DROPTI DEVI & ANR.
V.
UNION OF INDIA & ORS.
(Writ Petition (Crl.) No. 65 of 2010)

JULY 2, 2012

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

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 – s. 3(1) – Constitutional validity of, to the extent it empowers the competent Authority to make an order of detention against any person with a view to prevent him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange – Held: If the activity of any person is prejudicial to the conservation or augmentation of foreign exchange, the authority is empowered to make a detention order against such person and the Act does not contemplate that such activity should be an offence – The whole intent and idea behind the Act is to prevent violation of foreign exchange regulations or smuggling activities having serious and deleterious effect on the national economy – There is no constitutional mandate that preventive detention cannot exist for an act where such act is not a criminal offence and does not provide for punishment – An act may not be declared as an offence under law but still for such an act, which is an illegal activity, the law can provide for preventive detention if such act is prejudicial to the State security – Essential concept of preventive detention is not to punish a person for what he has done but to prevent him from doing an illegal activity prejudicial to the security of the State – Thus, the constitutional validity of impugned part of s. 3(1) upheld.

Detention order was passed in respect of second petitioner by the Joint Secretary to the Government of India, specially empowered under Section 3(1) of the

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended), for indulging in hawala activities. The first petitioner (mother of detenue) filed a writ petition before the High Court challenging the detention order. The Division Bench of the High Court by an interim order directed that the detenue would not be arrested till the next date of hearing and the said order was later made absolute. Thereafter, the Division Bench of the High Court dismissed the writ petition holding that if the activity of any person was prejudicial to the conservation or augmentation of foreign exchange, the authorities were empowered to make a detention order against such person. Aggrieved, the petitioners filed Special Leave Petition. During the pendency, the petitioners filed the instant writ petition. Thereafter, the writ petition was detagged from special leave petition. Thus, the instant writ petition.

The petitioners challenged the constitutional validity of COFEPOSA on the ground that on repeal of Foreign Exchange Regulation Act, 1973 and enactment of Foreign Exchange Management Act, 1999 (did not regard its violation of criminal offence) an act where no punitive detention (arrest and prosecution) is even contemplated or provided under law, such an act cannot be made the basis for preventive detention and any law declaring it to be prejudicial to the interest of the State so as to invoke the power of preventive detention is violative of Articles 14, 19 and 21 of the Constitution and must be struck down.

Dismissing the writ petition and the criminal miscellaneous application, the Court

HELD: 1.1. The importance of foreign exchange in the development of a country needs no emphasis. The Foreign Exchange Management Act, 1999 regulates the

foreign exchange. The conservation and augmentation of foreign exchange continues to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardizing the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non-compliance results in civil imprisonment of the defaulter. The whole intent and idea behind Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is to prevent violation of foreign exchange regulations or smuggling activities which have serious and deleterious effect on the national economy. In today's world the physical and geographical invasion may be difficult but it is easy to imperil the security of a State by disturbing its economy. The smugglers and foreign exchange manipulators by flouting the regulations and restrictions imposed by FEMA-by their misdeeds and misdemeanours-directly affect the national economy and thereby endanger the security of the country. In this situation, the distinction between acts where punishments are provided and the acts where arrest and prosecution are not contemplated pales into insignificance. It must be remembered that the person who violates foreign exchange regulations or indulges in smuggling activities succeeds in frustrating the development and growth of the country. His acts and omissions seriously affect national economy. Therefore, the relevance of provision for preventative detention of the anti-social elements indulging in smuggling and violation and manipulation of foreign exchange in COFEPOSA continues even after repeal of Foreign Exchange Regulation Act, 1973. [Para 58] [351-E-H; 352-A-C]

1.2. The menace of smuggling and foreign exchange violations has to be curbed. Notwithstanding the many disadvantages of preventive detention, particularly in a

country like ours where right to personal liberty has been placed on a very high pedestal, the Constitution has adopted preventive detention to prevent the greater evil of elements imperiling the security, the safety of State and the welfare of the Nation. [Para 59] [352-D-E]

1.3. On the touchstone of constitutional jurisprudence, as reflected by Article 22 read with Articles 14, 19 and 21, the impugned provision is not rendered unconstitutional. There is no constitutional mandate that preventive detention cannot exist for an act where such act is not a criminal offence and does not provide for punishment. An act may not be declared as an offence under law but still for such an act, which is an illegal activity, the law can provide for preventive detention if such act is prejudicial to the state security. After all, the essential concept of preventive detention is not to punish a person for what he has done but to prevent him from doing an illegal activity prejudicial to the security of the State. Strictly speaking, preventive detention is not regulation (many people call it that way), it is something much more serious as it takes away the liberty of a person but it is accepted as a necessary evil to prevent danger to the community. The law of preventative detention arms the State with precautionary action and must be seen as such. The safeguards that the Constitution and preventive detention laws provide must be strictly insisted upon whenever the Court is called upon to examine the legality and validity of an order of preventive detention. If the activity of any person is prejudicial to the conservation or augmentation of foreign exchange, the authority is empowered to make a detention order against such person and the Act does not contemplate that such activity should be an offence. [Paras 60, 61] [352-F-H; 353-A-B, F]

Union of India and Anr. vs. Venkateshan S. and Anr. **(2002) 5 SCC 285: 2002 (3) SCR 268 – relied on.**

1.4. It is too naive to suggest that in today's economic scenario of abundant foreign exchange and booming foreign trade, contravention of foreign exchange laws does not pose any threat to the national interest for which a person has to be detained. Thus, there is no merit in challenge to the constitutional validity of impugned part of Section 3(1) of COFEPOSA. [Paras 62 and 63] