of Section 20 of Specific Relief Act, the First Appellate Court held as follows:

"20. Having regard to the facts on the record, it is evident from the evidence of the defendant and also an admitted fact that the defendant was having the only suit land and he would be landless if the decree would be granted for specific performance. On the other hand, the plaintiff is having landed properties and all the riches including the business of clothes and fertilizers. Therefore these aspects



are not considered by the learned lower court, while exercising the discretion, in granting the decree for specific performance. The amount of Rs.12,000/- were not paid or deposited to the defendant's favour since the agreement for sale till the date of decree. Therefore having regard to all these circumstances and facts on the record, this Court is of the opinion that this Court should interfere in the discretion exercised by the learned lower court while granting the decree for specific performance. The hardship would be, in all probabilities and facts and circumstances caused to the defendant than the plaintiff. In the result, the court is of the opinion that alternative relief for refund of the earnest amount of Rs.39,000/- to the plaintiff by the defendant, would meet the ends of justice. The same can be utilized and exercised by awarding the damages by way of an interest on the earnest amount……."

9. When the matter was taken up in the second appeal, the learned Single Judge vide impugned judgment dated 6th March, 2007 dismissed the second appeal on the ground that the first appellate court has factually found that the respondent would be landless as against the appellant who is having various businesses as well.

10. According to the learned counsel for the appellant, there was no impediment in according a relief of specific performance particularly when all the issues have been decided in favour of the appellant and against the respondent. He further submitted that, in the absence of any defence taken by the respondent that he would become landless if the relief for specific performance is granted and in absence of any material on record, the finding of the first appellate court cannot be sustained.

11. Learned counsel for the appellant referring to the cross- examination of the respondent contended that the respondent would not become landless as is evident from the fact that after the agreement reached with the appellant, he sold

4 acres of land to one Dilip Karekar. Even thereafter the respondent is having 2.25 H of cultivable land apart from 0.88 H uncultivable land.

12. According to the learned counsel for the respondent, as hardship would be caused to the respondent, the appellate court rightly held that it would sub-serve the ends of justice if the entire amount of earnest money received by the respondent is directed to be paid back to appellant along with interest.

13. We have heard the learned counsel for the parties. The learned counsel appearing on either side elaborately took us through the findings of the trial court, the first appellate court as well as the High Court in second appeal. From the materials on record and the agreement dated 18th April, 1996 and from the judgment of the trial court and the first appellate court, it is evident that no issue relating to the hardship of the respondent was framed. In a case of Specific performance, hardship is a good defence provided such defence is taken by the defendant and evidence in support of such defence is brought on record, while in this case no such defence was taken by the respondent and no evidence was brought on record in its support.

14. The appellant has specifically pleaded that the respondent possessed agricultural land admeasuring 5 H. 76.R. in Gat No. ½, which has not been denied by the respondent. The appellant proved that an agreement was reached between the parties on 18th April, 1996 to sell southern portion of land admeasuring 1.61 H. by making an east-west boundary for the consideration of Rs. 51,000/- for which appellant had paid Rs.39,000/- to the respondent as earnest money. The appellant also proved that he was always ready and willing to perform his part of the contract. These issues were decided in favour of the appellant. During cross-examination the respondent stated that he sold only 4 acres of land during the pendency of the case, thereby remaining 2.25 H cultivable and 0.88 H uncultivable land is still available with the respondent.



15. The question as to whether the grant of relief for specific performance will cause hardship to the defendant within the meaning of Clause (b) of sub-section (2) of Section 20 of the Specific Relief Act, 1963, being a question of fact, the first appellate court without framing such an issue ought not to have reversed the finding of the trial court while concurring with it on all other issues with regard to the appellant's entitlement to relief for specific performance of contract.

The High Court in the second appeal failed to notice that the respondent had not taken any defence of hardship and no such issue was framed and in absence of any such evidence on record, the first appellate court held that he would be landless should the decree for specific performance be granted.

16. For the reasons stated above, we are of the view that the appellant is entitled to the specific performance of agreement for sale, as ordered and decreed by the trial court. The appeal is accordingly allowed. The order passed by the High Court in the second appeal and the judgment and decree passed by the first appellate court are set aside. The judgment and decree passed by the Trial Court is affirmed. The appellant is allowed two months to pay the balance consideration to the respondents. If the respondent fails to execute the sale deed, such amount will be deposited in the trial court which will ensure the execution of the sale deed as per its judgment and decree.

N.J. Appeal allowed.

C.N. RAMAPPA GOWDA
*v.*
C.C. CHANDREGOWDA (DEAD) BY LRS. & ANR.
(Civil Appeal No. 3710 of 2012)

APRIL 23, 2012

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

*Code of Civil Procedure, 1908 - Or. 8, r.10 - Non-filing of written statement - Duty of Court - Held: In a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Or.8 r.10 CPC and before passing a judgement, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgement and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint - It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgement and decree against the defendant who has not filed the written statement - But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgement without directing the plaintiff to prove the facts so as to settle the factual controversy - In the instant case, the trial court decreed the suit without assigning any reason how the plaintiff was entitled for half share in the property - The same was absolutely cryptic in nature wherein the trial court did not critically examine as to how the affidavit filed by the plaintiff in support of his plea of jointness of the family was proved - Assertion is no proof and hence, the burden lay on the plaintiff to prove that the property had not been partitioned in the past even if there was no written statement to the contrary or any evidence of rebuttal -*





*The trial court clearly adopted an erroneous approach by inferring that merely because there was no evidence of denial or rebuttal, the plaintiff's case could be held to have been proved - The High Court was legally justified in setting aside the judgement and decree of the trial court and allowing the appeal to the limited extent of remanding the matter to the trial court for a de-novo trial after permitting the defendant-respondent to file the written statement - However, since the disposal of the suit for partition has now been dragged into a protracted retrial of the suit, it is legally just and appropriate to balance the scales of equity and fairplay by awarding a sum of rupees twenty five thousand by way of a token cost to the Plaintiff/Appellant to be paid by the Defendant/Respondent expeditiously as the impugned order of the High court directing retrial shall be given effect to only thereafter.*

**The appellant had filed a suit for partition and separate possession of landed property which according to his case was a joint family property. The defendants-respondents were served with the notice in response to which Vakalatnama was filed by their advocate. However, in spite of numerous opportunities, no written statement was filed by the defendants-respondents and subsequently, the trial court directed the plaintiff-appellant to lead evidence. The plaintiff filed his evidence by way of affidavit along with certain documents. On the basis of the pleadings and the ex-parte evidence adduced by the plaintiff in support of his case, the trial court decreed the suit in favour of the plaintiff-appellant and held him entitled to a decree of partition to the extent of half share in the landed property. The defendants-respondents thereafter filed appeal before the High Court. The High Court set aside the judgment and decree passed by the trial court and remanded the matter to the trial court for its retrial and consideration of the matter afresh. The defendants-respondents were also granted liberty to file written statement and produce the documents and**

**the trial court was directed to dispose of the suit on merits. The decree of partition which the plaintiff-appellant had already got executed in his favour was made subject to the result of retrial of the suit.**

**The questions which required determination in the present appeal were: 1) Whether the High Court exceeded its jurisdiction by directing the trial court for retrial of the suit and permitting the defendants to file written statement and documents without assigning any justifiable and legally sustainable reason particularly when the defendants-respondents were admittedly served with the summons and were also duly represented by their advocate in the trial court (ii) Whether the defendants-respondents who had chosen not to file written statement in spite of several opportunities granted by the trial court, could be granted fresh opportunity by the High Court to file written statement and order for retrial resulting into delay and prejudice to the plaintiff-appellant from enjoying the fruits of the decree in his favour and (iii) Whether the trial court before whom the defendants failed to file written statement in spite of repeated opportunities could straightway pass a decree in favour of the plaintiff without entering into the merits of the plaintiff's case and without directing the plaintiff to lead evidence in support of his case and appreciating any evidence or in spite of the absence of written statement, the trial court ought to try the suit critically appreciating the merits of the plaintiff's case directing the plaintiff to adduce evidence in support of his own case examining the weight of evidence led by the plaintiff.**

**Dismissing the appeal, the Court**

**HELD: 1.1. The plaintiff-appellant has sought to prove his case that the suit property was a joint family property only on the strength of affidavit which he had filed and**



**has failed to lead any oral or documentary evidence to establish that the property was joint in nature. Even if the case of the plaintiff-appellant was correct, it was of vital importance for the trial court to scrutinize the plaintiff's case by directing him to lead some documentary evidence worthy of credence that the property sought to be partitioned was joint in nature. But the trial court seems to have relied upon the case of the plaintiff merely placing reliance on the affidavit filed by the plaintiff which was fit to be tested on at least a shred of some documentary evidence even if it were by way of an ex-parte assertion. Reliance placed on the affidavit in a blindfold manner by the trial court merely on the ground that the defendant had failed to file written statement would amount to punitive treatment of the suit and the resultant decree would amount to decree which would be nothing short of a decree which is penal in nature. [Para 13] [466-F-H; 467-A-B]**

**1.2. The effect of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non filing of the written statement by trying the suit in a mechanical manner by passing a decree. In a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgement, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgement and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgement and decree against the defendant who has not filed the written statement. But, if**

**the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgement without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex-parte judgement although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes the cause of speedy trial. However, if the Court is clearly of the view that the plaintiff's case even without any evidence is prima facie unimpeachable and the defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial court who is seized of the trial of the suit. [Para 14] [467-C-H; 468-A-B]**

*Balraj Taneja And Another. v. Sunil Madan And Another,* **(1999) 8 SCC 396: 1999 (2) Suppl. SCR 258;** *Kailash vs. Nanhku And Ors.* **(2005) 4 SCC 480: 2005 (3) SCR 289 - relied on.**

**2. In the instant case, the trial court has decreed the suit without assigning any reason how the plaintiff is entitled for half share in the property. The same is absolutely cryptic in nature wherein the trial court has not critically examined as to how the affidavit filed by the plaintiff in support of his plea of jointness of the family was proved on relying upon Ex.P-1 to P-10 without even discussing the nature of the document indicating that the suit property was a joint property. Ex.P-1 to P-10 are the preliminary records viz. Atlas, Tipni Book, R.R. Pakka**



**Book, Settlement Akarband, sale deeds etc. The trial court although relied upon these documents, it has not elaborated critically as to why these documents have been believed without indicating as to how it proves the plea that the property always remained joint in nature and had never been partitioned between the parties. Even if the trial court relied upon these documents to infer that the property was joint in nature, it failed to record any reason as to whether the property was never partitioned among the coparceners. It is a well acknowledged legal dictum that assertion is no proof and hence, the burden lay on the plaintiff to prove that the property had not been partitioned in the past even if there was no written statement to the contrary or any evidence of rebuttal. The trial court clearly adopted an erroneous approach by inferring that merely because there was no evidence of denial or rebuttal, the plaintiff's case could be held to have been proved. The trial court, therefore, while accepting the plea of the plaintiff-appellant ought to have recorded reasons even if it were based on ex-parte evidence that the plaintiff had succeeded in proving the jointness of the suit property on the basis of which a decree of partition could be passed in his favour. [Para 15] [468-C-H; 469-A]**

**3. The High Court was legally justified in setting aside the judgement and decree of the trial court and allowing the appeal to the limited extent of remanding the matter to the trial court for a de-novo trial after permitting the defendant-respondent to file the written statement. However, this Court is conscious of the fact that the Plaintiff/Appellant for no fault on his part has been forced to entangle himself in the appeal before the High Court as Respondent giving rise to an appeal before this Court, although the Defendant/Respondent had leisurely failed to file written statement in spite of numerous opportunities to file the same and also had failed to cross-**

**examine the plaintiff witnesses, but once the decree for partition of half share was passed in favour of the Plaintiff/Appellant, the Defendant/Respondent promptly challenged the same by filing an appeal before the High Court. Since the disposal of the suit for partition has now been dragged into a protracted retrial of the suit, it is legally just and appropriate to balance the scales of equity and fairplay by awarding a sum of rupees twenty five thousand by way of a token cost to the Plaintiff/ Appellant to be paid by the Defendant/Respondent expeditiously as the impugned order of the High court directing retrial shall be given effect to only thereafter. [Para 16] [469-B-F]**

**Case Law Reference**

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|---|---|---|
| **1999 (2) Suppl. SCR 258** | **relied on** | **Para 10** |
| **2005 (3) SCR 289** | **relied on** | **Para 11** |

CIVIL APPEAL JURISDICTION : Civil Appeal No. 3710 of 2012.

From the Judgment & Order dated 05.10.2010 of the High Court of Karnataka at Bangalore in R.F.A. No. 597 of 2004.

R.S. Hegde, Chandra Prakash, Ashwani Garg, P.P. Singh for the Appellant.

T.V. Ratnam for the Respondents.

The Judgment of the Court was delivered by

**GYAN SUDHA MISRA, J.** 1. The impugned order dated 05.10.2010 passed by the Division Bench of the High Court of Karnataka at Bangalore in R.F.A.No. 597/2004 is under challenge in this appeal after grant of special leave at the instance of the plaintiff-appellant by which the High Court has set aside the judgment and decree of partition passed in favour of the plaintiff-appellant by the Civil Judge (Sr. Divn.)



Chikmagalur dated 28.01.2004 and the appeal was remanded to the trial court in order to consider the matter afresh. The defendants-respondents herein have also been granted liberty to file written statement and produce the documents within four weeks from the date of the order passed by the High Court and the trial court was directed to dispose of the suit on merits in accordance with law within a period of six months. However, the decree of partition which the plaintiff-appellant already got executed in his favour was made subject to the result of retrial of the suit.

2. (i) The core question which requires determination in this appeal is whether the High Court exceeded its jurisdiction by directing the trial court for retrial of the suit and permitting the defendants to file written statement and documents without assigning any justifiable and legally sustainable reason particularly when the defendants-respondents were admittedly served with the summons and were also duly represented by their advocate in the trial court?

(ii) Further question which is related to the issue is whether the defendants-respondents who had chosen not to file written statement in spite of several opportunities granted by the trial court, could be granted fresh opportunity by the High Court to file written statement and order for retrial resulting into delay and prejudice to the plaintiff-appellant from enjoying the fruits of the decree in his favour?.

(iii) Yet another important question which arises herein and frequently crops up before the trial court is whether the trial court before whom the defendants failed to file written statement in spite of repeated opportunities could straightway pass a decree in favour of the plaintiff without entering into the merits of the plaintiff's case and without directing the plaintiff to lead evidence in support of his case and appreciating any evidence or in spite of the absence of written statement, the trial court ought to try the suit critically appreciating the merits of the

plaintiff's case directing the plaintiff to adduce evidence in support of his own case examining the weight of evidence led by the plaintiff?

3. Before we appreciate the aforesaid questions involved in this appeal, it appears essential to record some of the salient features and facts of the case giving rise to this appeal after grant of leave.

4. The plaintiff-appellant had filed a suit for partition and separate possession of landed property measuring 13 acres 20 guntas which according to his case was a joint family property wherein the partition had not taken place and as the defendants-respondents had failed to arrange for partition and separate possession of the plaintiff's half share in the schedule property, the plaintiff was compelled to file a suit for partition. It was also averred in the plaint that the defendants-respondents had partitioned the property amongst themselves without giving any share to the plaintiff-appellant. The plaintiff-appellant sent a legal notice dated 24.05.1999 to the defendants-respondents which were duly served on them in response to which the defendants appeared through their advocate and sent a reply on 10.07.1999 denying the claim of the plaintiff. The plaintiff-appellant in view of the reply of the defendants-respondents filed a suit bearing O.S.No.197/2002 before the court of Civil Judge (Sr. Divn.) at Chikmagalur for partition and separate possession. The defendants-respondents in the said suit were served with the notice in response to which Vakalatnama was filed by their advocate. However, in spite of numerous opportunities, no written statement was filed by the defendants-respondents. Since the defendants-respondents failed to file written statement, the trial court directed the plaintiff to lead evidence. The plaintiff filed his evidence by way of affidavit along with certain documents which were marked as Ex.P-1 to P-10. However, the plaintiff was neither cross-examined by the defendants nor the defendants had filed the written statement as already stated hereinbefore.



5. Since the defendants neither filed written statement nor cross-examined the plaintiff, the learned Judge vide judgment and order dated 28.01.2004 on the basis of the pleadings and the ex-parte evidence adduced by the plaintiff in support of his case, decreed the suit in favour of the plaintiff-appellant and was thus held entitled to a decree of partition to the extent of half share in the landed property. The learned trial judge further held that the defendants although were served with the notice and were represented by their counsel, they did not choose to file written statement denying the case of the plaintiff and hence there was no reason to disbelieve the case of the plaintiff. Accordingly, the suit was decreed directing that the plaintiff-appellant shall be entitled to half share in the property.

6. The defendants-respondents herein thereafter challenged the judgment and decree before the High Court by filing an appeal bearing RFA No. 597/2004 wherein the plaintiff-appellant herein submitted that the defendants-respondents have not stated any valid or justifiable reason for non-filing of the written statement nor took part in the proceedings before the trial court in spite of service of summons. There was also no prayer incorporated seeking permission to file the written statement . It was also stated therein that the plaintiff had already got the preliminary decree of partition executed and came in possession of half share of the schedule property.

7. The High Court by its interim order dated 30.05.2005 had also refused to grant stay of execution of the decree in favour of the plaintiff-appellant and directed that the trial court may conclude the final decree proceedings. However, it was observed that if the preliminary decree is given effect to and the property is divided and allotted in the final decree proceedings, the same shall be subject to the result of the appeal. Thereafter during pendency of the appeal before the High Court, the defendant No.1 died whose legal representatives were brought on record.

8. The appeal was finally heard by the High Court and the

judgment and order in appeal was delivered on 05.10.2010 by the High Court setting aside the judgment and decree passed by the trial court and the matter was remanded to the trial court for its retrial and consideration of the matter afresh as already stated hereinbefore. The plaintiff-appellant felt aggrieved with the impugned order of the High Court and hence filed the special leave petition before this Court wherein leave was granted and the matter was heard at some length.

9. Learned counsel for the plaintiff-appellant has reiterated the contentions urged before the High Court and submitted that the defendants-respondents ought to be held to have forfeited their rights to file their written statement and adduce evidence as the defendants were duly served with the summons and were also represented by their advocate. In spite of this the defendants chose not to file written statement although several opportunities were granted and they had also not stated any reason for not filing written statement. It was further urged that even in appeal the defendants have not disputed the factum of the suit property being joint family property and, therefore, in absence of any evidence to the contrary, the High Court ought not to have interfered with the judgment and decree passed by the trial court. It was submitted that the defendants had slept over the matter and committed grave latches when they failed to file written statement for which no reason at all has been assigned by the defendants and, therefore, the High Court committed error by granting undue indulgence and permitting the defendants to file written statement and documents when their right to file the same stood forfeited.

10. Contesting the appeal, it was urged on behalf of the defendants-respondents that the suit of the plaintiff-appellant has been decreed only on the basis of the averments in the plaint which was legally impermissible for even if the suit has been decided in the absence of written statement, the trial court ought not to have decreed the suit without cross-examination of the plaintiff's witness and without appreciation of evidence and,



therefore, it has rightly been set aside by the High Court. Elaborating on this part of his submission, it was contended that the trial court was bound to independently examine the case of the plaintiff and satisfy itself as to the correctness of the plaintiff's claim even in the absence of written statement which evidently has not been done. In these circumstances, the High Court has rightly exercised its discretion and allowed the defendants-respondents to file their written statement. To reinforce his submission, it was further supplemented that a duty is cast upon the court to examine the plaintiff and satisfy itself as to the correctness of the averments of the pleadings and the trial court ought not to have adopted the plaint without even cross-examination of the plaintiff. In support of his submission, learned counsel has placed reliance on the ratio of the decision of this Court in *Balraj Taneja And Another. vs. Sunil Madan And Another* reported in (1999) 8 SCC 396 wherein this Court has dealt with a situation which has arisen in the present appeal. In the matter of *Balraj Taneja* (supra), the Court while considering a circumstance wherein written statement was not filed by the defendant, held that the court is duty bound to adjudicate even in the absence of complete pleadings or in the presence of pleadings of only one party. Learned counsel in this context has specifically placed reliance on the observations of this Court which is of great relevance and value wherein it was held as follows:-

> "As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have

been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8".

11. Explaining the default on the part of the defendant for not filing written statement it has been stated that late C.C. Chandregowda represented by his Lr. C.C. Harish was suffering from severe illness due to jaundice. This fact was pleaded before the High Court at the stage of appeal and the High Court in the light of the same has rightly remanded the matter to the trial court to re-consider it afresh. Learned counsel for the defendants-respondents also submitted that the remand order of the High Court will not serve the interest of justice if the defendants-respondents are not allowed to place written statement of the defendants-respondents on record and the remand order will not serve any useful purpose if the suit is restored and ordered for retrial without permitting the defendants-respondents to file written statement. Learned counsel has contended that the filing of written statement is governed by procedural law and this Hon'ble Court has held in *Kailash vs. Nanhku And Ors.* reported in (2005) 4 SCC 480, as follows:-



"The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away."

12. It was finally submitted that the plaintiff-appellant who claims to be in possession of his share in the plaint schedule property would not be prejudiced in any manner by the order of remand and hence the High Court was perfectly justified in remanding the matter for its trial by granting permission to the defendants-respondents to file written statement which need not be interfered with by this Court under its extra-ordinary jurisdiction under Article 136 of the Constitution.

13. In the light of the ratio decidendi of the cases cited hereinabove, when we examined the judgement and order of the trial court granting a decree of partition in favour of the plaintiff-appellant, we could notice that the plaintiff-appellant has sought to prove his case that the suit property was a joint family property only on the strength of affidavit which he had filed and has failed to lead any oral or documentary evidence to establish that the property was joint in nature. Even if the case of the plaintiff-appellant was correct, it was of vital importance for the trial court to scrutinize the plaintiff's case by directing him to lead some documentary evidence worthy of credence that the property sought to be partitioned was joint in nature. But the trial court seems to have relied upon the case of the plaintiff merely placing reliance on the affidavit filed by the plaintiff which

was fit to be tested on at least a shred of some documentary evidence even if it were by way of an ex-parte assertion. Reliance placed on the affidavit in a blindfold manner by the trial court merely on the ground that the defendant had failed to file written statement would amount to punitive treatment of the suit and the resultant decree would amount to decree which would be nothing short of a decree which is penal in nature.

14. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgement, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgement and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgement and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgement without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex-parte judgement although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes the cause of speedy trial. However, if the Court is clearly of the view that



the plaintiff's case even without any evidence is prima facie unimpeachable and the defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial court who is seized of the trial of the suit.

15. When we examined the instant matter on the anvil of what has been stated above, we have noticed that the trial court has decreed the suit without assigning any reason how the plaintiff is entitled for half share in the property. The same is absolutely cryptic in nature wherein the trial court has not critically examined as to how the affidavit filed by the plaintiff in support of his plea of jointness of the family was proved on relying upon Ex.P-1 to P-10 without even discussing the nature of the document indicating that the suit property was a joint property. Ex.P-1 to P-10 are the preliminary records viz. Atlas, Tipni Book, R.R. Pakka Book, Settlement Akarband, sale deeds etc. The trial court although relied upon these documents, it has not elaborated critically as to why these documents have been believed without indicating as to how it proves the plea that the property always remained joint in nature and had never been partitioned between the parties. Even if the trial court relied upon these documents to infer that the property was joint in nature, it failed to record any reason as to whether the property was never partitioned among the coparceners. It is a well acknowledged legal dictum that assertion is no proof and hence, the burden lay on the plaintiff to prove that the property had not been partitioned in the past even if there was no written statement to the contrary or any evidence of rebuttal. The trial court in our view clearly adopted an erroneous approach by inferring that merely because there was no evidence of denial or rebuttal, the plaintiff's case could be held to have been proved. The trial court, therefore, while accepting the plea of the plaintiff-appellant ought to have recorded reasons even if it were based on ex-parte evidence

that the plaintiff had succeeded in proving the jointness of the suit property on the basis of which a decree of partition could be passed in his favour.

16. As a consequence of the aforesaid analysis and the reasons recorded hereinabove, we are of the view that the High Court was legally justified in setting aside the judgement and decree of the trial court and allowing the appeal to the limited extent of remanding the matter to the trial court for a de-novo trial after permitting the defendant-respondent to file the written statement. The appeal consequently stands dismissed. However, we are conscious of the fact that the Plaintiff/ Appellant for no fault on his part has been forced to entangle himself in the appeal before the High Court as Respondent giving rise to an appeal before this Court, although the Defendant/Respondent had leisurely failed to file written statement in spite of numerous opportunities to file the same and also had failed to cross-examine the plaintiff witnesses, but once the decree for partition of half share was passed in favour of the Plaintiff/Appellant, the Defendant/Respondent promptly challenged the same by filing an appeal before the High Court. Since the disposal of the suit for partition has now been dragged into a protracted retrial of the suit, we consider it legally just and appropriate to balance the scales of equity and fairplay by awarding a sum of rupees twenty five thousand by way of a token cost to the Plaintiff/Appellant to be paid by the Defendant /Respondent expeditiously as the impugned order of the High court directing retrial shall be given effect to only thereafter.

17. The appeal thus stands dismissed subject to the payment of cost by the Defendant/Respondent to the Plaintiff/ Appellant.

B.B.B. Appeal dismissed.



UNION OF INDIA & ORS.
*v.*
MADHU E.V. & ANR.
(Civil Appeal Nos. 9647-9650 of 2003)

APRIL 26, 2012

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

*Border Security Force Rules, 1969 - r. 19 - Constables in Border Security Force (BSF) resigning from service on completion of 10 years of service - Constables allowed to resign with pensionary benefits u/r. 19 - Pensionary benefits - Entitlement to - Held: r. 19 does not entitle any pensionary benefits on resignation of its personnel - However, by virtue of G.O. dated December 27, 1995 read with r. 19 of Rules, a member of BSF would be entitled to get pensionary benefits if he is otherwise eligible - Such personnel must satisfy eligibility under CCS (Pension) Rules which does not provide that a person who has resigned before completing 20 years of service is entitled to the pensionary benefits - On facts, constables had resigned from BSF service immediately after completion of 10 years service, thus, not entitled to any pensionary benefits - Central Civil Services (Pension) Rules, 1972 - rr 26, 48-A and 49(2)(b).*

**Respondents-constables in the Border Security Force (BSF) tendered their resignation on completion of 10 years service under Rule 19 of the Border Security Force Rules, 1969. Their resignation was accepted and it was provided that the respondent would be entitled to pensionary benefits. However, subsequently the respondents were intimated that no pensionary benefits were admissible to them. The respondents filed writ petitions challenging the said communication. The Single Judge of the High Court held that when the petitioners**

**were allowed to resign with pensionary benefits under Rule 19 of the BSF Rules, then their claim for pension must be worked out under Rule 49(2)(b) of the CCS (Pension) Rules. The Single Judge allowed the writ petitions and directed the appellants to grant pension to the respondents in accordance with Rule 49(2)(b) of the CCS (Pension) Rules. The Division Bench of the High Court upheld the decision of the Single Judge. Therefore, the appellants filed the instant appeals.**

**Allowing the appeals, the Court**

**HELD: 1.1. Rule 19 of the Border Security Force Rules, 1969 does not entitle any pensionary benefits on resignation of its personnel. The pensionary benefits are not ordinarily available on resignation under Central Civil Services (Pension) Rules, 1972 since Rule 26 provides for forfeiture of service on resignation. However, by virtue of G.O. dated December 27, 1995 read with Rule 19 of BSF Rules, the member of BSF would be entitled to get pensionary benefits if he is otherwise eligible. Such personnel must, therefore, satisfy his eligibility under CCS (Pension) Rules. The CCS (Pension) Rules does not provide that a person who has resigned before completing 20 years of service is entitled to the pensionary benefits. Rule 49 only prescribes the procedure for calculation and quantification of pension amount and not the minimum qualifying service. [Para 12] [479-A-D]**

**1.2. In the instant case, the respondents had resigned from BSF service immediately after completion of 10 years service and, therefore, they are not entitled to any pensionary benefits. [Para 14] [479-E-F]**

**1.3. The view taken by the Single Judge of the High Court and judgment of the Division Bench of the High Court upholding the view taken by the Single Judge**



**cannot be upheld and are set aside. However, the amount of pension paid to the respondents, if any, would not be recovered. [Paras 13 and 15] [479-E-H]**

*Ex-Naik Rakesh Kumar vs. Union of India and Ors.* **C.W.P. No. 761 of 1998;** *Union of India and Ors. vs. Rakesh Kumar* **(2001) 4 SCC 309: 2001 (2) SCR 927 - relied on.**

*Raj Kumar and Ors. Vs. Union of India and Anr.* **(2006) 1 SCC 737: 2006 (1) SCR 169 - referred to.**

**Case Law Reference:**

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| **2001 (2) SCR 927** | **Relied on.** | **Paras 7, 10, 12** |
| **2006 (1) SCR 169** | **Referred to.** | **Paras 10, 12** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9647-9650 of 2003.

From the Judgment & Order dated 25.8.2000 of the High Court of Kerala at Ernakulam in Writ Appeal No. 443 & 279 of 2000 and order dated 28.9.2000 in Review Petition No. 413, 443 & 414 of 2000 in W.A. No. 279 of 2000.

Tara Chandra Sharma, Neelam Sharma, Rashmi Malhotra, B.K. Prasad, Sushma Suri for the Appellants.

M.P. Vinod, Neelam Saini for the Respondents.

The Judgment of the Court was delivered by

**R.M. LODHA, J.** 1. Delay condoned.

2. We have heard Mr. Tara Chandra Sharma, learned counsel for the appellants, and Mr. M.P. Vinod, learned counsel for the respondents.

3. The respondents were the original writ petitioners before the High Court. They were constables in the Border Security Force (BSF). On completion of 10 years service, they tendered resignation. Their resignation was accepted by the

Commandant 48 BN BSF. The order accepting resignation provided that they would be entitled to pensionary benefits at their own request on extreme compassionate grounds. Later on, it was found that the pensionary benefits were not admissible to them and few others whose resignation was accepted under Rule 19 of the Border Security Force Rules, 1969 (for short, 'BSF Rules'). Accordingly, on October 20, 1998, a letter was sent intimating them that no pensionary benefits were admissible to those who have proceeded on resignation under Rule 19 of the BSF Rules. However, their case for reinstatement in BSF would be considered subject to refund of all payment made to them from the Government such as GPF, Gratuity, CGEGIS, etc. on their resignation. The respondents challenged the above communication by filing two separate Writ Petitions.

4. The writ petitions were contested by the present appellants (respondents therein). Their stand in the High Court was that the writ petitioners were governed by the Central Civil Services (Pension) Rules, 1972 (for short, 'CCS (Pension) Rules') and as per these rules the minimum qualifying service for pension is 20 years and, therefore, they were not entitled to any pension.

5. The Single Judge of the High Court referred to Rules 19 and 182 of the BSF Rules and relevant provisions of CCS (Pension) Rules, particularly Rules 26, 48-A and 49(2)(b). The Single Judge held that when the petitioners (therein) were allowed to resign with pensionary benefits under Rule 19 of the BSF Rules, then their claim for pension must be worked out under Rule 49(2)(b) of the CCS (Pension) Rules. Accordingly, the Single Judge, by his judgment dated September 29, 1999, allowed the writ petitions and directed the present appellants to grant pension to the petitioner (respondents herein) in accordance with Rule 49(2)(b) of the CCS (Pension) Rules.

6. Against the order of the Single Judge, the present appellants preferred Writ Appeals. The Division Bench of the



Kerala High Court upheld the decision of the Single Judge and dismissed the Writ Appeals vide judgment dated August 25, 2000. While doing so, the Division Bench referred to the decision of the Himachal Pradesh High Court in *Ex-Naik Rakesh Kumar Vs. Union of India & Others* – C.W.P. No. 761 of 1998. It is from this order of the Division Bench that the present Appeals, by special leave, have arisen.

7. The judgment of the Himachal High Court in *Ex-Naik Rakesh Kumar Vs. Union of India & Others* was challenged by the Union of India before this Court in the case of *Union of India and Others Vs. Rakesh Kumar*, (2001) 4 SCC 309. The question involved therein was - Whether members of BSF who have resigned their posts after serving for 10 years or more years but less than 20 years are entitled to pension/pensionary benefits under relevant provisions of the Border Security Force Act, 1968 (for short, 'BSF Act') and the BSF Rules or the CCS (Pension) Rules.

8. This Court referred to Section 8 of the BSF Act and Rule 19 of the BSF Rules and the provisions of the CCS (Pension) Rules, particularly Rules 35, 36, 48, 48-A and 49. G.O. dated December 27, 1995 issued by the Central Government was also referred to. After quoting G.O. dated December 27, 1995, this Court in para 20 of the report observed as follows :-

> "20. The aforesaid GO makes it clear that there was a demand for grant of pensionary benefit on acceptance of the resignation under Rule 19 and that demand was accepted by the Government. Para 2 of the GO makes it clear that the Government has agreed that a member of BSF is entitled to get pensionary benefits on resignation under Rule 19 provided he has put in requisite number of years of service and fulfills all other eligibility conditions. This para only reiterates Rule 19. It also clarifies that authority competent to grant permission to resign is also empowered to make reduction in pension if the member of BSF is eligible to get such pension. Para 5 provides

that in future the competent authority who accepts the resignation would specify in the order the reduction to be made in the pension if any and if no such reduction is specified in the order, it would imply that no reduction in the pension has been made. Under para 6, directions are issued for pending cases where resignation was accepted but pensionary benefits were not allowed and provide that necessary orders should be passed within shortest possible time. Reading the aforesaid GO as a whole, it nowhere reveals the Government's intention to confer any additional pensionary benefits on the members of BSF who retired before completing the requisite qualifying service as provided under the CCS (Pension) Rules. It neither supplements nor substitutes the statutory rules. The GO read with Rule 19 of the BSF Rules would only mean that in case of resignation and its acceptance by the competent authorities, the member of BSF would be entitled to get pensionary benefits if he is otherwise eligible for getting the same under the CCS (Pension) Rules and to that extent Rule 26 which provides for forfeiture of service on resignation would not be applicable. Hence, there is no substance in the contention of the learned counsel for the respondents that in view of the GO or specific orders passed by the competent authority granting pension, the appellants are estopped from contending that such officers are not entitled to get pensionary benefits. As stated above, the GO does not confer any additional benefit. Even in the specific order which is quoted above in favour of Naik Rakesh Kumar, the authority has stated that he would get pensionary benefits as admissible under the Rules. Under the Rules, he is not entitled to get such benefits."

9. While dealing with the arguments of the ex BSF personnel that on the basis of the G.O. dated December 27, 1995, a number of persons are granted pensionary benefits even though they have not completed 20 years of service and,



therefore, the Court should not interfere and see that the pensionary benefits granted to the respondents (therein) are not disturbed and are released as early as possible, this Court observed that for grant of pension to the members of BSF, the provisions of the CCS (Pension) Rules are applicable and the CCS (Pension) Rules nowhere provide that a person who has resigned before completing 20 years of service as provided in Rule 48-A is entitled to the pensionary benefits. It was expressly held that Rule 19 of the BSF Rules did not make any provision for grant of pensionary benefits. In para 22 of the report, this Court concluded:-

> "22. In the result, there is no substance in the contention of the learned counsel for the respondents that on the basis of Rule 49 of the CCS (Pension) Rules or on the basis of the GO, the respondents who have retired after completing qualifying service of 10 years but before completing qualifying service of 20 years by voluntary retirement, are entitled to get pensionary benefits. The respondents, who were permitted to resign from service under Rule 19 of the BSF Rules before the attainment of the age of retirement or before putting such number of years of service as may be necessary under the Rules, to be eligible for retirement are not entitled to get any pension under any of the provisions under the CCS (Pension) Rules. Rule 49 only prescribes the procedure for calculation and quantification of pension amount. The GO dated 27-12-1995 does not confer any additional right of pension on the BSF employees."

10. In a later decision in the case of *Raj Kumar & Others Vs. Union of India and Another*, (2006) 1 SCC 737, this Court was again concerned with the similar question. This Court referred to the earlier decision of this Court in *Union of India & Others Vs. Rakesh Kumar* (supra) and reiterated the position that was declared in *Union of India & Others Vs. Rakesh Kumar* (supra), namely, that Rule 19 of the BSF Rules did not

grant any right to pension in cases where pension was not payable under the CCS (Pension) Rules. In para 17 of the report, the Court catalogued the cases before it as follows :

"17. ....

(A) *Pre-circular*. Personnel who resigned and were granted pension for special reasons, even prior to the circular dated 27-12-1995.

(B) *Post-circular.* Personnel who resigned pursuant to the circular dated 27-12-1995. These persons can be further divided into two sub-categories.

(i) Personnel who retired in 1996, were sanctioned pension and were therefore asked vide letter dated 31-10-1998 not to report for reinduction. Their pension has been stopped pursuant to the judgment in Rakesh Kumar (supra). These persons can be further divided into two sub-categories:

(a) those who are in a position to be reinducted into service even now; and

(b) those who cannot be reinducted into the service as a result of being age-barred or due to being medically or physically unfit.

(ii) Those who retired subsequent to 1996, were not sanctioned pension, and were directed to report for reinduction into service or to forfeit pension benefits by virtue of the circular dated 17-10-1998 and the individual letters."

11. Having regard to the peculiar facts arising in each of the above groups, this Court made the following orders :

"1. The personnel falling in category (B)(ii) i.e. those persons who had retired subsequent to 1996 pursuant to



the circular dated 27-10-1995 and had not been sanctioned pension, but who have been directed to report for reinduction in service shall necessarily have to forfeit their pension, if they have not reported for service by virtue of the circular dated 17-10-1998. If, however, they have reported for service then there is no question of any relief in their case.

2. In the case of persons falling in category (B)(i), they shall also be given the option of reinduction into service, and those falling in category (B)(i)(a) shall be so reinducted, subject to the conditions stipulated in the circular dated 17-10-1998 and on condition that they shall refund GPF and pension amounts drawn by them till reinduction. The authorities shall indicate the deadline by which such persons shall offer themselves for reinduction.

3. In the case of persons who shall fall in category B(i)(b) i.e. persons who had retired in 1996, were sanctioned pension but who cannot be reinducted today as they are age-barred or physically or medically unfit or for any other reason including their inability to return the amount of GPF, pension drawn or other dues, there shall be no question of continuing payment of pension which shall be liable to cease as a result of the decision in *Rakesh Kumar* (supra). We are however of the view that equity demands that in such cases there shall be no recovery of the pension amounts already paid to them.

4. In cases which fall under category (A) i.e. personnel who had resigned prior to the circular dated 27-12-1995 and had been granted pension for special reasons and continued to draw it till the stoppage of pension as a result of the judgment in *Rakesh Kumar* (supra) we think that irrespective of the position in law, equity demands that, as they have drawn their pension for long periods, they shall not be asked to refund their drawn pension amounts, nor shall their pension be stopped now."

12. In view of the decisions of this Court in *Union of India & Others Vs. Rakesh Kumar* (supra) and *Raj Kumar & Others Vs. Union of India and Another* (supra), the legal position that emerges is this : Rule 19 of the BSF Rules does not entitle any pensionary benefits on resignation of its personnel. The pensionary benefits are not ordinarily available on resignation under CCS (Pension) Rules since Rule 26 provides for forfeiture of service on resignation. However, by virtue of G.O. dated December 27, 1995 read with Rule 19 of BSF Rules, the member of BSF would be entitled to get pensionary benefits if he is otherwise eligible. Such personnel must, therefore, satisfy his eligibility under CCS (Pension) Rules. The CCS (Pension) Rules do not provide that a person who has resigned before completing 20 years of service is entitled to the pensionary benefits. Rule 49 only prescribes the procedure for calculation and quantification of pension amount and not the minimum qualifying service.

13. The view taken by the Single Judge and judgment of the Division Bench upholding the view taken by the Single Judge cannot be upheld and have to be set aside in light of the legal position noted above.

14. In the present case, the respondents had resigned from BSF service immediately after completion of 10 years service and, therefore, they are not entitled to any pensionary benefits.

15. We, accordingly, allow these Appeals and set aside the orders dated August 25, 2000 passed by the Division Bench and dated September 29, 1999 passed by the Single Judge. We, however, observe that amount of pension paid to the respondents herein, if any, shall not be recovered.

16. No costs.

N.J. Appeals allowed.



SRI MARCEL MARTINS
*v.*
M. PRINTER & ORS.
(Civil Appeal No. 6645 of 2003)

APRIL 27, 2012

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

*Benami Transactions (Prohibition) Act, 1988 - s.4(3)(b) - Transaction saved from prohibition u/s.4 - Municipal Corporation decided to sell residential property originally owned by it to its tenant 'S' - However, in the meanwhile S' passed away - Husband of deceased 'S' and her daughters-respondents consented to the transfer of the property in the name the of appellant, the only son of 'S' - Property purchased in name of appellant though sale consideration for the purchase contributed by appellant as well as S's husband and daughters-respondents - Dispute relating to the property - S's husband and daughters-respondents filed civil suit praying for declaration that they were co-owners in the property to the extent of their contribution and praying for an injunction against the defendant-appellant - Trial Court dismissed the suit - High Court repelled the plea of appellant that the suit was hit by the provisions of the 1988 Act and decreed it - Held: Transfer of rights in favour of appellant was not because the other legal heirs of 'S' had abandoned their rights but because the Corporation required the transfer to be in favour of an individual presumably to avoid procedural complications in enforcing rights and duties qua the property at a later stage - Appellant held ostensible title to the property in a fiduciary capacity vis-à-vis his siblings (i.e. respondents) who had by reason of their contribution towards the sale consideration paid for acquisition of the property and the contribution made by their father (i.e. S's husband) continued to evince interest in the property and its ownership - Especially when respondents*

*continued to enjoy possession over the property, they who would in law and on a parity of reasoning be deemed to be holding the same for the benefit of appellant and vice versa - Consequently, sale transaction in favour of appellant was completely saved from the mischief of s.4 of the 1988 Act by reason of the same falling under sub-section 3(b) of s.4 - Suit in question not, therefore, barred by the 1988 Act as contended by the appellant.*

*Words and Phrases - Expression "fiduciary capacity" - Meaning of.*

**The Municipal Corporation of the city of Bangalore took decision to sell residential property originally owned by it to its tenant 'S'. However, in the meanwhile 'S' passed away. Inasmuch as the Municipal Corporation desired the transfer to be in the name of one individual legal representative rather than several individuals, the husband of deceased 'S' and her daughters-respondents consented to transfer of the property in the name of appellant, the only son of 'S'. The property was consequently purchased in the name of the appellant though the sale consideration for the purchase was contributed by the appellant as well as S's husband and daughters-respondents. A dispute relating to the property having arisen, S's husband and daughters-respondents filed civil suit praying for a declaration to the effect that they were co-owners in the property to the extent of their contribution and praying for an injunction against the defendant-appellant. The trial Court dismissed the suit. On appeal, the High Court reversed the findings recorded by the trial court and decreed the suit. The contention raised by the defendant-appellant that the suit was hit by the provisions of the Benami Transactions (Prohibition) Act, 1988, was repelled by the High Court. The High Court held that if a part of the consideration paid for the property in dispute had been provided by the appellant**



**in whose name the property was purchased, the transaction could not be said to be a benami transaction. The High Court was of the view that since the appellant had raised the contention that the entire sale consideration had been provided by him, he was estopped from contending that the transaction was a benami transaction hit by the provisions of Section 4 of the 1988 Act.**

**In the instant appeal, the primary question which arose for consideration was whether the sale transaction in favour of the appellant was saved from prohibition under Section 4 of the 1988 Act by reason of the same falling under sub-section (3)(b) of Section 4.**

**Dismissing the appeal, the Court**

**HELD: 1.1. A plain reading of Section 4 of the Benami Transactions (Prohibition) Act, 1988 shows that no suit, claim or action to enforce a right in respect of any property held benami shall lie against the person in whose name the property is held or against any other person at the instance of a person claiming to be the real owner of such property. It is common ground that although the sale deed by which the property was transferred in the name of the appellant had been executed before the enactment of above legislation yet the suit out of which this appeal arises had been filed after the year 1988. The prohibition contained in Section 4 would, therefore, apply to such a suit, subject to the satisfaction of other conditions stipulated therein. In other words unless the conditions contained in Section 4(1) and (2) are held to be inapplicable by reason of anything contained in sub-section (3) thereof the suit filed by plaintiffs-respondents would fall within the mischief of Section 4. [Paras 11, 12 and 13] [494-C-D; F-G; 495-D]**

**1.2. Sub-section (3) to Section 4 of the 1988 Act is in**

**two distinct parts. The first part comprises clause (a) to Section 4(3) which deals with acquisitions by and in the name of a coparcener in a Hindu undivided family for the benefit of such coparceners in the family. The said provision has no application in the instant case nor was any reliance placed upon the same by the plaintiffs-respondents. What was invoked by the respondents was Section 4(3)(b) of the 1988 Act which too is in two parts viz. one that deals with trustees and the beneficiaries thereof and the other that deals with persons standing in a fiduciary capacity and those towards whom he stands in such capacity. [Para 14] [495-G-H; 496-A-B]**

**2. The expression "fiduciary capacity" has not been defined in the 1988 Act or any other Statute for that matter. And yet there is no gainsaying that the same is an expression of known legal significance. It is manifest that while the expression "fiduciary capacity" may not be capable of a precise definition, it implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. The expression is in fact wider in its import for it extends to all such situations that place the parties in positions that are founded on confidence and trust on the one part and good faith on the other. In determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, the Court shall have to take into consideration the factual context in which the question arises, for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case. [Paras 15, 22, 23] [496-D; 499-G-H; 500-A-B]**

*Central Board of Secondary Education and Anr. v. Adiya Bandopadhyay and Ors.* **(2011) 8 SCC 497: 2011 (11) SCR 1028 - referred to.**

*Corpus Juris Secundum; Words and Phrases,*



**Permanent Edition (Vol. 16-A p. 41);** *Black's Law Dictionary (7th Edn. Page 640); Stroud's Judicial Dictionary and Bouvier's Law Dictionary* **- referred to.**

**3. The first and foremost of the circumstances relevant to the case at hand is that the property in question was tenanted by 'S'. It is common ground that at the time of her demise she had not left behind any Will nor is there any other material to suggest that she intended that the tenancy right held by her in the suit property should be transferred to the appellant to the exclusion of S's husband, or her daughters, respondents in this appeal, or both. In the ordinary course, upon the demise of the tenant, the tenancy rights should have as a matter of course devolved upon her legal heirs that would include the husband of the deceased and her children (parties to this appeal). Even so, the reason why the property was transferred in the name of the appellant was the fact that the Corporation desired such transfer to be made in the name of one individual rather than several individuals who may have succeeded to the tenancy rights. A specific averment to that effect was made by plaintiffs-respondents in the plaint which was not disputed by the appellant in the written statement filed by him. It is, therefore, reasonable to assume that transfer of rights in favour of the appellant was not because the others had abandoned their rights but because the Corporation required the transfer to be in favour of individual presumably to avoid procedural complications in enforcing rights and duties qua in property at a later stage. It is on that touchstone equally reasonable to assume that the other legal representatives of the deceased-tenant neither gave up their tenancy rights in the property nor did they give up the benefits that would flow to them as legal heirs of the deceased tenant consequent upon the decision of the Corporation to sell the property to the occupants. That conclusion gets strengthened by the fact that the parties had made**

**contributions towards the sale consideration paid for the acquisition of the suit property which they would not have done if the intention was to concede the property in favour of the appellant. Superadded to the above is the fact that the parties were closely related to each other which too lends considerable support to the case of the plaintiffs that the defendant-appellant held the tenancy rights and the ostensible title to the suit property in a fiduciary capacity vis-à-vis his siblings who had by reason of their contribution and the contribution made by their father continued to evince interest in the property and its ownership. Reposing confidence and faith in the appellant was in the facts and circumstances of the case not unusual or unnatural especially when possession over the suit property continued to be enjoyed by the plaintiffs who would in law and on a parity of reasoning be deemed to be holding the same for the benefit of the appellant as much as the appellant was holding the title to the property for the benefit of the plaintiffs. [Para 24] [500-C-H; 501-A-E]**

**4. The cumulative effect of the circumstances of the case when seen in the light of the substantial amount paid by the father of the parties, thus puts the appellant in a fiduciary capacity vis-à-vis the said four persons. Such being the case the transaction is completely saved from the mischief of Section 4 of the 1988 Act by reason of the same falling under Sub-section 3(b) of Section 4. The suit filed by the respondents was not, therefore, barred by the 1988 Act as contended by the appellant. The view taken by the High Court to that effect is affirmed though for slightly different reasons. [Para 25] [501-F-G]**

**5. This Court is not impressed by the contentions urged on behalf of the appellant that the plea of a fiduciary relationship existing between the parties and saving the suit from the mischief of Section 4 of the 1988**



**Act, was not available to the respondents, as the same had not been raised before the Courts below. The question whether the suit was hit by Section 4 of the 1988 Act was argued before the High Court and found against the appellant. The plea was not, therefore, new nor did it spring a surprise upon the appellant, especially when it was the appellant who was relying upon Section 4 of the 1988 Act and the respondents were simply defending the maintainability of their suit. That apart no question of fact beyond what has been found by the High Court was or is essential for answering the plea raised by the appellant nor is there any failure of justice to call for interference at this stage. [Para 26] [501-H; 502-A-C]**

**Case Law Reference:**

**2011 (11) SCR 1028 referred to Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6645 of 2003.

From the Judgment & Order dated 26.03.2001 of the High Court of Karnataka at Bangalore in Regular First Appeal No. 402 of 1995.

Anoop G. Chaudhary, S. Udaya Kumar Sagar, Bina Madhavan, Gaurav Mitra, Vinita (for M/s. Lawyer's nit & Co.) for the Appellant.

Naveen R. Nath, Lalit Mohini Bhat, Amrita Sharma for the Respondents.

The Judgment of the Court was delivered by

**T.S. THAKUR, J.** 1. This appeal by special leave arises out of a judgment and order passed by the High Court of Karnataka at Bangalore whereby OS No.3119/90 filed by the respondents for a declaration to the effect that they are co-

owners of the suit property and for an injunction restraining the defendant-appellant from interfering with their possession has been decreed. The factual backdrop in which the suit is filed may be summarised as under:

The suit property comprises a residential house bearing Municipal No.33, A and B Block, Austin Town, Bangalore-47 which was originally owned by the Corporation of the city of Bangalore. The said property was leased by the Corporation to late Smt. Stella Martins-mother of the parties before us. In the year 1978 the Corporation took a decision to sell the said property and presumably similar other properties to those in occupation of the same. The State Government also approved the said proposal with a note of caution that care should be taken to correctly identify the occupants of the property being sold. Before a sale could be effected in her favour, Stella Martins passed away in November, 1982 leaving behind her husband Sri C.F. Martins, their daughters (respondents in this appeal) and the appellant who happens to be the only son of his parents. The case of the plaintiffs-respondents is that the Corporation desired that transfer of the tenancy rights held by Smt. Stella Martins should be made to only one individual out of the several legal representatives left behind by the deceased. It was for that reason that the husband of the deceased-tenant and the daughters-respondents herein all consented to the transfer of the tenancy rights in favour of the appellant.

In due course the Corporation raised a demand for a sum of Rs.48,636/- towards consideration for the sale of the suit property to the appellant who held the tenancy rights. The case of the plaintiffs-respondents before us is that in order to satisfy the said demand Sri C.F. Martins-father of the parties in this appeal, transferred a sum of Rs.35,636/- to an account jointly held by respondent no.1 and her husband for purchasing a bank draft in order to satisfy the Corporation's demand referred to above. A demand draft for a sum of Rs.48,636/- was eventually purchased on 13th November, 1986 by debit to the saving



account of respondent no.1 and her husband and paid to the Corporation on the 14th November, 1986. A sale deed was on payment of the sale consideration, executed in favour of the appellant on 26th June, 1987. The plaintiffs-respondents further case was that Sri C.F. Martins-plaintiff no.1 executed a registered will on 16th August, 1989 whereby he bequeathed his entire estate including the suit schedule property equally to all his children. An affidavit setting out the circumstances in which the suit schedule property was transferred in favour of the appellant was also sworn by the father of the parties on 15th November, 1989.

A dispute relating to the suit schedule property having arisen between the parties including Sri C.F. Martins, their father, the latter filed a criminal complaint in December 1989 followed by OS No.3119 of 1990 in the Court of VI Additional City Civil Judge, Bangalore, praying for a declaration to the effect that the plaintiffs were co-owners in the schedule property to the extent of their contribution and praying for an injunction restraining the defendant-appellant herein from interfering with the possession of plaintiff nos.1 and 2 over the same.

In the written statement filed by the defendant-appellant, it was, inter alia, alleged that the entire sale consideration towards purchase of the schedule premises was provided by him, which made him the absolute owner of the suit property. On the pleadings of the parties, the Trial Court framed the following issues for determination:

1. Whether the plaintiffs prove that plaintiffs and defendant contributed the purchase money of suit site?

2. Whether the plaintiffs prove that plaintiffs and defendant are having a right in the schedule premises as co-owners?

3. Do the plaintiffs prove that they are in lawful possession of the suit property?

4. Do the plaintiffs prove that defendant threatened to throw away them from the suit property?

5. Whether defendant proves that the entire sale consideration towards purchase of suit schedule property was contributed by him?

6. What relief or order?

Addl. Issues:

7. Whether the plaintiffs are entitled for a decree of permanent injunction restraining the defendant from forcibly dispossessing the plaintiffs other than by due process of law?

The parties led oral and documentary evidence in support of their respective cases eventually culminating in the judgment and order dated 29th March, 1995 passed by the Trial Court dismissing the suit filed by the plaintiffs.

Aggrieved by the above judgment and decree the plaintiffs-respondents filed Regular First Appeal No.402 of 1995 before the High Court which was allowed by the High Court by its judgment and order dated 26th March, 2001 impugned before us. The High Court reversed the findings recorded by the Trial Court and decreed the suit filed by the plaintiffs-respondents, as already noticed above.

The High Court on a re-appraisal of the evidence took the view that the appellant had not succeeded in proving that he had paid the entire amount of consideration for the purchase of the suit property. The High Court held that the deposition of the Bank Manager had clearly established that the joint account held by the appellant and his father Sri C.F. Martins had never been operated by the appellant. The High Court further held that the appellant's case that he had withdrawn a sum of Rs.23,000/- towards the sale consideration from the post office savings account was not borne out by the record of the Post Office the withdrawals having been made in the year 1982



whereas the sales consideration was deposited five years later in 1987. The High Court further held that the deposition of plaintiff no.1 Sri C.F. Martins to the effect that his children had contributed equally towards the sale consideration had remained unassailed in cross-examination. The contention urged on behalf of the defendant-appellant herein that the suit was hit by The Benami Transactions (Prohibition) Act, 1988, was also repelled by the High Court.

2. Appearing for the appellants Mr. Anoop G. Chaudhary strenuously argued that the findings recorded by the High Court were contrary to the weight of evidence on record hence legally unsustainable. Mr. Chaudhary took pains to refer to us the depositions of the witnesses and the documents on record in an attempt to persuade us to reverse the findings of fact recorded by the High Court. Mr. Naveen R. Nath, learned counsel appearing for the respondents, on the other hand, argued that the High Court being the last Court of facts, in the absence of any perversity in the approach adopted by the High Court causing miscarriage of justice, there was no room for a reappraisal of the evidence and reversal of the findings recorded by the High Court on facts. He contended that the findings recorded by the High Court were even otherwise fully justified in the light of the overwhelming evidence on record.

3. The High Court had, on the basis of the rival submissions made before it, formulated two distinct questions that fell for its consideration. The first was whether the entire sale consideration required for the purchase of the suit property was provided by the defendant or contributions in that regard were made even by the plaintiffs. The second question which the High Court formulated was whether the plaintiffs and the defendant were co-owners of the suit property and whether the sale transaction in favour of the appellant was a benami transaction so as to be hit by the provisions of the Benami Transactions (Prohibition) Act, 1988.

4. While answering the first question, the High Court

referred to the evidence on record including the deposition of witnesses especially Respondent No.1 (PW-2) who had played a dominant role in obtaining the sale deed from the Corporation. This witness had stated that each one of the children had contributed Rs.5000/- whereas the rest of the amount was paid by their father Sri. C.F. Martins to make a total of Rs.48,636/- demanded by the Corporation towards the sale consideration for the premises. She also stated that the said amount was paid by a demand draft obtained from her and her husband's joint account which fact was certified even by the bank in terms of Ex.P.2, a letter stating that the bank draft in question had been issued by debit to the account jointly held by her and her husband. The original sale deed was also in possession of the said witness as was the possession of the suit property. She had further stated that the amount of Rs.35,636/- transferred to her account in November, 1986 had been paid by their father alone and not jointly by the defendant-appellant and their father as alleged by the former.

5. The High Court also relied upon the deposition of respondent No.2 (PW-3) who similarly supported the plaintiffs' version regarding contribution of Rs.5000/- for the purchase of the suit schedule property and PW-4-the Bank Manager who was examined to speak about Savings Account No.902 standing in the name of the first plaintiff and the appellant herein. The Manager had deposed that plaintiff no.1, Sri C.F. Martins, used to get cheques in pound sterling from the Crown Agents, London and the bank used to purchase the cheques convert the same into rupees and credit the amount to the account every month. It was also stated that although the defendant-appellant was a joint holder of the account, he had never operated the said account. The High Court upon a careful reappraisal of the evidence concluded as under:

> "From the aforesaid evidence on record what emerges is Rs.48,636.00 is the consideration amount paid to the Corporation for purchase of the schedule property. The same amount was paid by way of a demand draft. The said demand draft was obtained from the Savings bank Account no. 339 of the second plaintiff on 13.11.1986. These facts are not in dispute. Now it is also not in dispute a sum of Rs. 35,636.00 was paid to the second plaintiff by the first plaintiff from his Savings Bank Account which amount was utilized by the second plaintiff to purchase the demand draft towards sale consideration after making good the balance amount. The defendant contends in one breath that he sent a cheque for Rs. 48,636.00 from Bombay where he was working to the plaintiff for the purpose of sale consideration. The evidence on record clearly falsified this part of the case of the defendant and the falsity of the said stand taken by the defendant. The next version given by the defendant is this cheque for Rs. 35,636.00 issued from Savings Bank Account No.901 as per Ex.D.5 is a cheque issued by him to the second plaintiff towards the sale consideration. The evidence of the manager of the bank discloses that the defendant never operated the bank account. On the contrary, the evidence of P.W.1 and the other material on record discloses that it is a cheque issued by P.W.1 in favour of PW.2 which again exposes the falsity of the case of the defendant."



6. The High Court noticed the reasons given by the Trial Court in support of its findings and found the same to be untenable. The High Court observed:

> "Therefore, in view of my discussion as aforesaid, I am of the opinion that the defendant has miserably failed to establish that the entire sale consideration of Rs.48,636.00 was paid by him. On the contrary the plaintiffs have established their case that plaintiffs 2, 3 and 4 and defendant have contributed Rs. 5000.00 towards the sale consideration and the balance amount has been contributed by the first plaintiff. As such it cannot be said

that the defendant is the absolute owner of the suit schedule property."

7. We do not find any error much less any perversity in the view taken by the High Court nor do we see any miscarriage of justice to warrant interference with the finding that the sale consideration for the purchase of the suit property was contributed by the plaintiffs and the defendant and not provided by the defendant alone as claimed by him. We have, therefore, no hesitation in upholding the said findings which is at any rate a pure finding of fact.

8. On the second question the High Court relied upon the principles underlying Section 45 of the Transfer of Property Act, 1882, apart from holding that the purchase of the suit property in the name of the appellant by contributions made by the remaining legal representatives and the original owner did not amount to a benami transaction. The High Court held that if a part of the consideration paid for the property in dispute had been provided by the appellant in whose name the property was purchased, the transaction could not be said to be a benami transaction. The High Court was of the view that since the appellant had raised the contention that the entire sale consideration had been provided by him, he was according to the High Court estopped from contending that the transaction was a benami transaction hit by the provisions of Section 4 of Benami Transactions (Prohibition) Act, 1988.

9. Mr. Chaudhary, learned counsel for the appellant submitted that the High Court was in error in holding that the Benami Transactions (Prohibition) Act, 1988 was not applicable. The transaction in question argued the learned counsel was benami to the extent the title to the property was transferred in the name of the appellant while consideration for such transfer was provided by the plaintiffs. He submitted that Section 3 prohibited any benami transaction while Section 4 prohibited recovery of property held benami from a person in whose name the same is held. He contended that the suit filed



by the respondents fell within the mischief of Section 4 and was, therefore, liable to be dismissed.

10. Mr. Nath, learned counsel for the respondents, on the other hand, submitted that not only on the principle of estoppel which the High Court had invoked but even in the light of the provisions of Section 5 of the Act the appellant was not entitled to plead the prohibition under Section 4 of the Act. He further argued that sub-section (3) (b) of Section 4 specifically saved a transaction where the property is held by the person who stands in a fiduciary capacity for the benefit of the person towards whom he stands in such capacity.

11. Section 2 of the Benami Transactions (Prohibition) Act, 1988 defines a benami transaction as under:

> "Section 2 (a) "benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person;"

12. Section 3 forbids benami transaction while sub-section (2) thereof excludes such a transaction enumerated therein from the said provision. Section 4 of the Act, upon which heavy reliance was placed by Mr. Chaudhary, may be extracted in extenso:

> **Section 4. Prohibition of the right to recover property held benami.-** (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.
>
> (2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,--

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

13. A plain reading of the above will show that no suit, claim or action to enforce a right in respect of any property held benami shall lie against the person in whose name the property is held or against any other person at the instance of a person claiming to be the real owner of such property. It is common ground that although the sale deed by which the property was transferred in the name of the appellant had been executed before the enactment of above legislation yet the suit out of which this appeal arises had been filed after the year 1988. The prohibition contained in Section 4 would, therefore, apply to such a suit, subject to the satisfaction of other conditions stipulated therein. In other words unless the conditions contained in Section 4(1) and (2) are held to be inapplicable by reason of anything contained in sub-section (3) thereof the suit filed by plaintiffs-respondents herein would fall within the mischief of Section 4.

14. The critical question then is whether sub-section (3) of Section 4 saves a transaction like the one with which we are concerned. Sub-section (3) to Section 4 extracted above is in two distinct parts. The first part comprises clause (a) to Section 4(3) which deals with acquisitions by and in the name of a coparcener in a Hindu undivided family for the benefit of such coparceners in the family. There is no dispute that the said provision has no application in the instant case nor was any



reliance placed upon the same by learned counsel for the plaintiffs-respondents. What was invoked by Mr. Naveen R. Nath, learned counsel appearing for the respondents was Section 4(3)(b) of the Act which too is in two parts viz. one that deals with trustees and the beneficiaries thereof and the other that deals with persons standing in a fiduciary capacity and those towards whom he stands in such capacity. It was argued by Mr. Nath that the circumstances in which the purchase in question was made in the name of the appellant assumes great importance while determining whether the appellant in whose name the property was acquired stood in a fiduciary capacity towards the plaintiffs-respondents.

15. The expression "fiduciary capacity" has not been defined in the 1988 Act or any other Statute for that matter. And yet there is no gainsaying that the same is an expression of known legal significance, the import whereof may be briefly examined at this stage.

16. The term "Fiduciary" has been explained by Corpus Juris Secundum as under:

"A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil, or Roman Law. It connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction, refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.

The word 'fiduciary', as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a character analogous to that of a trustee with respect to the trust and confidence involved

in it and the scrupulous good faith and condor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person, trust or estate."

17. **Words and Phrases,** Permanent Edition (Vol. 16-A p. 41) defines "Fiducial Relation" as under:

"There is a technical distinction between a 'fiducial relation' which is more correctly applicable to legal relationships between parties, such as guardian and ward, administrator and heirs, and other similar relationships, and 'confidential relation' which includes the legal relationships, and also every other relationship wherein confidence is rightly reposed and is exercised.

Generally, the term 'fiduciary' applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, a well as technical fiduciary relations."

18. *Black's Law Dictionary* (7th Edn. Page 640) defines "fiduciary relationship" thus:

"Fiduciary relationship- A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships- such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client - require the highest duty of care. Fiduciary relationship usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or



influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person ha a duty to act for give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a clinet or a stockbroker and a customer."

19. *Stroud's Judicial Dictionary* explains the expression "fiduciary capacity" as under:

"Fiduciary Capacity - An administrator who had received money under letters of administration and who is ordered to pay it over in a suit for the recall of the grant, holds it "in a fiduciary capacity" within Debtors Act 1869 so, of the debt due from an executor who is indebted to his testator's estate which he is able to pay but will not, so of moneys in the hands of a receiver, or agent, or Manager, or moneys due to an account from the London agent of a country solicitor, or proceeds of sale in the hands of an auctioneer, or moneys which in the compromise of an action have been ordered to be held on certain trusts or partnership moneys received by a partner."

20. *Bouvier's Law Dictionary defines* "fiduciary capacity" as under:

"What constitutes a fiduciary relationship is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, or administrator, director of a corporation of society. Medical or religious adviser, husband and wife, an agent who appropriates money put into his hands for a specific purpose of investment, collector of city taxes who retains money officially collected, one who receives a note or other security for collection. In the following cases debt has been held not a fiduciary one; a factor who retains the money of his

principal, an agent under an agreement to account and pay over monthly, one with whom a general deposit of money is made."

21. We may at this stage refer to a recent decision of this Court in *Central Board of Secondary Education and Anr. v. Adiya Bandopadhyay and Ors.* (2011) 8 SCC 497, where Ravindeeran, J. speaking for the Court in that case explained the term 'fiduciary' and 'fiduciary relationship' in the following words:

> "39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party."

22. It is manifest that while the expression "fiduciary capacity" may not be capable of a precise definition, it implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. The expression is in fact wider in its import for it extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other.



23. In determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, the Court shall have to take into consideration the factual context in which the question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case. Having said that, let us turn to the facts of the present case once more to determine whether the appellant stood in a fiduciary capacity vis-à-vis the plaintiffs-respondents.

24. The first and foremost of the circumstance relevant to the question at hand is the fact that the property in question was tenanted by Smt. Stella Martins-mother of the parties before us. It is common ground that at the time of her demise she had not left behind any Will nor is there any other material to suggest that she intended that the tenancy right held by her in the suit property should be transferred to the appellant to the exclusion of her husband, C.F. Martins or her daughters, respondents in this appeal, or both. In the ordinary course, upon the demise of the tenant, the tenancy rights should have as a matter of course devolved upon her legal heirs that would include the husband of the deceased and her children (parties to this appeal). Even so, the reason why the property was transferred in the name of the appellant was the fact that the Corporation desired such transfer to be made in the name of one individual rather than several individuals who may have succeeded to the tenancy rights. A specific averment to that effect was made by plaintiffs-respondents in para 7 of the plaint which was not disputed by the appellant in the written statement filed by him. It is, therefore, reasonable to assume that transfer of rights in favour of the appellant was not because the others had abandoned their rights but because the Corporation required the transfer to be in favour of individual presumably to avoid procedural complications in enforcing rights and duties qua in property at a later stage. It is on that touchstone equally reasonable to assume that the other legal representatives of the deceased-tenant neither gave up their tenancy rights in the

property nor did they give up the benefits that would flow to them as legal heirs of the deceased tenant consequent upon the decision of the Corporation to sell the property to the occupants. That conclusion gets strengthened by the fact that the parties had made contributions towards the sale consideration paid for the acquisition of the suit property which they would not have done if the intention was to concede the property in favour of the appellant. Superadded to the above is the fact that the parties were closely related to each other which too lends considerable support to the case of the plaintiffs that the defendant-appellant held the tenancy rights and the ostensible title to the suit property in a fiduciary capacity vis-à-vis his siblings who had by reason of their contribution and the contribution made by their father continued to evince interest in the property and its ownership. Reposing confidence and faith in the appellant was in the facts and circumstances of the case not unusual or unnatural especially when possession over the suit property continued to be enjoyed by the plaintiffs who would in law and on a parity of reasoning be deemed to be holding the same for the benefit of the appellant as much as the appellant was holding the title to the property for the benefit of the plaintiffs.

25. The cumulative effect of the above circumstances when seen in the light of the substantial amount paid by late Shri C.F. Martins, the father of the parties, thus puts the appellant in a fiduciary capacity vis-à-vis the said four persons. Such being the case the transaction is completely saved from the mischief of Section 4 of the Act by reason of the same falling under Sub-section 3(b) of Section 4. The suit filed by the respondents was not, therefore, barred by the Act as contended by the learned counsel for the appellant. The view taken by the High Court to that effect is affirmed though for slightly different reasons.

26. We may while parting say that we have not been impressed by the contentions urged on behalf of the appellant that the plea of a fiduciary relationship existing between the



parties and saving the suit from the mischief of Section 4 of the Act, was not available to the respondents, as the same had not been raised before the Courts below. The question whether the suit was hit by Section 4 of the Act was argued before the High Court and found against the appellant. The plea was not, therefore, new nor did it spring a surprise upon the appellant, especially when it was the appellant who was relying upon Section 4 of the Act and the respondents were simply defending the maintainability of their suit. That apart no question of fact beyond what has been found by the High Court was or is essential for answering the plea raised by the appellant nor is there any failure of justice to call for our interference at this stage.

27. In the result, this appeal fails and is hereby dismissed but in the circumstances without any orders as to costs.

B.B.B. Appeal dismissed.

ANEETA HADA
*v.*
M/S. GODFATHER TRAVELS & TOURS PVT. LTD.
(Criminal Appeal No. 838 of 2008)

APRIL 27, 2012

**[DALVEER BHANDARI, SUDHANSU JYOTI MUKHOPADHAYA AND DIPAK MISRA, JJ.]**

*Liability: Vicarious liability - Held: An authorised signatory of a company cannot be held liable for prosecution u/s.138 of the Negotiable Instruments Act, 1881 or u/s.67 r/w s.85 of Information Technology Act, 2000 without the company being arraigned as an accused - Information Technology Act, 2000 - ss.67, 85 - Negotiable Instruments Act, 1881 - ss.138, 141.*

*Negotiable Instruments Act, 1881 - s.141 - Statutory intendment of - Held: s.147 stipulates that if a person who commits offence u/s.138 of the Act is a company, the company as well as every person in-charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence - The criminal liability on account of dishonour of cheque primarily falls on the drawee company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in s.141 are to be satisfied - The power of punishment is vested in the legislature and that is absolute in s.141 of the Act which clearly speaks of commission of offence by the company - Applying the doctrine of strict construction, commission of offence by the company is an express condition precedent to attract the vicarious liability of others - Thus, the words "as well as the company" appearing in the Section make it clear that when the company*





*can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof - For maintaining the prosecution u/s.141 of the Act, arraigning of a company as an accused is imperative - The analysis pertaining to s.141 of the Act would squarely apply to the Information Technology Act, 2000.*

*Interpretation of statutes: Legal fiction - Held: It is for the court to ascertain for what purpose the legal fiction has been created and to imagine the fiction with all real consequences and instances unless prohibited from doing so - That apart, the use of the term 'deemed' has to be read in its context and further the fullest logical purpose and import are to be understood - Information Technology Act, 2000 - Negotiable Instruments Act, 1881.*

**The question which arose for consideration in these appeals was whether without the company being arraigned as an accused, an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 or under Section 67 r/w Section 85 of Information Technology Act, 2000.**

**Allowing the appeals, the Court**

**HELD: 1. Section 138 of the Negotiable Instruments Act, 1881 deals with the ingredients of the offence for dishonour of the cheque and the consequent non-payment of the amount due thereon. The main part of the provision can be segregated into three compartments, namely, (i) the cheque is drawn by a person, (ii) the cheque drawn on an account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of a debt or other liability, is returned unpaid, either because the amount of money standing to**

**the credit of that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an arrangement made with the bank and (iii) such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of the Act, be punished with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both. The proviso to the said section postulates under what circumstances the section shall not apply. Section 7 of the Act defines 'drawer' to mean the maker of a bill of exchange or a cheque. An authorised signatory of a company becomes a drawer as he has been authorised to do so in respect of the account maintained by the company. Section 141 deals with offences by companies. On a reading of the said provision, it is clear that if a person who commits offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. In both the provisions, there is a 'deemed' concept of criminal liability. [Paras 13-16] [525-F-G; 526-H; 527-A-D; F-H; 528-A-G-H, 529-A]**

*D. Vinod Shivappa v. Nanda Belliappa* **AIR 2006 SC 2179;** *M/s. Modi Cement Ltd. v. Shri Kuchil Kumar Nandi* **AIR 1998 SC 1057,** *Goaplast Pvt. Shri Ltd. v. Chico Ursula D'souza and Anr.* **AIR 2003 SC 2035: 2003 (2) SCR 712;** *NEPC Micon Ltd and Ors. v. Magma Leasing Ltd.* **(1999) 4 SCC 253: 1999 (2) SCR 932;** *Dalmia Cement (Bharat) Ltd. v. M/s. Galaxy Traders and Agencies Ltd and Ors.* **AIR 2001**



**SC 676: 2001 (1) SCR 461;** *I.C.D.C. Ltd. v. Beena Shabeer and Anr.* **2002 Crl.L.J. 3935 (SC);** *S.V. Majumdar and others v. Gujarat Fertilizers Co. Ltd and Anr.* **AIR 2005 SC 2436;** *M/s Bilakchand Gyanchand Co. v. A. Chinnaswami* **JT 1999 (10) SC 236;** *R. Rajgopal v. S.S. Venkat* **AIR (2001) SC 2432: 2001 (10) SCC 91 - referred to.**

**2. Section 139 of the Act creates a presumption in favour of the holder. The said provision has to be read in conjunction with Section 118(a) which occurs in Chapter XIII of the Act that deals with special rules of evidence. Section 140 stipulates the defence which may not be allowed in a prosecution under Section 138 of the Act. Thus, there is a deemed fiction in relation to criminal liability, presumption in favour of the holder, and denial of a defence in respect of certain aspects. Section 141 uses the term 'person' and refers it to a company. There is no trace of doubt that the company is a juristic person. The concept of corporate criminal liability is attracted to a corporation and company and it is so luminescent from the language employed under Section 141 of the Act. The company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. Section 141 of the Act clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus, the statutory intendment is absolutely plain. As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification. [Paras 13, 17, 18, 25, 26] [529-B-D; 532-B-D]**

*Iridium India Telecom Ltd. v. Motorola Inc and Ors.* **(2011) 1 SCC 74: 2010 (14) SCR 591;** *Standard Chartered*

*Bank and others v. Directorate of Enforcement and Others* **(2005) 4 SCC 530: 2005 (1) Suppl. SCR 49 - relied on.**

*H.L. Bolton (Engineering) Co. Ltd. vs. T.J. Graham & Sons Ltd.* **(1956) 3 All E.R. 624;** *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* **(1915) AC 705, 713-714; 31 T.L.R. 294;** *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.* **1994 KB 146 : (1994) 1 All ER 119 (DC) - referred to.**

*Halsbury's Laws of England,* **Volume 11(1); 9** *Corpus Juris Secundum* **- referred to.**

**3. It is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term 'deemed' has to be read in its context and further the fullest logical purpose and import are to be understood. It is because in modern legislation, the term 'deemed' has been used for manifold purposes. The object of the legislature has to be kept in mind. The word 'deemed' used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in charge of the company. The criminal liability on account of dishonour of cheque primarily falls on the drawee company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied. Section 141 of the Act makes the other persons vicariously liable for commission of an offence on the part of the company. The vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision**



**would be necessitous and, in a way, the warrant. There has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. Applying the doctrine of strict construction, commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted. For maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. The proceedings initiated under Section 138 of the Act are quashed. [Paras 32, 33, 39, 42, 43, 45] [534-C-H; 535-A; 542-E-F; 543-D-E; 544-A-E; 545-B]**

*The Bengal Immunity Co. Ltd. v. State of Bihar and others* **AIR 1955 SC 661: 1955 SCR 603;** *Hira H. Advani Etc. v. State of Maharashtra* **AIR 1971 SC 44: 1970 SCR 821;** *State of Tamil Nadu v. Arooran Sugars Ltd.* **AIR 1997 SC 1815: 1996 (8) Suppl. SCR 193;** *The Chief Inspector of Mines and*

*another v. Lala Karam Chand Thapar Etc.* **AIR 1961 SC 838: 1962 SCR 9;** *J.K. Cotton Spinning and Weaving Mills Ltd. and anr. v. Union of India and others* **AIR 1988 SC 191: 1988 SCR 700;** *M. Venugopal v. Divisional Manager, Life Insurance Corporation of India* **(1994) 2 SCC 323: 1994 (1) SCR 433;** *Harish Tandon v. Addl. District Magistrate, Allahabad* **(1995) 1 SCC 537: 1995 (1) SCR 56;** *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another* **(2005) 8 SCC 89: 2005 (3) Suppl. SCR 371;** *State of Madras v. C.V. Parekh and Another* **(1970) 3 SCC 491 - relied on.**

*U.P. Pollution Control Board v. M/s. Modi Distillery and others* **AIR 1988 SC 1128 - distinguished.**

*Anil Hada v. Indian Acrylic Ltd.* **(2000) 1 SCC 1: 1999 (5) Suppl. SCR 6;** *Sheoratan Agarwal and Another v. State of Madhya Pradesh* **(1984) 4 SCC 352: 1985 (1) SCR 719 - overruled.**

*Francis Bennion's Statutory Interpretation; Maxwell's The Interpretation of Statutes* **(12th Edition) - referred to.**

**4. The analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. The director could not have been held liable for the offence under Section 85 of the 2000 Act. [Para 48] [546-D-E]**

*Madhumilan Syntex Ltd. & others v. Union of India and another* **AIR 2007 SC 1481: (2007) 11 SCC 297: 2007 (4) SCR 378;** *Sabitha Ramamurthy and Another v. R.B.S. Channabasavaradhya* **(2006) 10 SCC 581: 2006 (6) Suppl. SCR 126;** *S.V. Mazumdar and others v. Gujarat State Fertilizer Co. Ltd. and Another* **(2005) 4 SCC 173: 2005 (3) SCR 857;** *Sarav Investment & Financial Consultancy Private Limited and another v. Lloyds Register of Shipping Indian Office Staff Provident Fund and another* **(2007) 14 SCC 753: 2007 (10 ) SCR 1110;** *K. Srikanth Singh v. North East Securities Ltd. and Anr.* **(2007) 12 SCC 788: 2007 (8) SCR 452;** *Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. and Ors.* **(2008)13 SCC 678: 2008 (1) SCR 432;** *N. Rangachari v. Bharat Sanchar Nigam Ltd.* **(2007) 5 SCC 108: 2007 (5) SCR 329;** *Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi and Ors.* **(2007) 5 SCC 54: 2007 (4) SCR 1055;** *Saroj Kumar Poddar v. State (NCT of Delhi) and Anr.* **(2007) 3 SCC 693: 2007 (1) SCR 907;** *N.K. Wahi v. Shekhar Singh and Ors* **(2007) 9 SCC 481***; R. Rajgopal v. S.S. Venkat* **(2001) 10 SCC 91;** *Electronics Trade and Technology Development Corporation Ltd., Secunderabad v. Indian Technologists and Engineers (Electronics) (P) Ltd. and another* **(1996) 2 SCC 739: 1996 (1) SCR 843;** *C.C. Alavi Haji v. Palapetty Mohammed and Another* **(2007) 6 SCC 555: 2007 (7) SCR 326;** *Vinay Devanna Nayak v. Ryot Sewa Sahakaro Bank Ltd.* **(2008) 2 SCC 305: 2007 (12) SCR 1134;** *Rajneesh Aggarwal v. Amit J. Bhalla* **JT 2001 (1) SC 325;** *East end Dwellings Co. Ltd. v. Finsbury Borough Council* **1952 AC 109; Reserve** *Bank of India v. Peerless General Finance and Investment Co. Ltd. and others* **(1987) 1 SCC 424***; Deewan Singh and others v. Rajendra Prasad Ardevi and others* **(2007) 10 SCC 528: 2007 (1) SCR 30;** *Sarabjit Rick Singh v. Union of India* **(2008) 2 SCC 417 - referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **2005 (1) Suppl. SCR 49** | **relied on** | **Para 5,24** |
| **2007 (4) SCR 378** | **referred to** | **Para 5** |
| **2006 (6) Suppl. SCR 126** | **referred to** | **Para 5,6,9,33** |
| **2005 (3) SCR 857** | **referred to** | **Para 5,9** |
| **2007 (10) SCR 1110** | **referred to** | **Para 5,9** |
| **2007 (8) SCR 452** | **referred to** | **Para 5,9** |
| **2008 (1) SCR 432** | **referred to** | **Para 5,9** |
| **2007 (5) SCR 329** | **referred to** | **Para 5** |

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| **2007 (4) SCR 1055** | **referred to** | **Para 5** |
| **2007 (1) SCR 907** | **referred to** | **Para 5** |
| **(2007) 9 SCC 481** | **referred to** | **Para 5** |
| **1985 (1) SCR 719** | **overruled** | **Para 5,11(e), 34,35,37** |
| **(1970) 3 SCC 491** | **relied on** | **Para 5,34,37** |
| **1999 (5) Suppl. SCR 6** | **referred to** | **Para 5,6, 11(f),35,37** |
| **2001 (10) SCC 91** | **referred to** | **Para 6** |
| **1996 (1) SCR 843** | **referred to** | **Para 12(i)** |
| **2007 (7) SCR 326** | **referred to** | **Para 12(i)** |
| **2007 (12) SCR 1134** | **referred to** | **Para 12(i)** |
| **AIR 2006 SC 2179** | **referred to** | **Para 12(iii)** |
| **AIR 1998 SC 1057** | **referred to** | **Para 12(iii)** |
| **2003 (2) SCR 712** | **referred to** | **Para 12(iii)** |
| **1999 (2) SCR 932** | **referred to** | **Para 12(iii)** |
| **2001 (1) SCR 461** | **referred to** | **Para 12(iii)** |
| **2002 Crl.L.J. 3935 (SC)** | **referred to** | **Para 12(iii)** |
| **AIR 2005 SC 2436** | **referred to** | **Para 12(iii)** |
| **JT 1999 (10) SC 236** | **referred to** | **Para 12(iv)** |
| **AIR (2001) SC 2432** | **referred to** | **Para 12(iv)** |
| **2001 (10) SCC 91** | **referred to** | **Para 12 (iv)** |
| **JT 2001 (1) SC 325** | **referred to** | **Para 12(iv)** |
| **(1956) 3 All E.R. 624** | **referred to** | **Para 21** |



| | | |
|---|---|---|
| **31 T.L.R. 294** | **referred to** | **Para 21** |
| **(1994) 1 All ER 119 (DC)** | **referred to** | **Para 22** |
| **2010 (14) SCR 591** | **relied on** | **Para 23** |
| **1952 AC 109** | **relied on** | **Para 28** |
| **1955 SCR 603** | **relied on** | **Para 29** |
| **1970 SCR 821** | **relied on** | **Para 30** |
| **1996 (8) Suppl. SCR 193** | **relied on** | **Para 31** |
| **1962 SCR 9** | **relied on** | **Para 31** |
| **1988 SCR 700** | **relied on** | **Para 31** |
| **1994 (1) SCR 433** | **relied on** | **Para 31** |
| **1995 (1) SCR 56** | **relied on** | **Para 31** |
| **2005 (3) Suppl. SCR 371** | **relied on** | **Para 5** |
| **AIR 1988 SC 1128** | **distinguished** | **Para 38** |
| **(1987) 1 SCC 424** | **referred to** | **Para 42** |
| **2007 (1) SCR 30** | **referred to** | **Para 42** |
| **(2008) 2 SCC 417** | **referred to** | **Para 42** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 838 of 2008 etc.

From the Judgment & Order dated 12.01.2007 of the High Court of Delhi in Crl. M.C. No. 928-929 of 2006.

WITH

Crl. A. Nos. 1483, 1484 of 2009 & 842 of 2008.

P.P. Malhotra, ASG, Arun Mohan, (Amicus Curiae), Dr. Abhishek Manu Singhvi, Amit Desai, Sidharh Luthra, Muneesh Malhotra, Pankaj Gupta, Rajat Bali, Shri Singh, Ruby Singh

Ahuja, Supriya Ahuja, Raunak Dhillon, Udit Mendiratta , Amit Bhandari, Manik Karanjawala, Vijay K. Sondhi, Salim Ansari, Wasim Beg, Suhail Malik, Jaiveer Shergil, Subramonium Prasad, Rajesh Harnal, Bharat B. Sethi, Jyoti Mendiratta, R.N. Karanjawala, P.K. Dey, Shailendra Sharma, Sonia Malhotra, B.V. Balaram Das, Gargi Khanna for the appearing parties.

The Judgment of the Court was delivered by

**DIPAK MISRA, J.** 1. In Criminal Appeal Nos. 838 of 2008 and 842 of 2008, the common proposition of law that has emerged for consideration is whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for brevity 'the Act') without the company being arraigned as an accused. Be it noted, these two appeals were initially heard by a two-Judge Bench and there was difference of opinion between the two learned Judges in the interpretation of Sections 138 and 141 of the Act and, therefore, the matter has been placed before us.

2. In Criminal Appeal Nos. 1483 of 2009 and 1484 of 2009, the issue involved pertains to the interpretation of Section 85 of the Information Technology Act, 2000 (for short 'the 2000 Act') which is pari materia with Section 141 of the Act. Be it noted, a director of the appellant-Company was prosecuted under Section 292 of the Indian Penal Code and Section 67 of the 2000 Act without impleading the company as an accused. The initiation of prosecution was challenged under Section 482 of the Code of Criminal Procedure before the High Court and the High Court held that offences are made out against the appellant-Company along with the directors under Section 67 read with Section 85 of the 2000 Act and, on the said base, declined to quash the proceeding. The core issue that has emerged in these two appeals is whether the company could have been made liable for prosecution without being impleaded as an accused and whether the directors could have been prosecuted for offences punishable under the aforesaid



provisions without the company being arrayed as an accused. Regard being had to the similitude of the controversy, these two appeals were linked with Criminal Appeal Nos. 838 of 2008 and 842 of 2008.

3. We have already noted that there was difference of opinion in respect of the interpretation of Sections 138 and 141 of the Act and, therefore, we shall advert to the facts in Criminal Appeal No. 838 of 2008 and, thereafter, refer to the facts in Criminal Appeal Nos. 1482 of 2009 and 1484 of 2009.

4. The appellant, Anita Hada, an authorised signatory of International Travels Limited, a company registered under the Companies Act, 1956, issued a cheque dated 17th January, 2011 for a sum of Rs.5,10,000/- in favour of the respondent, namely, M/s. Godfather Travels & Tours Private Limited, which was dishonoured as a consequence of which the said respondent initiated criminal action by filing a complaint before the concerned Judicial Magistrate under Section 138 of the Act. In the complaint petition, the Company was not arrayed as an accused. However, the Magistrate took cognizance of the offence against the accused appellant.

5. Being aggrieved by the said order, she invoked the jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure for quashing of the criminal proceeding and the High Court, considering the scope of Sections 138 and 139 of the Act and various other factors, opined that the ground urged would be in the sphere of defence of the accused and would not strengthen the edifice for quashing of the proceeding. While assailing the said order before the two-Judge Bench, the substratum of argument was that as the Company was not arrayed as an accused, the legal fiction created by the legislature in Section 141 of the Act would not get attracted. It was canvassed that once a legal fiction is created by the statutory provision against the Company as well as the person responsible for the acts of the Company, the conditions precedent engrafted under such deeming provisions are to be

totally satisfied and one such condition is impleadment of the principal offender. S.B. Sinha, J. dissected the anatomy of Sections 138 and 141 of the Act and referred to the decisions in *Standard Chartered Bank and others v. Directorate of Enforcement and others*[1]; *Madhumilan Syntex Ltd. & others v. Union of India and another*[2]*; S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another*[3]*; Sabitha Ramamurthy and Another v. R.B.S. Channabasavaradhya*[4]; *S.V. Mazumdar and others v. Gujarat State Fertilizer Co. Ltd. and Another*[5]; *Sarav Investment & Financial Consultancy Private Limited and another v. Lloyds Register of Shipping Indian Office Staff Provident Fund and another*[6]; *K. Srikanth Singh v. North East Securities Ltd. and Anr.*[7]; *Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. and Ors.*[8]; *N. Rangachari v. Bharat Sanchar Nigam Ltd.*[9]; *Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi and Ors.*[10]; *Saroj Kumar Poddar v. State (NCT of Delhi) and Anr.*[11]; *N.K. Wahi v. Shekhar Singh and Ors.*[12]; and took note of the two-Judge Bench decision in *Sheoratan Agarwal and Another v. State of Madhya Pradesh*[13] wherein the decision of the three-Judge Bench in *State of Madras v. C.V. Parekh and Another*[14] was distinguished and expressed the view as follows: -

1. (2005) 4 SCC 530.
2. AIR 2007 SC 1481 : (2007) 11 SCC 297.
3. (2005) 8 SCC 89.
4. (2006) 10 SCC 581.
5. (2005) 4 SCC 173.
6. (2007) 14 SCC 753.
7. (2007) 12 SCC 788.
8. (2008) 13 SCC 678.
9. (2007) 5 SCC 108.
10. (2007) 5 SCC 54.
11. (2007) 3 SCC 693.
12. (2007) 9 SCC 481.
13. (1984) 4 SCC 352.
14. (1970) 3 SCC 491.



"28. With the greatest of respect to the learned judges, it is difficult to agree therewith. The findings, if taken to its logical corollary lead us to an anomalous position. The trial court, in a given case although the company is not an accused, would have to arrive at a finding that it is guilty. Company, although a juristic person, is a separate entity. Directors may come and go. The company remains. It has its own reputation and standing in the market which is required to be maintained. Nobody, without any authority of law, can sentence it or find it guilty of commission of offence. Before recording a finding that it is guilty of commission of a serious offence, it may be heard. The Director who was in charge of the company at one point of time may have no interest in the company. He may not even defend the company. He need not even continue to be its Director. He may have his own score to settle in view of change in management of the company. In a situation of that nature, the company would for all intent and purport would stand convicted, although, it was not an accused and, thus, had no opportunity to defend itself.

29. Any person accused of commission of an offence, whether natural or juristic, has some rights. If it is to be found guilty of commission of an offence on the basis whereof its Directors are held liable, the procedures laid down in the Code of Criminal Procedure must be followed. In determining such an issue all relevant aspects of the matter must be kept in mind. The ground realities cannot be lost sight of. Accused persons are being convicted for commission of an offence under Section 138 of the Act inter alia on drawing statutory presumptions.

Various provisions contained therein lean in favour of a drawer of the cheque or the holder thereof and against the accused. Sections 20, 118(c), 139 and 140 of the Act are some such provisions. The Act is a penal statute. Unlike offences under the general law it provides for reverse

burden. The onus of proof shifts to the accused if some foundational facts are established.

It is, therefore, in interpreting a statute of this nature difficult to conceive that it would be legally permissible to hold a company, the prime offender, liable for commission of an offence although it does not get an opportunity to defend itself. It is against all principles of fairness and justice. It is opposed to the Rule of Law. No statute in view of our Constitutional Scheme can be construed in such a manner so as to refuse an opportunity of being heard to a person. It would not only offend a common- sense, it may be held to be unconstitutional. Such a construction, therefore, in my opinion should be avoided.

In any event in a case of this nature, the construction which may be available in invoking Essential Commodities Act, Prevention of Food Adulteration Act, which affects the Society at large may not have any application when only a private individual is involved."

6. Thereafter, the learned Judge referred to *Anil Hada v. Indian Acrylic Ltd.*[15] and *R. Rajgopal v. S.S. Venkat*[16], distinguished the decision in Anil Hada and opined that the issue decided in the said case is to be understood in the factual matrix obtaining therein as the Company could not have been prosecuted, it being under liquidation. The observations to the effect that the Company need not be prosecuted against was regarded as obiter dicta and not the ratio decidendi. Sinha J. clearly opined that the Bench was bound by the three-Judge Bench decision in *S.M.S. Pharmaceuticals Ltd.'s* case (supra) and *C.V. Parekh's* case (supra). After stating so, he observed as under: -

"It is one thing to say that the complaint petition

15. (2000) 1 SCC 1.

16. (2001) 10 SCC 91.



proceeded against the accused persons on the premise that the company had not committed the offence but the accused did, but it is another thing to say that although the company was the principal offender, it need not be made an accused at all.

I have no doubt whatsoever in our mind that prosecution of the company is a sine qua non for prosecution of the other persons who fall within the second and third categories of the candidates, viz., everyone who was in-charge and was responsible for the business of the company and any other person who was a director or managing director or secretary or officer of the company with whose connivance or due to whose neglect the company had committed the offence."

7. The learned Judge also took note of the maxim lex non cogit ad impossibilia and expressed thus: -

"True interpretation, in my opinion, of the said provision would be that a company has to be made an accused but applying the principle "lex non cogit ad impossibilia", i.e., if for some legal snag, the company cannot be proceeded against without obtaining sanction of a court of law or other authority, the trial as against the other accused may be proceeded against if the ingredients of Section 138 as also 141 are otherwise fulfilled. In such an event, it would not be a case where the company had not been made an accused but would be one where the company cannot be proceeded against due to existence of a legal bar. A distinction must be borne in mind between cases where a company had not been made an accused and the one where despite making it an accused, it cannot be proceeded against because of a legal bar."

8. Being of the aforesaid view, he allowed the appeals.

9. V.S. Sirpurkar J., after narrating the facts and referring

to Section 141(2) of the Act, which deals with additional criminal liability, opined that even if the liability against the appellant is vicarious herein on account of the offence having alleged to have been committed by M/s. International Travels, it would be presumed that the appellant had also committed the offence and non-arraying of M/s. International Travels as an accused would be of no consequence. His Lordship further held that there is nothing in *Standard Chartered Bank and others* (supra), *S.M.S. Pharmaceuticals Limited* (supra), *Sabitha Ramamurthy and another* (supra), *S.V. Muzumdar and others* (supra*), Sarav Investment and Financial Consultants Pvt. Ltd. and another* (supra) and *K. Srikanth Singh* (supra) to suggest that unless the Company itself is made an accused, there cannot be prosecution of the signatory of the cheque alone. Thereafter, the learned Judge referred to the decision in Anil Hada and expressed that in the said case, the decision of *C.V. Parekh* (supra) and *Sheoratan Agarwal* (supra) had been referred to and, therefore, it is a binding precedent and cannot be viewed as an obiter dicta. Sirpurkar J. further proceeded to state that the principle of lex non cogit ad impossibilia would not apply. That apart, the learned Judge held that in the case at hand, it is yet to be decided as to whether the flaw was that of the Company or the appellant herself and it could not be made out as to whether the cheque issued by the accused was issued on behalf of the Company or to discharge her personal liability. Eventually, his Lordship referred to the allegations in the complaint which are to the effect that the two accused persons, namely, Anil Hada and Aneeta Hada, used to purchase the air tickets for their clients and they had purchased for the Company from time to time and issued cheques. The accused No. 1 used to conduct the business of the Company and she also used to purchase the tickets from the complainant. On the aforesaid foundation the learned Judge opined that the basic complaint is against the two accused persons in their individual capacity and they might be purchasing tickets for their travelling company. Being of this view, he dismissed both the appeals.



10. We have heard Mr. Muneesh Malhotra, learned counsel for the appellant in Criminal Appeal Nos. 838 and 842 of 2008, Dr. Abhishek Manu Singhvi, learned senior counsel for the appellant in Criminal Appeal No. 1483 of 2009 and for the respondent in Criminal Appeal No. 1484 of 2009, Mr. Sidharth Luthra, learned senior counsel for the appellant in Criminal Appeal No. 1484 of 2009, Mr. Rajesh Harnal, learned counsel for the respondents in Criminal Appeal Nos. 838 of 2008 and 842 of 2008, Mr. P.P. Malhotra, learned Additional Solicitor General for the respondent in Criminal Appeal No. 1483 of 2009 and Mr. Arun Mohan, learned Amicus Curiae.

11. The learned senior counsel appearing for the appellants, in support of the proponement that the impleadment of the company is a categorical imperative to maintain a prosecution against the directors, various signatories and other categories of officers, have canvassed as follows: -

(a) The language of Section 141 of the Act being absolutely plain and clear, a finding has to be returned that the company has committed the offence and such a finding cannot be recorded unless the company is before the court, more so, when it enjoys the status of a separate legal entity. That apart, the liability of the individual as per the provision is vicarious and such culpability arises, ipso facto and ipso jure, from the fact that the individual occupies a decision making position in the corporate entity. It is patent that unless the company, the principal entity, is prosecuted as an accused, the subsidiary entity, the individual, cannot be held liable, for the language used in the provision makes the company the principal offender.

(b) The essence of vicarious liability is inextricably intertwined with the liability of the principal offender. If both are treated separately, it would amount to

causing violence to the language employed in the provision.

(c) It is a fundamental principle of criminal law that a penal provision must receive strict construction. The deeming fiction has to be applied in its complete sense to have the full effect as the use of the language in the provision really ostracizes or gets away with the concepts like "identification", "attribution" and lifting the corporate veil and, in fact, puts the directors and the officers responsible in a deemed concept compartment on certain guided parameters.

(d) The company, as per Section 141 of the Act, is the principal offender and when it is in existence, its non-impleadment will create an incurable dent in the prosecution and further, if any punishment is inflicted or an unfavourable finding is recorded, it would affect the reputation of the company which is not countenanced in law.

(e) The decision in *Sheoratan Agarwal and Another* (supra) has incorrectly distinguished the decision in *C.V. Parekh* (supra) and has also misconstrued the ratio laid down therein. That apart, in the said decision, a part of the provision contained in Section 10(1) of the Essential Commodities Act, 1955 (for brevity 'the 1955 Act') has been altogether omitted as a consequence of which a patent mistake has occurred.

(f) The decision in *Anil Hada* (supra) has not appreciated in proper perspective the ratio decidendi in C.V. Parekh and further there is an inherent contradiction in the judgment inasmuch as at one point, it has been stated that "the payee can succeed in the case only if he succeeds in showing



that the offence was actually committed by the company" but at another place, it has been ruled that "the accused can show that the company has not committed the offence, though such company is not made an accused".

(g) The terms used "as well as the company" in Section 141(1) of the Act cannot mean that no offence need be committed by the company to attract the vicarious liability of the officers in-charge of the management of the company because the first condition precedent is commission of the offence by a person which is the company.

12. The learned counsel for the respondents, resisting the submissions propounded by the learned counsel for the appellants, have urged the following contentions: -

(i) If the interpretation placed by the appellant is accepted, the scheme, aims, objects and the purpose of the legislature would be defeated inasmuch as Chapter XVII of the Act as introduced by the Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988)is to promote efficacy of banking to ensure that in commercial or contractual transactions, cheques are not dishonoured and the credibility in transacting business through cheques is maintained. The Chapter has been inserted with the object of promoting and inculcating faith in the efficacy of the banking system and its operations and giving credibility to negotiable instruments in business transactions. The fundamental purpose is to discourage people from not honouring their commitments and punish unscrupulous persons who purport to discharge their liability by issuing cheques without really intending to do so. If the legislative intendment is appositely understood and appreciated, the interpretation of the various

provisions of the Act is to be made in favour of the paying-complainant. To bolster the aforesaid submission, reliance has been placed on *Electronics Trade and Technology Development Corporation Ltd., Secunderabad v. Indian Technologists and Engineers (Electronics) (P) Ltd. and another*[16] , *C.C. Alavi Haji v. Palapetty Mohammed and Another*[18] and *Vinay Devanna Nayak v. Ryot Sewa Sahakaro Bank Ltd.*[19]

(ii) The reliance placed by the appellants on the decision in *C.V. Parekh* (supra) is absolutely misconceived. In the first case, the Court was considering the question of acquittal or conviction of the accused persons after considering the entire evidence led by the parties before the trial court but in the present case, the challenge has been at the threshold where summons have been issued. That apart, the 1955 Act and the Act in question operate in different fields having different legislative intents, objects and purposes and further deal with offences of various nature. In the case at hand, the new dimensions of economic growth development and revolutionary changes and the frequent commercial transactions by use of cheques are to be taken note of. Further, Section 141 creates liability for punishment of offences under Section 138 and it is a deemed liability whereas the criminal liability created for an offence under Section 7 of the 1955 Act is not a deemed offence.

(iii) After the amendment of the Act, the unscrupulous drawers had endeavoured hard to seek many an escape route to avoid the criminal liability but this

17. (1996) 2 SCC 739.
18. (2007) 6 SCC 555.
19. (2008) 2 SCC 305.



Court with appropriate interpretative process has discouraged the innovative pleas of such accused persons who had issued cheques as the purpose is to eradicate mischief in the commercial world. To buttress the aforesaid submission, heavy reliance has been placed on *D. Vinod Shivappa v. Nanda Belliappa*[20], *M/s. Modi Cement Ltd. v. Shri Kuchil Kumar Nandi*[21], *Goaplast Pvt. Shri Ltd. v. Chico Ursula D'souza and Anr.*[22], *NEPC Micon Ltd and Ors. v. Magma Leasing Ltd.*[23], *Dalmia Cement (Bharat) Ltd. v. M/s. Galaxy Traders and Agencies Ltd and Ors.*[24], *I.C.D.C. Ltd. v. Beena Shabeer and Anr.*[25] and *S.V. Majumdar and others v. Gujarat Fertilizers Co. Ltd and Anr.*[26]

(iv) The company being a legal entity acts through its directors or other authorized officers and it authorizes its directors or other officers to sign and issue cheques and intimate the bank to honour the cheques if signed by such persons. The legislature in its wisdom has used the word 'drawer' in Sections 7 and 138 of the Act but not "an account holder". A notice issued to the Managing Director of the company who has signed the cheques is liable for the offence and a signatory of a cheque is clearly responsible for the incriminating act and, therefore, a complaint under Section 138 of the Act against the director or authorized signatory of the cheque is maintainable. In this regard, reliance has

20. AIR 2006 SC 2179.
21. AIR 1998 SC 1057.
22. AIR 2003 SC 2035.
23. (1999) 4 SCC 253.
24. AIR 2001 SC 676.
25. 2002 Crl.L.J. 3935 (SC).
26. AIR 2005 SC 2436.

been placed upon *M/s Bilakchand Gyanchand Co. v. A. Chinnaswami*[27], *Rajneesh Aggarwal v. Amit J. Bhalla*[28], *SMS Pharmaceuticals Ltd. v. Neeta Bhalla* (supra), *Anil Hada v. Indian Acrylic Ltd.* (supra) and *R. Rajgopal v. S.S. Venkat*[29].

(v) There is no postulate under Section 141 of the Act that the director or the signatory of the cheque cannot be separately prosecuted unless the company is arrayed as an accused. The company, as is well-known, acts through its directors or authorised officers and they cannot seek an escape route by seeking quashment of the proceedings under Section 482 of the Code of Criminal Procedure solely on the foundation that the company has not been impleaded as an accused. The words "as well as the company" assumes significance inasmuch as the deemed liability includes both the company and the officers in-charge and hence prosecution can exclusively be maintained against the directors or officers in-charge depending on the averments made in the complaint petition.

13. The gravamen of the controversy is whether any person who has been mentioned in Sections 141(1) and 141(2) of the Act can be prosecuted without the company being impleaded as an accused. To appreciate the controversy, certain provisions need to be referred to. Section 138 of the Act, which deals with the ingredients of the offence for dishonour of the cheque and the consequent non-payment of the amount due thereon, reads as follows: -

*"138. Dishonour of cheque for insufficiency, etc, of funds*

27. JT 1999 (10) SC 236.

28. JT 2001 (1) SC 325.

29. AIR 2001 SC 2432.



*in the account* - Where any cheque drawn by a person on account maintained by him with a banker for the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an arrangement made with the bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with a fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier,

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

14. The main part of the provision can be segregated into

three compartments, namely, (i) the cheque is drawn by a person, (ii) the cheque drawn on an account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of a debt or other liability, is returned unpaid, either because the amount of money standing to the credit of that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an arrangement made with the bank and (iii) such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of the Act, be punished with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both. The proviso to the said section postulates under what circumstances the section shall not apply. In the case at hand, we are not concerned with the said aspect. It will not be out of place to state that the main part of the provision deals with the basic ingredients and the proviso deals with certain circumstances and lays certain conditions where it will not be applicable. The emphasis has been laid on the factum that the cheque has to be drawn by a person on the account maintained by him and he must have issued the cheque in discharge of any debt or other liability. Section 7 of the Act defines 'drawer' to mean the maker of a bill of exchange or a cheque. An authorised signatory of a company becomes a drawer as he has been authorised to do so in respect of the account maintained by the company.

15. At this juncture, we may refer to Section 141 which deals with offences by companies. As the spine of the controversy rests on the said provision, it is reproduced below:-

> *"141. Offences by companies.* - (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
>
> Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act, has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

16. On a reading of the said provision, it is plain as day that if a person who commits offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth

noting that in both the provisions, there is a 'deemed' concept of criminal liability.

17. Section 139 of the Act creates a presumption in favour of the holder. The said provision has to be read in conjunction with Section 118(a) which occurs in Chapter XIII of the Act that deals with special rules of evidence. Section 140 stipulates the defence which may not be allowed in a prosecution under Section 138 of the Act. Thus, there is a deemed fiction in relation to criminal liability, presumption in favour of the holder, and denial of a defence in respect of certain aspects.

18. Section 141 uses the term 'person' and refers it to a company. There is no trace of doubt that the company is a juristic person. The concept of corporate criminal liability is attracted to a corporation and company and it is so luminescent from the language employed under Section 141 of the Act. It is apposite to note that the present enactment is one where the company itself and certain categories of officers in certain circumstances are deemed to be guilty of the offence.

19. In *Halsbury's Laws of England,* Volume 11(1), in paragraph 35, it has been laid down that in general, a corporation is in the same position in relation to criminal liability as a natural person and may be convicted of common law and statutory offences including those requiring mens rea.

20. In 19 *Corpus Juris Secundum,* in paragraph 1358, while dealing with liability in respect of criminal prosecution, it has been stated that a corporation shall be liable for criminal prosecution for crimes punishable with fine; in certain jurisdictions, a corporation cannot be convicted except as specifically provided by statute.

21. In *H.L. Bolton (Engineering) Co. Ltd. vs. T.J. Graham & Sons Ltd.*[30] Lord Denning, while dealing with the liability of a

30. (1956) 3 All E.R. 624.



company, in his inimitable style, has expressed that a company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. In certain cases, where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. The learned Law Lord referred to Lord Haldane's speech in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[31]. Elaborating further, he has observed that in criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty.

22. It may be appropriate at this stage to notice the observations made by MacNaghten, J. in *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.*[32]: (AC p. 156.)

> "A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention - indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstance may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this

31. (1915) AC 705, 713-714; 31 T.L.R. 294.

32. 1994 KB 146 : (1994) 1 All ER 119 (DC).

particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive. I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate.

23. In this regard, it is profitable to refer to the decision in *Iridium India Telecom Ltd. v. Motorola Inc and Ors.*[33] wherein it has been held that in all jurisdictions across the world governed by the rule of law, companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are not capable of possessing the necessary mens rea for commission of criminal offences. It has been observed that the legal position in England and United States has now been crystallized to leave no manner of doubt that the corporation would be liable for crimes of intent. In the said decision, the two-Judge Bench has observed thus:-

"The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the "alter ego" of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation."

24. In *Standard Charted Bank* (supra), the majority has laid down the view that there is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the fact that the corporation cannot commit a crime, the generally accepted modern rule is that a corporation may be subject to indictment and other

33. (2011) 1 SCC 74.



criminal process although the criminal act may be committed through its agent. It has also been observed that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment is mandatory imprisonment and fine.

25. We have referred to the aforesaid authorities to highlight that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. In this backdrop, Section 141 of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus, the statutory intendment is absolutely plain.

26. As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification.

27. In this context, we may refer with profit to the observations made by Lord Justice James in Ex Parte Walton, In *re, Levy*[34], which is as follows:

"When a statute enacts that something shall be deemed to have been done, which, in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

28. Lord Asquith, in *East end Dwellings Co. Ltd. v. Finsbury Borough Council*[35], had expressed his opinion as follows:

34. 1881 (17) Ch D 746.

35. 1952 AC 109.

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents, which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

29. In *The Bengal Immunity Co. Ltd. v. State of Bihar and others*[36], the majority in the Constitution Bench have opined that legal fictions are created only for some definite purpose.

30. In *Hira H. Advani Etc. v. State of Maharashtra*[37], while dealing with a proceeding under the Customs Act, especially sub-section (4) of Section 171-A wherein an enquiry by the custom authority is referred to, and the language employed therein, namely, "to be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code", it has been opined as follows:

"It was argued that the Legislature might well have used the word "deemed" in Sub-section (4) of Section171 not in the first of the above senses but in the second, if not the third. In our view the meaning to be attached to the word "deemed" must depend upon the context in which it is used."

31. In *State of Tamil Nadu v. Arooran Sugars Ltd.*[38], the Constitution Bench, while dealing with the deeming provision in a statute, ruled that the role of a provision in a statute creating legal fiction is well settled. Reference was made to *The Chief Inspector of Mines and another v. Lala Karam Chand Thapar*

36. AIR 1955 SC 661.

37. AIR 1971 SC 44.

38. AIR 1997 SC 1815.



*Etc.*[39], *J.K. Cotton Spinning and Weaving Mills Ltd. and anr. v. Union of India and others*[40], *M. Venugopal v. Divisional Manager, Life Insurance Corporation of India*[41] and *Harish Tandon v. Addl. District Magistrate, Allahabad*[42] and eventually, it was held that when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between which persons such a statutory fiction is to be resorted to and thereafter, the courts have to give full effect to such a statutory fiction and it has to be carried to its logical conclusion.

32. From the aforesaid pronouncements, the principle that can be culled out is that it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term 'deemed' has to be read in its context and further the fullest logical purpose and import are to be understood. It is because in modern legislation, the term 'deemed' has been used for manifold purposes. The object of the legislature has to be kept in mind.

33. The word 'deemed' used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in charge of the company. What averments should be required to make a person vicariously liable has been dealt with in *SMS Pharmaceuticals Ltd.* (supra). In the said case, it has been opined that the criminal liability on account of dishonour of cheque primarily falls on the drawee company and is extended to the officers of the company and as there is a specific

39. AIR 1961 SC 838.

40. AIR 1988 SC 191.

41. (1994) 2 SCC 323.

42. (1995) 1 SCC 537.

provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied. It has been ruled as follow:-

> "It primarily falls on the drawer company and is extended to officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in the statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonor of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable."

After so stating, it has been further held that while analyzing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. In paragraph 19 of the judgment, it has been clearly held as follows: -

> "There is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a



> departure from the rule in criminal law against vicarious liability."

34. Presently, we shall deal with the ratio laid down in the case of *C.V. Parekh* (supra). In the said case, a three-Judge Bench was interpreting Section 10 of the 1955 Act. The respondents, C.V. Parekh and another, were active participants in the management of the company. The trial court had convicted them on the ground the goods were disposed of at a price higher than the control price by Vallabhadas Thacker with the aid of Kamdar and the same could not have taken place without the knowledge of the partners of the firm. The High Court set aside the order of conviction on the ground that there was no material on the basis of which a finding could be recorded that the respondents knew about the disposal by Kamdar and Vallabhadas Thacker. A contention was raised before this Court on behalf of the State of Madras that the conviction could be made on the basis of Section 10 of the 1955 Act. The three-Judge Bench repelled the contention by stating thus: -

> "Learned counsel for the appellant, however, sought conviction of the two respondents on the basis of Section 10 of the Essential Commodities Act under which, if the person contravening an order made under Section 3 (which covers an order under the Iron and Steel Control Order, 1956), is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. *It was urged that the two respondents were in charge of, and were responsible to, the Company for the conduct of the business of the Company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of clause (5) of the Iron and*

*Steel Control Order. This argument cannot be accepted, because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause (5) of the Iron and Steel Control Order was made by the Company. In fact, the Company was not charged with the offence at all. The liability of the persons in charge of the Company only arises when the contravention is by the Company itself.* Since, in this case, there is no evidence and no finding that the Company contravened clause (5) of the Iron and Steel Control Order, the two respondents could not be held responsible. The actual contravention was by Kamdar and Vallabhadas Thacker and any contravention by them would not fasten responsibility on the respondents."

(emphasis supplied)

The aforesaid paragraph clearly lays down that the first condition is that the company should be held to be liable; a charge has to be framed; a finding has to be recorded, and the liability of the persons in charge of the company only arises when the contravention is by the company itself. The said decision has been distinguished in the case of *Sheoratan Agarwal and another* (supra). The two-Judge Bench in the said case referred to Section 10 of the 1955 Act and opined that the company alone may be prosecuted or the person in charge only may be prosecuted since there is no statutory compulsion that the person in charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself. The two-Judge Bench further laid down that Section 10 of the 1955 Act indicates the persons who may be prosecuted where the contravention is made by the company but it does not lay down any condition that the person in-charge or an officer of the company may not be separately prosecuted if the company itself is not prosecuted. The two-Judge Bench



referred to the paragraph from *C.V. Parekh* (supra), which we have reproduced hereinabove, and emphasised on certain sentences therein and came to hold as follows: -

"The sentences underscored by us clearly show that what was sought to be emphasised was that there should be a finding that the contravention was by the company before the accused could be convicted and not that the company itself should have been prosecuted along with the accused. We are therefore clearly of the view that the prosecutions are maintainable and that there is nothing in Section 10 of the Essential Commodities Act which bars such prosecutions."

For the sake of completeness, we think it apposite to refer to the sentences which have been underscored by the two-Judge Bench:-

"because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause (5) of the Iron and Steel Control Order was made by the Company and there is no evidence and no finding that the Company contravened clause (5) of the Iron and Steel Control Order, the two respondents could not be held responsible."

35. With greatest respect to the learned Judges in *Sheoratan Agarwal* (supra), the authoritative pronouncement in *C.V. Parekh* (supra) has not been appositely appreciated. The decision has been distinguished despite the clear dictum that the first condition for the applicability of Section 10 of the 1955 Act is that there has to be a contravention by the company itself. In our humblest view, the said analysis of the verdict is not correct. Quite apart, the decision in *C.V. Parekh* (supra) was under Section 10(a) of the 1955 Act and rendered by a three-Judge Bench and if such a view was going to be expressed, it

would have been appropriate to refer the matter to a larger Bench. However, the two-Judge Bench chose it appropriate to distinguish the same on the rationale which we have reproduced hereinabove. We repeat with the deepest respect that we are unable to agree with the aforesaid view.

36. In the case of *Anil Hada* (supra), the two-Judge Bench posed the question: when a company, which committed the offence under Section 138 of the Act eludes from being prosecuted thereof, can the directors of that company be prosecuted for that offence. The Bench referred to Section 141 of the Act and expressed the view as follows: -

> "12. Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context the phrase "as well as" used in Sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words "shall also" in Sub-section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per the section. Hence the actual offence should have been committed by the company, and then alone the other two categories of persons can also become liable for the offence.
>
> 13. If the offence was committed by a company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in



> showing that the offence was actually committed by the company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the company is sine qua non for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt a finding that the offence was committed by the company is sine qua non for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act."

On a reading of both the paragraphs, it is evincible that the two-Judge Bench expressed the view that the actual offence should have been committed by the company and then alone the other two categories of persons can also become liable for the offence and, thereafter, proceeded to state that if the company is not prosecuted due to legal snag or otherwise, the prosecuted person cannot, on that score alone, escape from the penal liability created through the legal fiction and this is envisaged in Section 141 of the Act. If both the paragraphs are appreciated in a studied manner, it can safely be stated that the conclusions have been arrived at regard being had to the obtaining factual matrix therein. However, it is noticeable that the Bench thereafter referred to the dictum in *Sheoratan Agarwal* (supra) and eventually held as follows: -

> "We, therefore, hold that even if the prosecution proceedings against the Company were not taken or could not be continued, it is no bar for proceeding against the other persons falling within the purview of sub-sections (1) and (2) of Section 141 of the Act."

37. We have already opined that the decision in *Sheoratan*

*Agarwal* (supra) runs counter to the ratio laid down in the case of *C.V. Parekh* (supra) which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in *Anil Hada* (supra) has to be treated as not laying down the correct law as far as it states that the director or any other officer can be prosecuted without impleadment of the company. Needless to emphasize, the matter would stand on a different footing where there is some legal impediment and the doctrine of lex non cogit ad impossibilia gets attracted.

38. At this juncture, we may usefully refer to the decision in *U.P. Pollution Control Board v. M/s. Modi Distillery and others*[43]. In the said case, the company was not arraigned as an accused and, on that score, the High Court quashed the proceeding against the others. A two-Judge Bench of this Court observed as follows: -

> "Although as a pure proposition of law in the abstract the learned single Judge's view that there can be no vicarious liability of the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors under sub-s.(1) or (2) of S.47 of the Act unless there was a prosecution against Messers Modi Industries Limited, the Company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolation but in the conspectus of facts and events and not in vacuum. We have already pointed out that the technical flaw in the complaint is attributable to the failure of the industrial unit to furnish the requisite information called for by the Board. Furthermore, the legal infirmity is of such a nature which could be easily cured. Another circumstance which brings out the narrow perspective of the learned single Judge is his failure to appreciate the fact that the averment in paragraph 2 has to be construed in the light of the averments contained in paragraphs 17, 18 and 19 which are to the effect that the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors were also liable for the alleged offence committed by the Company."

43. AIR 1988 SC 1128.



Be it noted, the two-Judge Bench has correctly stated that there can be no vicarious liability unless there is a prosecution against the company owning the industrial unit but, regard being had to the factual matrix, namely, the technical fault on the part of the company to furnish the requisite information called for by the Board, directed for making a formal amendment by the applicant and substitute the name of the owning industrial unit. It is worth noting that in the said case, M/s. Modi distilleries was arrayed as a party instead of M/s Modi Industries Limited. Thus, it was a defective complaint which was curable but, a pregnant one, the law laid down as regards the primary liability of the company without which no vicarious liability can be imposed has been appositely stated.

39. It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

40. In this context, we may usefully refer to Section 263 of Francis Bennion's Statutory Interpretation where it is stated as follows: -

> "A principle of statutory interpretation embodies the policy of the law, which is in turn based on public policy. The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy. A principle of statutory interpretation can therefore be

described as a principle of legal policy formulated as a guide to legislative intention.

41. It will be seemly to quote a passage from Maxwell's The Interpretation of Statutes (12th Edition) : -

> "The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

42. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term "as well as" in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words "as well as" have to be understood in the context. In *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others*[44] it has been laid down that the entire statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word. The same principle has been

44. (1987) 1 SCC 424.



reiterated in *Deewan Singh and others v. Rajendra Prasad Ardevi and others*[45] and *Sarabjit Rick Singh v. Union of India*[46]. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

43. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal* (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in *Anil Hada* (supra) is overruled with the qualifier as stated in paragraph 37. The decision in *Modi Distilleries* (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove.

44. We will be failing in our duty if we do not state that all the decisions cited by the learned counsel for the respondents relate to service of notice, instructions for stopping of payment and certain other areas covered under Section 138 of the Act.

45. (2007) 10 SCC 528.

46. (2008) 2 SCC 417.

The same really do not render any aid or assistance to the case of the respondents and, therefore, we refrain ourselves from dealing with the said authorities.

45. Resultantly, the Criminal Appeal Nos. 838 of 2008 and 842 of 2008 are allowed and the proceedings initiated under Section 138 of the Act are quashed.

46. Presently, we shall advert to the other two appeals, i.e., Criminal Appeal Nos. 1483 of 2009 and 1484 of 2009 wherein the offence is under Section 67 read with Section 85 of the 2000 Act. In Criminal Appeal No. 1483 of 2009, the director of the company is the appellant and in Criminal Appeal No. 1484 of 2009, the company. Both of them have called in question the legal substantiality of the same order passed by the High Court. In the said case, the High Court followed the decision in *Sheoratan Agarwal* (supra) and, while dealing with the application under Section 482 of the Code of Criminal Procedure at the instance of Avnish Bajaj, the Managing Director of the company, quashed the charges under Sections 292 and 294 of the Indian Penal Code and directed the offences under Section 67 read with Section 85 of the 2000 Act to continue. It is apt to note that the learned single Judge has observed that a prima facie case for the offence under Sections 292(2)(a) and 292(2)(b) of the Indian Penal Code is also made out against the company.

47. Section 85 of the 2000 Act is as under: -

"85. Offences by companies - (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:



Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly."

48. Keeping in view the anatomy of the aforesaid provision, our analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. Thus adjudged, the director could not have been held liable for the offence under Section 85 of the 2000 Act. Resultantly, the Criminal Appeal No. 1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the company is concerned, it was not arraigned as an accused. Ergo, the proceeding as initiated in the existing incarnation is not maintainable either against the company or against the director. As a logical sequeter, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the company in the present form are quashed.

49. Before we part with the case, we must record our uninhibited and unreserved appreciation for the able assistance rendered by the learned counsel for the parties and the learned amicus curiae.

50. In the ultimate analysis, all the appeals are allowed.

D.G. Appeals allowed.

AVISHEK GOENKA
*v.*
UNION OF INDIA AND ANR.
(Writ Petition (C) No. 285 of 2010)

APRIL 27, 2012

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

*Telecommunications - Mobile phone service - Verification of subscriber identity - Safe distribution of pre-paid Subscriber Identity Module (SIM) cards - DoT filed its instructions dated 14th March, 2011, specifically, on the manner of verification of new mobile subscribers (pre-paid and post-paid) - DoT, Telecom Regulatory Authority of India (TRAI) and the licencees ad idem in regard to most of the issues in terms of the instructions prepared by the DoT - However, difference of opinion between the DoT and the TRAI on certain points - Held: The points of divergence between TRAI and DoT are matters which will have serious ramifications not only vis-à-vis the regulatory authorities and the licensees but also on the subscribers and the entire country - These aspects demand serious deliberation at the hands of the technical experts - It is not only desirable but also imperative that TRAI and DoT seriously cogitate on the issues where divergence has been expressed between them and bring unanimity in the terms and conditions of licences which would form an integral part of the instructions dated 14th March, 2011 - Instructions dated 14th March, 2011 issued by DoT accepted by the Court subject to conditions - Direction given for constitution of a Joint Expert Committee consisting of two experts from TRAI and two experts from DoT to be chaired by the Secretary, Ministry of Communications and Information Technology, Government of India - Said Committee to discuss and resolve the issues on which TRAI*





*gave opinion divergent to that declared by DoT in its instructions dated 14th March, 2011 - DoT to take into consideration the recommendations of the Joint Expert Committee - Instructions issued by DoT dated 14th March, 2011 be thereupon amended, modified, altered, added to or substituted accordingly - Composite instructions, so formulated, to be positively issued by the DoT within definite time frame and report of compliance submitted to Supreme Court Registry.*

*Telecom Regulatory Authority of India Act, 1997 - s.11 - Telecom Regulatory Authority of India (TRAI) - Powers and functions of - Held: TRAI is the regulatory body for the telecommunications sector in India - It is a statutory obligation upon the TRAI to recommend a regulatory regime which will serve the purpose of development, facilitate competition and promote efficiency, while taking due precautions in regard to safety of the people at large and various other aspects of subscriber verification - The TRAI has to regulate the interests of telecom service providers and subscribers, so as to permit and ensure orderly growth of telecom sector -TRAI would not only recommend, to the DoT, the terms and conditions upon which a licence is granted to a service provider but has to also ensure compliance of the same and may recommend revocation of licence in the event of non compliance with the regulations - It is expected of this regulatory authority to monitor the quality of service and even conduct periodical survey to ensure proper implementation.*

*Administrative Law - Regulatory body - Issues of regulatory regime - Scope for judicial intervention - Held: The concept of 'regulatory regime' has to be understood and applied by the courts, within the framework of law, but not by substituting their own views, for the views of the expert bodies like an appellate court - It is not for this Court to examine the merit or otherwise of such policy and regulatory matters which have been determined by expert bodies possessing requisite*

*technical knowhow and are statutory in nature - However, the Court would step in and direct the technical bodies to consider the matter in accordance with law, while ensuring that public interest is safeguarded and arbitrary decisions do not prevail.*

**In the instant writ petition, the petitioner sought to highlight rampant flouting of norms/regulations/ guidelines related to proper and effective mobile phone subscriber verification by various service providers. The petitioner averred that there is no proper verification of the subscribers prior to selling of the pre-paid mobile connections to them; that the Subscriber Identity Module (SIM) cards are provided without any proper verification, which causes security threat as well as encourages malpractices in telecom sector; that such unverified SIM cards are also used in terrorist attacks; and that around 80% of the pre-paid SIM cards may be purchased in pre-activated form which is in violation of the notifications issued by the DoT, dated 22-11-2006 and 23-03-2009 respectively, banning the sale of pre-activated SIM cards.**

**The petitioner prayed that there should be strict implementation of subscriber verification guidelines, physical verification be compulsory in future and physical re-verification of existing subscriber base be conducted in a transparent manner. The petitioner, during the pendency of the petition, also filed an interim application, wherein he referred to a circulation containing the draft norms prepared by the Government of India (DoT) in relation to: a) Re-verification of existing customer base; b) Verification process as followed in Assam, J&K to be extended across country and c) Mail of SIM card and activation details to the address of the subscriber, both being sent separately and d) refusal of recognition of government ID cards as sufficient proof, etc. According to the petitioner, these norms have not been adhered to and, in fact, the present instructions / guidelines formulated by DoT are at variance with the norms,**



**ignoring essential precautions for verification of subscriber identity and safe distribution of pre-paid SIM cards.**

**Partly allowing the writ petition, the Court**

**HELD: 1.1. The Telecom Regulatory Authority of India (TRAI) is the regulatory body for the telecommunications sector in India and the Union of India has responsibility to issue guidelines and frame regulations and conditions of licence, in consultation with the TRAI, to ensure co-ordination, standardisation and compliance with the regulations, as well as protecting the security interests of the country. [Para 2] [557-B-C]**

**1.2. The rapid expansion of the telecom sector and its impact on development, both, equally impose responsibility on the Government of India, the regulatory body and the various stakeholders in the telecom sector to carry out proper verification of the pre-paid SIM cards and ensure national safety and security. To achieve this object, it is primarily for the expert bodies and the Government of India to act and discharge their respective functions. [Para 8] [559-D-E]**

**1.3. In terms of Section 11 of the Telecom Regulatory Authority of India Act, 1997, it is a statutory obligation upon the TRAI to recommend a regulatory regime which will serve the purpose of development, facilitate competition and promote efficiency, while taking due precautions in regard to safety of the people at large and the various other aspects of subscriber verification. Similarly, the DoT is responsible for discharging its functions and duties as, ultimately, it is the responsibility of the Government to provide for the safety of its citizens. The TRAI has to regulate the interests of telecom service providers and subscribers, so as to permit and ensure orderly growth of telecom sector. The Government of**

**India and TRAI, both, have to attain this delicate balance of interests by providing relevant instructions or guidelines in a timely manner and ensuring their implementation in accordance with law. [Para 9] [559-F-H; 560-A]**

*State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru* **(2005) 11 SCC 600: 2005 (2) Suppl. SCR 79 - referred to.**

**2.1. Before this Court, the DoT filed its instructions dated 14th March, 2011, relating to various aspects involved in the present case and specifically, on the manner of verification of new mobile subscribers (pre-paid and post-paid). These instructions, inter alia, dealt with the verification and activation of mobile connections, special guidelines for issue of mobile connections to foreigners and outstation users, bulk mobile connections, change in the name of subscriber, disconnection, lodging of complaints and even imposition of penalties. Clause 3(vii) of these instructions provided that pre-activated SIM cards are not to be sold. In case of sale of pre-activated SIM cards, a penalty of Rs.50,000/- per such connection shall be levied upon the service provider/licensee, in addition to immediate disconnection of the mobile connection. [Para 11] [560-H; 561-A-C]**

**2.2. Most of the grievances raised by the petitioner have been appropriately dealt with under these instructions. But, however, some of the issues have not been comprehensively provided for. The TRAI filed an affidavit dealing with the instructions of the DoT, dated 14th March, 2011. In the said affidavit, however, TRAI suggested certain variations. [Para 12] [561-D-E]**

**3. If one examines the powers and functions of TRAI, as postulated under Section 11 of the Act, it is clear that TRAI would not only recommend, to the DoT, the terms and conditions upon which a licence is granted to a**



**service provider but also ensure compliance of the same and may recommend revocation of licence in the event of non compliance with the regulations. It has to perform very objectively one of its main functions, i.e., to facilitate competition and promote efficiency in the operation of the telecommunication services, so as to facilitate growth in such services. It is expected of this regulatory authority to monitor the quality of service and even conduct periodical survey to ensure proper implementation. [Para 14] [562-G-H; 563-A-B]**

**4.1. The stakeholders DoT, TRAI and the licencees are ad idem in regard to most of the issues in terms of the instructions prepared by the DoT. However, there are certain points on which there is a difference of opinion between the DoT and the TRAI. This limited divergence is required to be resolved by further clarification and issuance of more specific instructions. These issues fall under two categories: - firstly, what has been pointed out by the petitioner and secondly, where the DoT and the TRAI hold different opinion. Proper deliberation between the stakeholders possessed of technical knowhow can resolve such issues usefully and effectively. [Para 15] [563-B-D]**

**4.2. The points of divergence between TRAI and DoT are matters which will have serious ramifications not only vis-à-vis the regulatory authorities and the licensees but also on the subscribers and the entire country. These aspects demand serious deliberation at the hands of the technical experts. It will not be appropriate for this Court to examine these technical aspects, as such matters are better left in the domain of the statutory or expert bodies created for that purpose. The concept of 'regulatory regime' has to be understood and applied by the courts, within the framework of law, but not by substituting their own views, for the views of the expert bodies like an appellate court. The regulatory regime is expected to fully**

**regulate and control activities in all spheres to which the particular law relates. [Para 16] [563-E-G]**

**4.3. It is not for this Court to examine the merit or otherwise of such policy and regulatory matters which have been determined by expert bodies having possessing requisite technical knowhow and are statutory in nature. However, the Court would step in and direct the technical bodies to consider the matter in accordance with law, while ensuring that public interest is safeguarded and arbitrary decisions do not prevail. [Para 17] [563-H; 564-A-B]**

**4.4. Some divergence on certain specific issues of the regulatory regime has been projected in the instructions and comments filed by TRAI and DoT. They need to be resolved but, in absence of any technical knowhow or expertise being available with this Court, it will not be appropriate to decide, by a judicial dictum, as to which of the views expressed by these high powered bodies would be more beneficial to the regulatory regime and will prove more effective in advancing the public interest. Essentially this should be left to be clarified and the disputes be resolved by the expert bodies themselves. It is a settled canon of law that in a regulatory regime, the terms and conditions imposed thereunder should be unambiguous and certain. It is expected that the authorities concerned would enforce the regulatory regime with exactitude. Therefore, it is not only desirable but also imperative that TRAI and DoT seriously cogitate on the issues where divergence has been expressed between them and bring unanimity in the terms and conditions of licences which would form an integral part of the instructions dated 14th March, 2011. [Para 18] [564-E-H; 565-A]**

*Delhi Science Forum & Ors. v. Union of India* **AIR 1996**



**SC 1356= (1996) 2 SCC 405: 1996 (2) SCR 767 - referred to.**

**5. As interveners, some of the licencees and / or service providers had criticised some of the terms and conditions of licence proposed under the instructions dated 14th March, 2011. These interveners not only made some suggestions with regard to the ambit and scope of the guidelines and instructions by TRAI or DoT but also intended to raise certain disputes vis-a-vis DoT in the capacity of licencees subject to the impugned instructions.**

**Without any reservation, it is made clear that this Court is not directly or indirectly entering upon the adjudication of any dispute or even differences between the service provider/licensee on the one hand and TRAI or DoT on the other. If they or any of them have any claim or dispute with the other, they should resolve the same by taking recourse to independent proceedings in accordance with law. [Para 19] [565-B-D]**

**6. The instructions dated 14th March, 2011 issued by DoT are accepted by the Court subject to the following conditions:**

**(i) We hereby direct the constitution of a Joint Expert Committee consisting of two experts from TRAI and two experts from DoT to be chaired by the Secretary, Ministry of Communications and Information Technology, Government of India.**

**(ii) This Committee shall discuss and resolve the issues on which TRAI in its affidavit has given opinion divergent to that declared by DoT in its instructions dated 14th March, 2011. Following are the points of divergence that require examination by the Joint Expert Committee :**

**(a) Whether re-verification should be undertaken by the service provider/ licensee, the DoT itself or any other central body?**

**(b) Is there any need for enhancing the penalty for violating the instructions/ guidelines including sale of pre-activated SIM cards?**

**(c) Whether delivery of SIM cards may be made by post? Which is the best mode of delivery of SIM cards to provide due verification of identity and address of a subscriber?**

**(d) Which of the application forms, i.e., the existing one or the one now suggested by TRAI should be adopted as universal application form for purchase of a SIM card?**

**(e) In absence of Unique ID card, whether updating of subscriber details should be the burden of the licensee personally or could it be permitted to be carried out through an authorized representative of the licensee?**

**(f) In the interest of national security and the public interest, whether the database of all registered subscribers should be maintained by DoT or by the licensee and how soon the same may be made accessible to the security agencies in accordance with law?**

**(iii) The above notified Committee shall resolve the above specified issues and any other ancillary issue arising therefrom and make its recommendations known to the DoT within three months from today.**

**(iv) The DoT shall take into consideration the recommendations of the Joint Expert Committee. The instructions issued by DoT dated 14th March, 2011 shall**



**thereupon be amended, modified, altered, added to or substituted accordingly. They shall then become operative in law and binding upon all concerned.**

**(v) Composite instructions, so formulated, shall positively be issued by the DoT within 15 weeks from today and report of compliance submitted to the Registry of this Court. [Para 20] [565-E-H; 566-A-H; 567-A-B]**

**Case Law Reference:**

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| **2005 (2) Suppl. SCR 79** | **referred to** | **Para 4** |
| **1996 (2) SCR 767** | **referred to** | **Para 17** |

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 285 of 2010.

Under Article 32 of the Constitution of India.

Avishek Goenka (Petitioner-In-Person), Gaurab Banerji, ASG, Harish N. Salve, Dr. A.M. Singhvi, Ramji Srinivasan, Vikas Singh, T.A. Khan, S.A. Haseeb, B.K. Prasad (for A.K. Sharma), Manjul Bajpai, Navin Chawla, Monika Singhal, Sanjay Kapur, Rajiv Kapur, Anmol, Ashmi Mohan for the appearing parties.

The Judgment of the Court was delivered by

**SWATANTER KUMAR, J.** 1. The petitioner is a businessman engaged in the business of distribution of pre-paid virtual and tangible calling value for mobile phone subscribers and also sells new customer acquisition packs and follows it up, by collection of customer application forms and executing tele-calling, to verify customer credentials. In this Public Interest Litigation, the petitioner has attempted to highlight the grave issue of non-observance of norms/ regulations/guidelines related to proper and effective subscriber verification by various service providers. In fact, according to

the petitioner, there is rampant flouting of norms/regulations/ guidelines relating to this subject matter and there is no proper verification of the subscribers prior to selling of the pre-paid mobile connections to them.

2. The Telecom Regulatory Authority of India (for short, "TRAI") is the regulatory body for the telecommunications sector in India and the Union of India has responsibility to issue guidelines and frame regulations and conditions of licence, in consultation with the TRAI, to ensure coordination, standardization and compliance with the regulations, as well as protecting the security interests of the country.

3. It is the averment of the petitioner that the telecom sector has witnessed the most fundamental structural and institutional reforms since 1991. This sector has grown significantly in the last few years. As per the Annual Report for 2009-2010 of the Department of Telecommunication, Ministry of Communications and IT, Government of India (for short "DoT"), as on 31st December, 2009, the Indian telecom sector had about 5622.11 million connections. The tele-density per hundred population, which is an important indicator of telecom penetration in the country, has increased from 2.32 per cent in March, 1999 to 47.88 per cent in December, 2009. The Eleventh Five Year Plan for 2007-2012 had provided a target of 600 million connections, but the industry has already provided around 700 million connections, thus far exceeding the target. Different random studies in relation to pre-paid Subscriber Identity Module (SIM) cards show widespread violation of guidelines for Know Your Customer (KYC) and even other common guidelines. The SIM cards are provided without any proper verification, which causes serious security threat as well as encourages malpractices in the telecom sector. It appears that 65 per cent of all pre-paid SIM cards issued in Jammu & Kashmir and 39 per cent of all pre-paid SIM cards in Mumbai, may have been issued without verification; which means that 1 out of every 6 pre-paid SIM cards is issued without proper



verification. The averment is that such unverified SIM cards are also used in terrorist attacks.

4. This Court, in the case of *State (NCT of Delhi) Vs. Navjot Sandhu alias Afsan Guru* [(2005) 11 SCC 600] had, with some caution, referred to a large number of calls which had been made by terrorists from instruments containing unverified SIM cards. It is further averred by the petitioner that around 80 per cent of the pre-paid SIM cards may be purchased in pre-activated form which is in violation of the notifications issued by the DoT, dated 22.11.2006 and 23.3.2009 respectively, banning the sale of pre-activated SIM cards. Another significant fact that has been brought out in this petition is that, pre-paid SIM cards, which are the most commonly issued without verification, constitute 96 per cent of the total SIM cards sold. This indicates the seriousness of the problem as well as the security hazard that emerges from the telecom sector.

5. Thus, the petitioner has prayed that there should be strict implementation of subscriber verification guidelines, physical verification be compulsory in future and physical re-verification of existing subscriber base be conducted in a transparent manner. He also seeks the prevention of inflated subscriber base. On all matters in relation to these prayers, he pleads for issuance of appropriate writ, orders or directions. Upon notice, the DoT as well as the TRAI had put in appearance and placed on record the guidelines issued by the DoT, as well as the comments of TRAI, respectively.

6. The petitioner, during the pendency of the petition, filed an Interim Application, I.A. No. 6 of 2012, wherein he referred to a circulation containing the draft norms prepared by the Government of India (DoT) in relation to :

- Re-verification of existing customer base.

- Verification process as followed in Assam, J&K to be extended across country.
- Mail of SIM card and activation details to the address of the subscriber, both being sent separately. This method is similar to that of delivery of debit, credit cards.
- Refuse to recognize government ID cards as sufficient proof, etc.

7. According to the petitioner, these norms have not been adhered to and in fact, the present instructions / guidelines formulated by DoT are at variance to the norms, ignoring essential precautions for verification of subscriber identity and safe distribution of pre-paid SIM cards.

8. We have already noticed that the rapid expansion of the telecom sector and its impact on development, both, equally impose responsibility on the Government of India, the regulatory body and the various stakeholders in the telecom sector to carry out proper verification of the pre-paid SIM cards and ensure national safety and security. To achieve this object, it is primarily for the expert bodies and the Government of India to act and discharge their respective functions.

9. In terms of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (for short, 'the Act'), it is a statutory obligation upon the TRAI to recommend a regulatory regime which will serve the purpose of development, facilitate competition and promote efficiency, while taking due precautions in regard to safety of the people at large and the various other aspects of subscriber verification. Similarly, the DoT is responsible for discharging its functions and duties as, ultimately, it is the responsibility of the Government to provide for the safety of its citizens. The TRAI has to regulate the interests of telecom service providers and subscribers, so as to permit and ensure orderly growth of telecom sector. The



Government of India and TRAI, both, have to attain this delicate balance of interests by providing relevant instructions or guidelines in a timely manner and ensuring their implementation in accordance with law.

10. While referring to the guidelines issued by DoT and the comments of TRAI thereupon, the petitioner has raised, inter alia, but primarily, the following objections :

(i) Despite clear guidelines and decision to complete re- verification of existing customer base, scheduled to be completed between 1st November, 2009 to 31st October, 2010, which time was further extended to 31st December, 2010, no effective steps have been taken to complete this exercise.

(ii) Re-verification has been left in the hands of the interested stakeholders, i.e., the service providers themselves, who are not taking appropriate and effective steps to complete the re- verification exercise.

(iii) The delivery of the pre-paid SIM card to the prospective subscribers should be effected by registered post and home delivery process, so as to provide basic verification of the address of the subscriber.

(iv) There should be no relaxation of requirement for photograph of the subscriber in the Customer Acquisition Forms (CAF).

(v) Lastly, that there should be heavy penalty for violation of the guidelines and particularly, for providing pre-paid SIM cards to subscribers whose identity and addresses are unverified.

11. Before this Court, the DoT filed its instructions dated 14th March, 2011, relating to various aspects involved in the

present case and specifically, on the manner of verification of new mobile subscribers (pre-paid and post-paid). These instructions, inter alia, dealt with the verification and activation of mobile connections, special guidelines for issue of mobile connections to foreigners and outstation users, bulk mobile connections, change in the name of subscriber, disconnection, lodging of complaints and even imposition of penalties. Clause 3(vii) of these instructions provided that pre-activated SIM cards are not to be sold. In case of sale of pre-activated SIM cards, a penalty of Rs. 50,000/- per such connection shall be levied upon the service provider/licensee, in addition to immediate disconnection of the mobile connection.

12. Most of the grievances raised by the petitioner have been appropriately dealt with under these instructions. But, however, some of the issues have not been comprehensively provided for. The TRAI filed an affidavit dated 14th March, 2012, dealing with the instructions of the DoT, dated 14th March, 2011. In the said affidavit, however, TRAI suggested certain variations as provided in Annexure R-I to their affidavit. According to TRAI, the verification of identity is dealt with differently in different countries, some have provided stringent standards of documentation of identification while others have not issued any guidelines and left it to the discretion of the service provider. In India, TRAI recommended that the Customer Acquisition Form (CAF) have a "unique" number, which may be affixed at a central warehouse, rather than prior to distribution. TRAI also recommended that the CAF form should be simpler in its content as the form presently in use is not serving its purpose adequately. TRAI has annexed to its affidavit, as Annexure I, the sample form which should be adopted as a regular form to be filled in by the subscriber. According to TRAI, in a manner similar to bulk users, even individual users should disclose all the SIM cards and connections in the name of such individual, with due verification by the licensee. Also differing with the instructions of DoT on the issue of manner of conversion from pre-paid to post-paid



connections and vice-versa, as well as regarding the transferability of mobile connections, TRAI submits that the both should be permissible, the former being treated as a change in tariff plan (not as a fresh or a transferred connection) and the latter as a new mobile connection, subject to consent of the existing owner of the mobile connection.

13. The other issue on which DoT and TRAI differed is, whether the employees of the licensee/service provider should be required to personally update the subscriber details in the database. While according to DoT, this should be carried out by the employees of the licensee itself, however, according to TRAI, it can be done by their authorized representatives, keeping in view various factors, like expense, time, efficiency and practicability. Both TRAI and DoT are agreeable that such a database of all the registered subscribers should be maintained by the licensee and the same be made accessible to the security agencies. Giving an example of the Nigerian Communication Commission, which maintains a similar database of all registered subscribers, TRAI concludes that even the general evidence demonstrates that such database makes verification and tracing of the identity of the subscriber easier, particularly in absence of the Unique ID cards. Some of the licensees and service providers intervened in the present writ petition and have taken a stand that they are, in fact, maintaining database details of all registered subscribers. Such information is also made available to the Government Department or security agencies on demand and in accordance with law.

14. If one examines the powers and functions of TRAI, as postulated under Section 11 of the Act, it is clear that TRAI would not only recommend, to the DoT, the terms and conditions upon which a licence is granted to a service provider but has to also ensure compliance of the same and may recommend revocation of licence in the event of non-compliance with the regulations. It has to perform very

objectively one of its main functions, i.e., to facilitate competition and promote efficiency in the operation of the telecommunication services, so as to facilitate growth in such services. It is expected of this regulatory authority to monitor the quality of service and even conduct periodical survey to ensure proper implementation.

15. What emerges from the above discussion is that the stakeholders DoT, TRAI and the licencees are ad idem in regard to most of the issues in terms of the instructions prepared by the DoT. However, there are certain points on which there is a difference of opinion between the DoT and the TRAI. This limited divergence is required to be resolved by further clarification and issuance of more specific instructions. These issues fall under two categories: - firstly, what has been pointed out by the petitioner and secondly, where the DoT and the TRAI hold different opinion as noticed above. Proper deliberation between the stakeholders possessed of technical knowhow can resolve such issues usefully and effectively.

16. The abovementioned points of divergence between TRAI and DoT are matters which will have serious ramifications not only vis-à-vis the regulatory authorities and the licensees but also on the subscribers and the entire country. These aspects demand serious deliberation at the hands of the technical experts. It will not be appropriate for this Court to examine these technical aspects, as such matters are better left in the domain of the statutory or expert bodies created for that purpose. The concept of 'regulatory regime' has to be understood and applied by the courts, within the framework of law, but not by substituting their own views, for the views of the expert bodies like an appellate court. The regulatory regime is expected to fully regulate and control activities in all spheres to which the particular law relates.

17. We have clearly stated that it is not for this Court to examine the merit or otherwise of such policy and regulatory



matters which have been determined by expert bodies having possessing requisite technical knowhow and are statutory in nature. However, the Court would step in and direct the technical bodies to consider the matter in accordance with law, while ensuring that public interest is safeguarded and arbitrary decisions do not prevail. This Court in the case of *Delhi Science Forum & Ors. v. Union of India* [AIR 1996 SC 1356 = (1996) 2 SCC 405], while dealing with provision of licences to private companies as well as establishment, maintenance and working of such licences under the provisions of the Telegraph Act, 1885, applied the 'wednesbury principle' and held that 'as such the Central Government is expected to put such conditions while granting licences which shall safeguard the public interest and the interest of the nation. Such conditions should be commensurate with the obligations that flow while parting with the privilege which has been exclusively vested in the Central Government by the Act'. It is the specific case of the petitioner and some of the affected parties in the present proceedings that certain very important aspects, including security, have not been appropriately dealt with in the instructions dated 14th March, 2011.

18. Some divergence on certain specific issues of the regulatory regime has been projected in the instructions and comments filed by TRAI and DoT. They need to be resolved but, in absence of any technical knowhow or expertise being available with this Court, it will not be appropriate to decide, by a judicial dictum, as to which of the views expressed by these high powered bodies would be more beneficial to the regulatory regime and will prove more effective in advancing the public interest. Essentially this should be left to be clarified and the disputes be resolved by the expert bodies themselves. It is a settled canon of law that in a regulatory regime, the terms and conditions imposed thereunder should be unambiguous and certain. It is expected that the authorities concerned would enforce the regulatory regime with exactitude. Therefore, it is not only desirable but also imperative that TRAI and DoT

seriously cogitate on the issues where divergence has been expressed between them and bring unanimity in the terms and conditions of licences which would form an integral part of the instructions dated 14th March, 2011.

19. It may be noticed here that, as interveners, some of the licensees and/or service providers had criticized some of the terms and conditions of licence proposed under the instructions dated 14th March, 2011. These interveners not only made some suggestions with regard to the ambit and scope of the guidelines and instructions by TRAI or DoT but also intended to raise certain disputes vis-à-vis DoT in the capacity of licensees subject to the impugned instructions. Without any reservation, we make it clear that we are not directly or indirectly entering upon the adjudication of any dispute or even differences between the service provider/licensee on the one hand and TRAI or DoT on the other. If they or any of them have any claim or dispute with the other, they should resolve the same by taking recourse to independent proceedings in accordance with law.

20. In view of our above discussion, we partially allow the writ petition. The instructions dated 14th March, 2011 issued by DoT be and hereby are accepted by the Court subject to the following conditions:

(i) We hereby direct the constitution of a Joint Expert Committee consisting of two experts from TRAI and two experts from DoT to be chaired by the Secretary, Ministry of Communications and Information Technology, Government of India.

(ii) This Committee shall discuss and resolve the issues on which TRAI in its affidavit has given opinion divergent to that declared by DoT in its instructions dated 14th March, 2011. Following are the points of divergence that require examination by the Joint Expert Committee :



(a) Whether re-verification should be undertaken by the service provider/licensee, the DoT itself or any other central body?

(b) Is there any need for enhancing the penalty for violating the instructions/guidelines including sale of pre-activated SIM cards?

(c) Whether delivery of SIM cards may be made by post? Which is the best mode of delivery of SIM cards to provide due verification of identity and address of a subscriber?

(d) Which of the application forms, i.e., the existing one or the one now suggested by TRAI should be adopted as universal application form for purchase of a SIM card?

(e) In absence of Unique ID card, whether updating of subscriber details should be the burden of the licensee personally or could it be permitted to be carried out through an authorized representative of the licensee?

(f) In the interest of national security and the public interest, whether the database of all registered subscribers should be maintained by DoT or by the licensee and how soon the same may be made accessible to the security agencies in accordance with law?

(iii) The above notified Committee shall resolve the above specified issues and any other ancillary issue arising therefrom and make its recommendations known to the DoT within three months from today.

(iv) The DoT shall take into consideration the recommendations of the Joint Expert Committee.

The instructions issued by DoT dated 14th March, 2011 shall thereupon be amended, modified, altered, added to or substituted accordingly. They shall then become operative in law and binding upon all concerned.

(v) Composite instructions, so formulated, shall positively be issued by the DoT within 15 weeks from today and report of compliance submitted to the Registry of this Court.

21. The writ petition is disposed of with the above directions.

There shall be no order as to costs.

B.B.B. Writ Petition partly allowed.



DEEPAK KHINCHI
*v.*
STATE OF RAJASTHAN
(Criminal Appeal No. 719 of 2012)

APRIL 30, 2012

**[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]**

*Explosive Substances Act, 1908 - ss.3,4,5,6 and 7 - Appellant-accused traded in explosive/inflammable substances - Fire broke out in his shop/ store due to which 14 persons died and several others were injured -Sessions Judge vide order dated 13-9-2007 discharged the appellant of charges under the Act because there was no sanction to prosecute him - Sanction subsequently issued by District Magistrate, but application by prosecution on that basis for framing charge against the appellant under the Act rejected by the Sessions Judge - Appellant submitted application u/ s.311 CrPC alongwith fresh sanction issued by District Magistrate - Application under s.311 CrPC allowed by Sessions Judge by order dated 16-11-2010 and trial directed to be proceeded with against the appellant for offences under the Act - Order upheld by High Court - Plea of accused-appellant that by passing order under s.311 of CrPC, the Sessions Judge had subjected him to ordeal of a trial for offences under the Explosive Substances Act after a period of three years which had resulted in miscarriage of justice - Held: The offence in this case was grave and at no stage, sanction was refused by the competent authority - No case of appellant that sanction was granted by an incompetent authority - Though proceedings are sought to be initiated under the said Act against the appellant after three years, but, in the facts of this case, where 14 innocent persons lost their lives and several persons were severely injured due to the blast which took place in the appellant's shop, three years*

*period cannot be termed as delay - It is also the duty of the court to see that perpetrators of crime are tried and convicted if offences are proved against them - It cannot be said that the lapse of three years has caused prejudice to the accused - The case will be conducted in accordance with the law and the appellant will have enough opportunity to prove his innocence - Besides, the victim's rights are equally important- Trial court to frame charges against the appellant under ss. 3, 4, 5 and 6 of the Act and to proceed with the trial - Criminal Trial.*

*Explosive Substances Act, 1908 - s.7 - Consent/sanction to prosecute the accused - Lackadaisical approach of prosecution in obtaining such consent/sanction in the instant case - Deprecated.*

**The accused-appellant traded in explosive/ inflammable substances. Fire broke out in his shop/store due to which 14 persons died and several others were injured. FIR was registered under Sections 3, 4, 5 and 6 of the Explosive Substances Act, 1908 as well as v.arious offences under the IPC. The Sessions Judge framed charges against the appellant for offences under the IPC. However, vide order dated 13-09-2007 it discharged the appellant of the charges under the Explosive Substances Act on the ground that no sanction to prosecute him as contemplated in Section 7 of the Act was produced by the prosecution.**

**Subsequently, sanction was issued by the District Magistrate, but the application made by the prosecution on that basis for framing charge against the appellant under the Explosive Substances Act was rejected by Sessions Judge vide order dated 15-05-2010. The appellant submitted application under Section 311 CrPC alongwith a fresh sanction letter dated 1-6-2010 issued by the District Magistrate. The Sessiosn Judge accepted the said fresh sanction and allowing the application under**



**Section 311 CrPC directed trial to be proceeded with against the appellant for offences under Sections 3, 4, 5 and 6 of the Explosive Substances Act. The order was upheld by the High Court.**

**In the instant appeal, the appellant submitted that by passing order under Section 311 of CrPC, the Sessions Judge had subjected the appellant to the ordeal of a trial for offences under the Explosive Substances Act after a period of three years which had resulted in miscarriage of justice.**

**Disposing of the appeal, the Court**

**HELD: 1.1. The explosion which took place in the appellant's shop resulted in death of 14 persons. Several persons were severely injured. Seriousness of the occurrence can hardly be disputed. The Sessions Judge framed charges against the appellant for offences under the IPC because in his prima facie opinion, there was enough material against the appellant to bring home the said charges. However, insofar as offences under the said Act are concerned, there was much inaction bordering on callousness on the part of the prosecution. The Sessions Judge in his order expressed despair about the prosecution's conduct. He had called for an explanation but the explanation does not appear to have come. This Court expresses its extreme displeasure about this approach of the prosecution. One wonders whether as desired by Sessions Judge, the inaction of the prosecution was conveyed to the Chief Secretary. Ultimately, Sessions Judge had to discharge the appellant of the said charges because there was no sanction. [Para 9] [577-B-E]**

**1.2. However, at no point of time, sanction was refused. On 1-4-2008 sanction was issued by the District Magistrate, but the application made by the prosecution**

**for framing charge against the appellant under the said Act was rejected by Sessions Judge. This Court is prima facie satisfied that the letter of the District Magistrate issued on 1-4-2008 gave good and valid consent as envisaged under Section 7 of the Act for trial of the appellant for offences under the said Act and the Sessions Judge was in error in rejecting the consent letter by his order dated 15-5-2010. Looking to the seriousness of the matter, that order ought to have been challenged by the prosecution but it was not challenged. [Paras 10, 12] [577-F-H; 580-B-C]**

*Rajendra Prasad v. Narcotic Cell* **(1999) 6 SCC 110: 1999 (3) SCR 818 and** *State of Himachal Pradesh v. Nishant Sareen* **(2010) 14 SCC 527: 2010 (13) SCR 1200 - held inapplicable.**

*Ramjani & Ors. v. State of Rajasthan* **1993 Cr.L.R. (Raj.) 179 - referred to.**

**2.1. The offence in this case is grave. At no stage, sanction was refused by the competent authority. It is not the case of the appellant that sanction is granted by the authority, which is not competent. It is true that the proceedings are sought to be initiated under the said Act against the appellant after three years. But, in the facts of this case, where 14 innocent persons lost their lives and several persons were severely injured due to the blast which took place in the appellant's shop, three years period cannot be termed as delay. It is also the duty of the court to see that perpetrators of crime are tried and convicted if offences are proved against them. It cannot be said that the lapse of three years has caused prejudice to the accused. The case will be conducted in accordance with the law and the appellant will have enough opportunity to prove his innocence. Besides, equally dear are the victim's rights. [Para 13] [581-C-F]**



**2.2. It is true that Sessions Judge has, by his order dated 13/9/2007 discharged the appellant of the charges under Sections 3, 4, 5 and 6 of the said Act because there was no sanction. But, the prosecution has now obtained sanction. The Sessions Judge has accepted the sanction and has directed that the trial should be started against the appellant for offences under Sections 3, 4, 5 and 6 of the said Act, as well. The order of the Sessions Judge is affirmed by the impugned order passed by the High Court. In view of the legal position, and in the facts of the case, there is no reason to interfere in the matter and the trial court is directed to frame additional charges against the appellant under Sections 3, 4, 5 and 6 of the said Act and to proceed with the trial. [Para 14] [581-G-H; 582-A-B]**

*State of Goa v. Babu Thomas* **(2005) 8 SCC 130: 2005 (3) Suppl. SCR 712 - relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1999 (3) SCR 818** | **held inapplicable** | **Para 8** |
| **2010 (13) SCR 1200** | **held inapplicable** | **Para 8, 12** |
| **1993 Cr.L.R. (Raj.) 179** | **referred to** | **ara10,11** |
| **2005 (3) Suppl. SCR 712** | **relied on** | **Para13** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 719 of 2012.

From the Judgment & Order dated 24.01.2011 of the High Court of Judicature for Rajasthan at Jodhpur in SB Criminal Revision Petition No. 853 of 2010.

Chinmay Khalidkar, Aruna Gupta for the Appellant.

Prashant Bhagwati (for Milind Kumar) for the Respondent.

The Judgment of the Court was delivered by

**(SMT.) RANJANA PRAKASH DESAI, J.** 1. Leave granted.

2. This appeal, by grant of special leave, is directed against judgment and order dated 24/01/2011 passed by the High Court of Rajasthan at Jodhpur. By the impugned judgment, learned Single Judge dismissed Criminal Revision Petition No.853 of 2010 filed by the appellant challenging order of Addl. Sessions Judge (Fast Track), Chittorgarh allowing application submitted by the prosecution under Section 311 of the Code of Criminal Procedure, 1973 (for short, **"the Code"**) and directing that trial should proceed against the appellant for offences under Sections 3, 4, 5 and 6 of the Explosive Substances Act, 1908.

3. Before, we turn to the facts of the case, it is necessary to have a look at Section 7 of the Explosive Substances Act, 1908 (for short, **"the said Act"**), as the controversy revolves round the 'consent to prosecute' contemplated therein. It reads thus:

> "Section 7: No court shall proceed to the trial of any person for an offence against this Act except with the consent of the Central Government."

It must be stated here that by Act 54 of 2001, Section 7 was amended and the words 'Central Government' were substituted by the words 'District Magistrate'.

4. The appellant claims to be a trader registered under the provisions of the Rajasthan Sales Tax Act, 1994. According to him, he deals in Kerosene, lubricants, paints, varnish, thinner, petroleum products and has a license for the storage of solvents, petrochemicals and raw materials used for the purpose of blasting for mining, roads and other end uses. The prosecution alleges that on 2/5/2006 at about 6.40 p.m. a fire broke out in the shop/store of the appellant situated at Gandhinagar Vistar Yojana, Chittorgarh, Rajasthan due to which



many children, women and men were burnt alive. The SHO, Reserve Center, Chittorgarh, upon receiving telephonic information from an unknown caller, visited the spot and registered the First Information Report against three persons under Sections 285, 286, 323, 324, 304 of the Indian Penal Code (for short, **"the IPC"** ) as well as under Sections 3, 4, 5 and 6 of the said Act. The appellant was arrayed as accused 1. Upon completion of the investigation, charge sheet was filed before the learned CJM, Chittorgarh under Sections 285, 286, 323, 324 and 304 of the IPC as well as under Sections 3, 4, 5 and 6 of the said Act. In respect of the offences under the provisions of the said Act, no consent of the competent authority was taken.

5. After committal of the case before the Sessions Court, the case was registered as Sessions Case No.53 of 2006. After the arguments on charge were heard on 7/8/2007, the Sessions Court directed the prosecution, in the interest of justice, to file a reply, inter alia, stating why mandatory permission under Section 7 of the said Act was not taken and indicating the correct legal position in that behalf. The case was posted for hearing on 22/8/2007. Though opportunity was given, Addl. Public Prosecutor did not file any reply nor did he submit any written arguments. He prayed that another opportunity be given to him to file reply. In the interest of justice, learned Sessions Judge adjourned the case. On 10/9/2007, an application was moved by the Addl. Public Prosecutor stating that he had written a letter to the SHO through the Superintendent of Police but no reply has been received so far. The case was, therefore, posted for hearing on 12/9/2007. Even on 12/9/2007, the sanction was not produced. Arguments of parties were heard and on 13/9/2007, learned Sessions Judge discharged the appellant of the offences under the said Act. While discharging the appellant of the said offences, learned Sessions Judge noted that though the hearing was repeatedly postponed, Addl. Public Prosecutor failed to produce the sanction and state the correct legal position. The question

whether if a sanction is produced in future, the appellant could be tried for offences under the said Act was kept open by him. He sought for an explanation from the District Magistrate, Chittorgarh why sanction was not obtained though 14 persons had died and a number of persons had received severe burn injuries in the disastrous fire accident. Learned Sessions Judge also called for an explanation as to why the Chief Secretary, State of Rajasthan should not be informed about the unhappy state of affairs due to which he was constrained to discharge the appellant of the offences under the said Act. Learned Sessions Judge, however, noted that it was his prima facie view that the appellant had not taken adequate care while conducting his business of storing and marketing of inflammable substances. He further noted that prima facie, it was evident that carelessness of the appellant led to the fire in his shop killing 14 persons and injuring many. He, therefore, directed that charge for the offences under Sections 285, 286 and 304 of the IPC be framed against the appellant on the next date of hearing of the case. It is pertinent to note that the appellant challenged order dated 13/9/2007 before learned Single Judge of the Rajasthan High Court. The said petition was dismissed.

6. On 3/4/2008, the SHO, Reserve Centre, Kotwali moved an application through the Addl. Public Prosecutor along with sanction letter issued on 1/4/2008 by the District Magistrate, Chittorgarh. On 15/5/2010, learned Sessions Judge rejected the application on the ground that sanction to prosecute the appellant under Sections 3, 4, 5 and 6 has been granted by the District Magistrate, however, it is not under Section 7 of the said Act. A copy of the sanction order is annexed to the appeal memo at Ex-P/6. It would be advantageous to produce the relevant portion of the said sanction order.

> "From the investigation of the case it has been revealed that the accused while acting negligently and in violation of the rules of the license kept in his shop in residential area highly inflammable substance solvent with the knowledge that it could at any time cause heavy loss to life and property but then also he committed this act due to which the explosion took place and the incident happened and damage has been caused to life and property.
>
> Therefore, against the accused Deepak Khichi S/o Madan Lal Khichi R/o Gandhi Nagar Chittorgarh prima facie the case under section 3, 4, 5, 6 of the Explosive Substance Act, 1908 is found to have been proved due to which under section 7 of the Explosive Substance Act, 1908 the sanction for prosecution upon the filing of the challan before a competent court is granted."



It is surprising that in a serious case like this, the prosecution should not challenge order dated 15/5/2010 passed by learned Sessions Judge.

7. The prosecution again submitted an application purported to be under Section 311 of the Code along with sanction dated 1/6/2010 issued by the District Magistrate, Chittorgarh. As stated hereinabove, the said application was allowed by learned Sessions Judge on 16/11/2010. By the impugned order passed by the Rajasthan High Court the order passed by learned Sessions Judge was upheld. Hence, the present appeal.

8. We have heard learned counsel for the parties, at some length. Counsel for the appellant submitted that the courts below erred in allowing the application filed by the prosecution after a delay of about three years. He submitted that it was not open to the prosecution to make repeated attempts to get sanction from the competent authority. Counsel submitted that by passing order under Section 311 of the Code, the trial court has subjected the appellant to the ordeal of a trial for the offences under the said Act after a period of three years. This has resulted in miscarriage of justice. Counsel submitted that since the prosecution had deliberately delayed obtaining

sanction, it cannot be now allowed to fill in the lacuna. Such a course will result in abuse of process of court. In support of his submissions, counsel relied on the judgments of this court in *Rajendra Prasad v. Narcotic Cell*[1] and *State of Himachal Pradesh v. Nishant Sareen*[2].

9. The explosion which took place in the appellant's shop resulted in death of 14 persons. Several persons were severely injured. Seriousness of the occurrence can hardly be disputed. Learned Sessions Judge has framed charges against the appellant for offences under the IPC because in his prima facie opinion, there is enough material against the appellant to bring home the said charges. It is unfortunate that so far as offences under the said Act are concerned, there should be so much inaction bordering on callousness on the part of the prosecution. Learned Sessions Judge has in his order expressed despair about the prosecution's conduct. He had called for an explanation but the explanation does not appear to have come. We express our extreme displeasure about this approach of the prosecution. We wonder whether as desired by learned Sessions Judge, the inaction of the prosecution was conveyed to the Chief Secretary. Ultimately, learned Sessions Judge had to discharge the appellant of the said charges because there was no sanction.

10. As stated hereinabove, on 1/4/2008 sanction was issued by the District Magistrate, Chittorgarh, but the application made by the prosecution for framing charge against the appellant under the said Act was rejected by learned Sessions Judge. We are prima facie satisfied that the letter of the District Magistrate, Chittorgarh issued on 1/4/2008 gave good and valid consent as envisaged under Section 7 of the Act for trial of the appellant for offences under the said Act and the learned Sessions Judge was in error in rejecting the consent letter by his order dated 15/5/2010. The proper course

1. (1999) 6 SCC 110.

2. (2010) 14 SCC 527.



for the prosecution was to challenge that order and have it set aside by the High Court. Instead of taking that course, a fresh sanction was issued by the District Magistrate, Chittorgarh on 1/6/2008. The prosecution then filed an application under Section 311 of the Code. It was prayed that sanction issued under Section 7 of the said Act by the District Magistrate be taken on record and the appellant be tried for offences under Sections 3, 4, 5 and 6 of the said Act. Learned Sessions Judge while granting the said application, relied on the judgment of Rajasthan High Court, Jaipur Bench in *Ramjani & Ors. v. State of Rajasthan*[3] wherein it was held that where sanction under Section 7 of the said Act is not obtained, the prosecution will have to be quashed but it would be open to the prosecution to start the prosecution afresh after obtaining sanction from the competent authority. The High Court upheld this order.

11. Before dealing with the submissions of learned counsel, we shall refer to the judgments on which reliance is placed by learned counsel for the appellant. In *Rajendra Prasad,* this court explained when a court can exercise its power of recalling or re-summoning witnesses. While repelling the contention raised by counsel for the appellant therein that power under Section 311 of the Code was being exercised to fill in the lacuna, this court observed that a lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. This court clarified that no party in a trial can be foreclosed from correcting errors and if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. This court observed that after all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among

3. 1993 Cr.L.R. (Raj.) 179.

the parties performed better. In our opinion, the appellant cannot draw any support from this judgment because it arose out of a totally different facts scenario. If at all the observations of this court quoted by us would help the prosecution rather than the appellant. No question of sanction was involved in that case. The prosecution and defence had closed their evidence and thereafter at the instance of the prosecution, two of the witnesses who had already been examined, were summoned for the purposes of proving certain documents for prosecution. In the circumstances, the question arose whether by making application under Section 311 of the Code, the prosecution was trying to fill in the lacuna. In our opinion, *Rajendra Prasad* has no application to the present case. We do not want to express any opinion as to whether in this case, the application was made rightly under Section 311 of the Code by the prosecution. We find that, in substance, the application filed by the prosecution was for tendering the consent/sanction of the District Magistrate, on record and requesting the court to start trial against the appellant for the offences punishable under the said Act. Learned Sessions Judge granted the said application.

12. In *Nishant Sareen,* the respondent therein was caught red-handed accepting bribe from the complainant. Sanction was sought by the Vigilance Department under Section 19 of the Prevention of Corruption Act, 1988 to prosecute the respondent. The Principal Secretary (Health) found no justification in granting sanction to prosecute the respondent. Sanction was refused. Thereafter, Vigilance Department took up the matter again with the Principal Secretary (Health) for grant of sanction. The matter was reconsidered. Though no fresh material was available for further consideration, the competent authority granted sanction to prosecute the respondent. It is in these circumstances that this court observed that sanction to prosecute a public servant on review could be granted only when fresh materials have been collected by the investigating agency subsequent to earlier order.



Reconsideration can be done by the sanctioning authority in the light of the fresh material, prayer for sanction having been once refused. This case also can have no application to the facts of the present case. Here, initially prosecution did show lackadaisical approach in obtaining sanction. But, at no point of time, sanction was refused. On 1/4/2008, the District Magistrate granted sanction but learned Sessions Judge rejected the application. Looking to the seriousness of the matter, that order ought to have been challenged by the prosecution but it was not challenged. Thereafter, the District Magistrate again granted sanction. Learned Sessions Judge took that sanction on record and directed the trial to proceed against the appellant for offences under Sections 3, 4, 5 and 6 of the said Act. The High Court affirmed the view taken by learned Sessions Judge. To these facts, judgment in *Nishant Sareen,* where sanction was refused earlier by the Principal Secretary (Health) and was granted on the same material later on, can have no application.

13. In this connection, we may usefully refer to the judgment of this court in *State of Goa v. Babu Thomas*[4]. In that case, the respondent therein was employed as Joint Manager in Goa Shipyard Limited, a Government of India Undertaking under the Ministry of Defence. He was arrested by the CID, Anti-Corruption Bureau of Goa Police on the charge that he demanded and accepted illegal gratification from an attorney of M/s. Tirumalla Services in order to show favour for settlement of wages, bills/arrears certification of pending bills and to show favour in the day-to-day affairs concerning the said contractor. The first sanction to prosecute the respondent was issued by an incompetent authority. The second sanction issued retrospectively after the cognizance was taken was also by an incompetent authority. This court held that when Special Judge took cognizance, there was no sanction under the law authorizing him to take cognizance. This was a fundamental

4. (2005) 8 SCC 130.

error which invalidated the cognizance as being without jurisdiction. However, having regard to the gravity of the allegations leveled against the respondent, this court permitted the competent authority to issue a fresh sanction order and proceed afresh against the respondent from the stage of taking cognizance of the offence. It is pertinent to note that the offence therein was committed on 14/9/1994. Looking to the seriousness of the offence, this court permitted the competent authority to issue fresh sanction order after about 10 years. We have no hesitation in drawing support from this judgment. The offence in this case is equally grave. At no stage, sanction was refused by the competent authority. It is not the case of the appellant that sanction is granted by the authority, which is not competent. It is true that the proceedings are sought to be initiated under the said Act against the appellant after three years. But, in the facts of this case, where 14 innocent persons lost their lives and several persons were severely injured due to the blast which took place in the appellant's shop, three years period cannot be termed as delay. It is also the duty of the court to see that perpetrators of crime are tried and convicted if offences are proved against them. We are not inclined to accept the specious argument advanced by learned counsel for the appellant that the lapse of three years has caused prejudice to the accused. The case will be conducted in accordance with the law and the appellant will have enough opportunity to prove his innocence. Besides, equally dear to us are the victim's rights.

14. It is true that learned Sessions Judge has, by his order dated 13/9/2007 discharged the appellant of the charges under Sections 3, 4, 5 and 6 of the said Act because there was no sanction. But, the prosecution has now obtained sanction. The Sessions Judge has accepted the sanction and has directed that the trial should be started against the appellant for offences under Sections 3, 4, 5 and 6 of the said Act, as well. The order of the Sessions Judge is affirmed by the impugned order passed by the High Court. In view of the legal position as



discussed above, and in the facts of the case, as narrated above, we see no reason to interfere in the matter and we direct the trial court to frame additional charges against the appellant under Sections 3, 4, 5 and 6 of the said Act and to proceed with the trial. Needless to say that the stay of further proceedings granted by this court on 5/7/2011 shall stand vacated.

15. Appeal is disposed of in the aforestated terms.

B.B.B. Appeal disposed of.

M/S. DSR STEEL (P) LTD.
*v.*
STATE OF RAJASTHAN & ORS.
(Civil Appeal No. 3814 of 2007 etc.)

MAY 1, 2012

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

*Electricity Act, 2003 - s. 125 - Appeal under - Maintainability of - Held: Appeal u/s. 125 is maintainable only on the grounds specified u/s. 100 CPC - It is maintainable only when the case involves substantial question of law - Concurrent findings of facts recorded by courts below cannot be reopened in appeal u/s. 125 - On facts, no substantial question of law arose for consideration - No perversity is found in the findings by courts below - Code of Civil Procedure, 1908 - s. 100.*

*Limitation - Reckoning of limitation - Original order and the order dismissing the review petition - Whether the two orders merged and whether limitation to be reckoned from the date of judgment/order in review petition and not original order - Held: Where review petition is dismissed, there is no question of merger - Limitation would be reckoned from the date of the original order - Doctrine of merger.*

**Distribution Companies filed applications before State Electricity Regulatory Commission for revision of tariff to be effective from 1.12.2004. The Commission directed that the revised tariff determined by it would become effective from 1.1.2005 and shall remain in force till the same is amended by the Commission by a separate order. Appellants and other consumers filed review petitions seeking review of the order of the Commission and asking for continuation of the incentive scheme. They took the plea that withdrawal of the**





**scheme offended the principle of promissory estoppel. The Commission dismissed the review petitions holding that the incentive scheme had a limited validity i.e. till 31.3.2003 or till the Commission issued a tariff order, and thus its withdrawal did not offend the principles of promissory estoppel. The appeal against the order was dismissed by the appellate tribunal for electricity. Hence the instant appeals were filed.**

**Dismissing the appeals, the Court**

**HELD: 1.1 The appeals are liable to be dismissed as no substantial question of law arises for consideration. An appeal u/s. 125 of the Electricity Act, 2003 is maintainable before the Supreme Court only on the grounds specified in Section 100 CPC. Section 100 C.P.C. in turn permits filing of an appeal only if the case involves a substantial question of law. Findings of fact recorded by the courts below, which would in the present case, imply the Regulatory Commission as the court of first instance and the Appellate Tribunal as the court hearing the first appeal, cannot be re-opened before Supreme Court in an appeal u/s. 125 of the Electricity Act, 2003. Just as the High Court cannot interfere with the concurrent findings of fact recorded by the courts below in a second appeal u/s. 100 CPC so also Supreme Court would be loathed to entertain any challenge to the concurrent findings of fact recorded by the Regulatory Commission and the Appellate Tribunal. [Para 7] [592-D-G]**

*Govindaraju v. Mariamman* **AIR 2005 SC 1008: 2005 (1) SCR1100;** *Hari Singh v. Kanhaiya Lal* **AIR 1999 SC 3325:1999 (2) Suppl. SCR 216;***Ramaswamy Kalingaryar v. MathayanPadayachi* **AIR 1992 SC 115;** *Kehar Singh v. Yash Pal and Ors.***AIR 1990 SC 2212;** *Bismillah Begum (Smt.) (Dead) by LRs. v.Rahmatullah Khan (Dead) by LRs.* **AIR 1998 SC 970: 1998 (1) SCR 284 - relied on.**

**1.2 The Regulatory Commission has, recorded a clear finding of fact that the old incentive scheme was limited only upto 31st March, 2007 or till the Commission issued a tariff order whichever was earlier. It also recorded a finding that while considering revision of tariff it had gone into the proposals regarding introduction of a new incentive scheme and approved the same, effectively bringing the existing scheme to an end and introducing a new scheme in its place. The Commission had declined to accept the contention that the appellant companies had altered their position to their detriment by making additional investments or that there was any specific representation or promise made to them that the old scheme would inevitably continue till 31st March, 2007. The additional material which the appellants had sought to introduce belatedly at the review stage had also been declined by the Commission. In its order revising tariff, the Commission had dealt with the question relating to the incentive scheme. The Tribunal concurred with the above view taken by the Commission and repelled the contention based on the principle of promissory estoppel. Thus, there is no perversity in any one of those findings nor is there any substantial question of law arising in the fact situation of the instant appeals. The appeals are dismissed on merits. [Paras 8 and 9] [593-A-D; 595-C-E]**

*M/s Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradeshand Ors.* **(1979) 2 SCC 409: 1979 (2) SCR 641;** *Kasinka Trading andAnr. v. Union of India and Anr.* **(1995) 1 SCC 274: 1994 (4) Suppl.SCR 448;** *Shrijee Sales Corporation and Anr. v. Union of India* **(1997) 3 SCC 398: 1996 (10) Suppl. SCR 888;** *Union of India and Ors. v. Godfrey Philips India Ltd.* **(1985) 4 SCC 369: 1985 (3) Suppl. SCR 123 - referred to.**

**2 It is not correct to say that the period of limitation could be reckoned only from the date of the order passed**



**in the review applications. The order passed by the Tribunal in appeal merged with the order by which the Tribunal has dismissed an application for review of the said order. Different situations may arise in relation to review petitions filed before a court or Tribunal. Where the review application is allowed, in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the Court hearing the review petition. Where a Court or Tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review reversed or modified, The decree so vacated reversed or modified is then the decree that is effective for purposes of a further appeal, if any, maintainable under law. Where the petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made and simply dismisses the review petition, the decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition. [Paras 12, 13 and 14] [596-G-H; 597-A-H; 598-A-B]**

*Manohar S/o Shankar Nale and Ors. v. Jaipalsing S/o Shivalalsing Rajput* **(2008) 1 SCC 520: 2007 (12) SCR 364;**

*Sushil Kumar Sen v. State of Bihar* **(1975) 1 SCC 774 :1975 (3)SCR 942;** *Kunhayammed and Ors. v. State of Kerala and Anr.***(2000) 6 SCC 359: 2000 (1) Suppl. SCR 538 - relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1979 (2) SCR 641** | **Referred to** | **Para 5** |
| **1994 (4) Suppl. SCR 448** | **Referred to** | **Para 5** |
| **1996 (10) Suppl. SCR 888** | **Referred to** | **Para 5** |
| **1985 (3) Suppl. SCR 123** | **Referred to** | **Para 5** |
| **2005 (1) SCR 1100** | **Relied on** | **Para 7** |
| **1999 (2) Suppl. SCR 216** | **Relied on** | **Para 7** |
| **AIR 1992 SC 115** | **Relied on** | **Para 7** |
| **AIR 1990 SC 2212** | **Relied on** | **Para 7** |
| **1998 (1) SCR 284** | **Relied on** | **Para7** |
| **2010 (4) SCR 680** | **Referred to** | **Para 11** |
| **2007 (12) SCR 364** | **Relied on** | **Para 15** |
| **1975 ( 3) SCR 942** | **Relied on** | **Para 15** |
| **2000 ( 1) Suppl. SCR 538** | **Relied on** | **Para 15** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3814 of 2007 etc.

From the Judgment & Order dated 23.11.2006 of the Appellate Tribunal of Electricity, New Delhi in Appeal No. 226 of 2006.

WITH

C.A. Nos. 4393 & 4396 of 2007.

Paras Kuhad, R.K. Agarwal, Atul Jha, Sandeep Jha, P.V. Yogeswaran, PN Bhandari, Hemant Sharma, Biju Mattam, Jitin Chaturvedi, Indu Sharma, Abhishek Gupta, Milind Kumar, Ajay Choudhary, Manish Kr. Sharma for the appearing parties.



The order of the Court was delivered by

**T.S. THAKUR, J.** 1. These appeals under Section 125 of the Electricity Act, 2003 call in question the correctness of an order dated 23rd November, 2006, passed by the Appellate Tribunal for Electricity whereby a batch of appeals including those filed by the appellants against an order dated 8th June, 2006 passed by the Rajasthan Electricity Regulatory Commission, have been dismissed.

2. Jaipur Vidyut Vitran Nigam Limited ('JVVNL' for short), Jodhpur Vidyut Vitran Nigam Limited ('JDVVNL' for short) and Ajmer Vidyut Vitran Nigam Limited ('AVVNL' for short), submitted separate applications before the Rajasthan Electricity Regulatory Commission (for short 'Commission') at Jaipur in terms of Sections 62 and 64 of the Electricity Act, 2003 for revision of tariff to be effective from December 1, 2004. Each one of these distribution companies ('Discoms' for short) had an existing tariff but in their respective applications they sought an identical tariff revision which requests were taken up by the Commission for consideration together and disposed of in terms of a common order dated 17th December, 2004, passed after notices regarding filing of the said applications were published in different newspapers having circulation in the State of Rajasthan. Several objections were filed and suggestions made by nearly 100 individuals and organisations in the course of the proceedings before the Commission. All these objections were then considered by the Commission no matter only 38 of those who had filed the same had complied with the requirement laid down by the former. A large number of people and organisations even applied for personal hearing and were heard on different dates at different venues fixed for the purpose. Some of these objections also related to individual problems of the consumers or disputes relating to bills and other matters which were directed to be

considered by the Discoms and decision taken on the same under intimation to the persons concerned. Other issues including those questioning the maintainability of the petitions and alleging non-compliance with the regulations and directions of the Commission were also raised. Issues touching reforms in power sector, non-determination of the Rajasthan Vidyut Utpadan Nigam's tariff from whom the Discoms purchase electricity, poor performance of Vidyut Vitran Nigams were also agitated. Similarly objections to the proposed increase in tariff, interest charges, depreciation etc. too were raised and examined by the Commission. Suggestions regarding improvement, objections relating to high T&D losses, inadequacy of staff, continuation of un-metered supply, issue of deemed licensee and tariff for deemed licensee were also examined. Questions relating to high voltage supply, segregation of mixed load, billing demand, demand based tariff for MIP consumers, power factor and shunt capacitor surcharge, vigilance checking of consumers, minimum billing, agriculture, domestic and industrial tariff too were examined by the Commission apart from several other issues that were placed before the Commission to which the Commission has made a reference in its order dated 8th June, 2006. The Commission eventually directed that the revised tariff determined by it will become effective from 1st January, 2005 and remain in force till the same is amended by the Commission by a separate order passed by it.

3. Aggrieved by the order passed by the Commission, the appellants and a large number of other consumers in that category filed review petitions under Section 94 (1)(f) of the Electricity Act, 2003 seeking review and continuation of the incentive scheme. These review petitions were dismissed by the Commission in terms of its order dated 8th June, 2006. The Commission noted the contention urged on behalf of the petitioners that they were affected by the withdrawal of the incentive scheme. It was also urged that these consumers had made investments on the basis of the incentive scheme bona



fide believing that the same would continue for at least three years. The review petitioners, therefore, sought continuation of the said scheme by suitable review of the Commission's order dated 17th December, 2004. The Commission also noted the opposition of the Discoms to the said prayer and the contention that the incentive scheme was to be effective upto 31st March, 2003 or till the Commission issued a tariff order whichever was earlier.

4. The Commission noted the submissions made on behalf of the Discoms that the tariff petitions had been filed in August 2004 and the details of the scheme had been published in newspapers including the incentive scheme which was deliberated in the course of the public hearing and dealt with in the Commission's tariff order dated 17th December, 2004. It was also argued on behalf of the Discoms that the modified incentive scheme was free from any legal flaw.

5. Consideration of the rival submissions led the Commission to the conclusion that its order dated 17th December, 2004 had examined the question raised by the petitioners regarding the continuation of the incentive scheme and found that the scheme had a limited validity and its withdrawal did not offend the principles of promissory estoppel. It also held that the modification of the scheme was not without public notice and the discontinuance of the old incentive scheme had been given wide publicity pursuant to which large industries and associations had been heard on the question of introduction of a new scheme in place of the old. The Commission also held that the question of applicability of Promissory Estoppel had been raised before the Commission at the hearing of the tariff petitions and that the material sought to be introduced in support of the said plea at the stage of review could not be taken into consideration. The Commission, accordingly, concluded that there was no mistake or error apparent on the face of the record in the order passed by it to call for a review of the same. In support the Commission noted several decisions of this Court on the question of Promissory

Estoppel including those delivered in *M/s Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.* (1979) 2 SCC 409, *Kasinka Trading and Anr. v. Union of India an Anr.* (1995) 1 SCC 274, *Shrijee Sales Corporation and Anr. v. Union of India* (1997) 3 SCC 398, *Union of India & Ors. v. Godfrey Philips India Ltd.* (1985) 4 SCC 369.

6. Aggrieved by the orders dated 17th December, 2004 and 8th June, 2006 passed by the Commission, the appellants and few others filed Appeal Nos.180-197 of 2006 and Appeal No.226 of 2006 before the Appellate Tribunal for Electricity, at New Delhi which were as noticed above dismissed by the Tribunal by the order impugned in these appeals. The Tribunal noted that there was no challenge before it as to the revision of the tariff order issued by the Commission. It also found that the Regulatory Commission could exercise its power of review in terms of Section 94(1)(f) of the Electricity Act, 2003 read with Order XLVII of the Civil Procedure Code and that it could review an order, provided a case for any such review was made out. The Tribunal rejected the contention urged on behalf of the appellants that the doctrine of Promissory Estoppel was attracted in the facts of the case. It concurred with the view taken by the Commission that the incentive scheme was applicable only upto 31st March, 2007 or till the Commission issued a tariff order whichever was earlier. The Tribunal observed:

> "As has been held in *Pawan Alloys & Casting Pvt. Ltd., Meerut v. U.P. State Electricity Board And Others,* (1997) 7 Supreme Court Cases 251, in this case, no promise was held out to any new industries nor there was an invitation for investments of large scale fund but it only imposed a condition that existing industries could avail of the incentive subject to the stipulations in the scheme and nothing more. The tariff fixation is a statutory function in terms of The Electricity Act 2003 and tariff is to be fixed in the larger interest of consumer public at large. That being the



> position and when in the very tariff scheme, it has been specifically provided that the scheme will come to an end on 31.03.2007 or when the Regulatory Commission determines distribution tariff which ever is earlier. This is only meaning it is not known as to how the appellants could advance the said contention that the scheme is to be given any other meaning is impermissible. This sentence which is incorporated in the scheme is fatal to the claim of the appellants and none of the precedents pressed into service by the appellants will come to their rescue. It will be sufficient to answer this point, however, as the appellants on all the contentions pressed for a decision."

7. We have heard learned counsel for the parties at considerable length. An appeal under Section 125 of the Electricity Act, 2003 is maintainable before this Court only on the grounds specified in Section 100 of the Code of Civil Procedure. Section 100 of the C.P.C. in turn permits filing of an appeal only if the case involves a substantial question of law. Findings of fact recorded by the Courts below, which would in the present case, imply the Regulatory Commission as the Court of first instance and the Appellate Tribunal as the Court hearing the first appeal, cannot be re-opened before this Court in an appeal under Section 125 of the Electricity Act, 2003. Just as the High Court cannot interfere with the concurrent findings of fact recorded by the Courts below in a second appeal under Section 100 of the Code of Civil Procedure, so also this Court would be loathed to entertain any challenge to the concurrent findings of fact recorded by the Regulatory Commission and the Appellate Tribunal. The decisions of this Court on the point are a legion. Reference to *Govindaraju v. Mariamman* (AIR 2005 SC 1008), *Hari Singh v. Kanhaiya Lal* (AIR 1999 SC 3325), *Ramaswamy Kalingaryar v. Mathayan Padayachi* (AIR 1992 SC 115), *Kehar Singh v. Yash Pal and Ors.* (AIR 1990 SC 2212), *Bismillah Begum (Smt.) (Dead) by LRs. v. Rahmatullah Khan (Dead) by LRs.* (AIR 1998 SC 970) should, however, suffice.

8. The Regulatory Commission has, in the case at hand recorded a clear finding of fact that the old incentive scheme was limited only upto 31st March, 2007 or till the Commission issued a tariff order whichever was earlier. It has also recorded a finding that while considering revision of tariff it had gone into the proposals regarding introduction of a new incentive scheme and approved the same, effectively bringing to an end the existing scheme and introducing a new scheme in its place. The Commission had declined to accept the contention that the appellant companies had altered their position to their detriment by making additional investments or that there was any specific representation or promise made to them that the old scheme would inevitably continue till 31st March, 2007. The additional material which the appellants had sought to introduce belatedly at the review stage had also been declined by the Commission. In its order dated 17th December, 2004 revising tariff the Commission had dealt with the question relating to the incentive scheme in the following words:

> "70. The incentive scheme was proposed by the Nigams as a stopgap arrangement to arrest the decline in industrial consumption. The Commission while conveying its approval to extension of the incentive scheme clearly stipulated that it shall be valid till 31.3.07 or revision of tariff whichever was earlier. The scheme itself had a limited validity and therefore, did not attract the principle of promissory estoppel. The Commission had envisaged review of incentive scheme at the time of tariff revision, as the proceeding would have provided opportunity to public to express their views to enable appropriate changes in incentive scheme or tariff.
>
> 71. After considering the petitioners' proposal and the views expressed before us, the Commission is of the view that no separate scheme is called for at this stage. The need to provide incentive to promote consumption of electricity by large industrial power (LIP) consumers should



> be taken care of by the tariff itself. An incentive which encourages better load factor will serve the purpose. Consequently, an incentive scheme linked to consumption per KVA of contract demand is proposed. Accordingly we direct that the incentive shall be available to all LIP consumers including railways and public water works, and eligibility for incentive shall be as follows:
>
> (i) The annual consumption of the consumer for the current financial year shall not be less than his annual consumption of the previous financial year.
>
> (ii) In respect of new LIP consumers and existing LIP consumers who reduce their contract demand, incentive shall be admissible from the quarter following six months from the date of new connection or reduction of contract demand, as the case may be.
>
> (iii) Consumer should have no arrear outstanding against him.
>
> 72. Incentive shall be allowed to eligible consumers provisionally on quarterly basis provided that consumption during the quarter is not less than his consumption during the corresponding quarter during the previous year. Incentive so allowed shall be subject to final assessment at the end of the year, on year-to-year basis. If consumption of a consumer in any quarter is less than that of the corresponding quarter of the previous year but the annual consumption is more than that of the previous year, he shall be eligible for the incentive for the year as a whole. Incentive shall be as under on energy charges:-
>
> (i) Energy consumption of 250 KWh per month per kVA of contract demand and upto 400 KWh per month per kVA of contract demand. 1.0%

(ii) Energy consumption exceeding 400 KWh per month per kVA of contract demand and upto 550 KWh per month per kVA of contract demand. 4.0%

(iii) Energy consumption in excess of 550 KWh per Month per kVA of contract demand." 7.0%

9. The Tribunal concurred with the above view taken by the Commission and repelled the contention based on the principle of promissory estoppel not only on the ground that there had been no unequivocal representation regarding continuation of the scheme till 31st March, 2007 but also on the ground that there was no material to support the contention that the appellants had indeed made any investment or changed their position to their detriment so as to attract the doctrine of promissory estoppel. In coming to that conclusion the Commission has also relied upon several decisions of this Court to which we have made a mention above. We do not see any perversity in any one of those findings nor do we see any substantial question of law arising in the fact situation of these appeals. We have, therefore, no hesitation in dismissing these appeals on merits although the same have been filed beyond the period stipulated for the purpose under Section 125 of the Electricity Act, 2003.

10. We may before parting mention that in Civil Appeal No.3814 of 2007 filed by DSR Steel (P) Ltd., one of the questions that was urged before us was whether the period of limitation would start running from the date of pronouncement of the order or the date of communication thereof. Relying upon the decision of this Court in *Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission and Ors.* (2010) 5 SCC 23 it was contended on behalf of the respondent that the date on which the order was pronounced would also be the date on which the same is deemed to have been communicated.



11. Section 125 of the Electricity Act, 2003 makes it abundantly clear that the period of limitation commences from the date of communication of the decision or order and not from the date of its pronouncement. As a matter of fact, Rules 94 and 98 of the Rules framed under the Act make a clear distinction between intimation regarding pronouncement of the order on the one hand and the communication of the order so pronounced to the parties on the other. While Rule 94 appears to us to provide for notice of pronouncement of an order, it makes no mention about the 'communication' of such an order as is referred to in Section 125 of the Act. Transmission of the order by the Court Master to the Deputy Registrar of the Tribunal and its onward communication to the parties is dealt with by Rule 98 of the said Rules which communication alone can be construed as a communication for purposes of Section 125 of the Electricity Act, 2003. The decision of this Court in the *Chattisgarh State Electricity Board's* case (supra) may in that view require reconsideration if the same were to be understood to be laying down that the date of pronouncement is also the date of communication of the order. We would have, in the ordinary course, made a reference to a larger Bench for that purpose but having regard to the fact that we have dismissed the appeals on merits, we consider it unnecessary to do so in the present case.

12. So also the question whether an order passed by the Tribunal in appeal merges with an order by which the Tribunal has dismissed an application for review of the said order was argued before us at some length. Learned counsel for the appellants contended that since a review petition had been filed by two of the appellants namely, J.K. Industries Ltd. (Now known as J.K. Tyres and Industries Ltd.) and J.K. Laxmi Cement Ltd. in this case, the orders made by the Tribunal dismissing the appeals merged with the orders passed by it in the said review applications so that it is only the order dismissing the review application that was appealable before this Court. If that were

so the period of limitation could be reckoned only from the date of the order passed in the review applications.

13. Different situations may arise in relation to review petitions filed before a Court or Tribunal. One of the situations could be where the review application is allowed, the decree or order passed by the Court or Tribunal is vacated and the appeal/proceedings in which the same is made are re-heard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the Court hearing the review petition. The second situation that one can conceive of is where a Court or Tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review reversed or modified. Such an order shall then be a composite order whereby the Court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for purposes of a further appeal, if any, maintainable under law.

14. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or Court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursing the remedy by way



of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.

15. The decisions of this Court in *Manohar S/o Shankar Nale and Ors. v. Jaipalsing S/o Shivalalsing Rajput* (2008) 1 SCC 520 in our view, correctly settle the legal position. The view taken in *Sushil Kumar Sen v. State of Bihar* (1975) 1 SCC 774 and *Kunhayammed and Ors. v. State of Kerala & Anr.* (2000) 6 SCC 359, wherein the former decision has been noted, shall also have to be understood in that light only.

16. In the result, we dismiss these appeals as no substantial question of law arises for our consideration. The respondent shall also be entitled to cost of Rs.20,000/- in each case to be deposited in the SCBA Lawyers' Welfare Fund within six weeks from today.

K.K.T. Appeals dismissed.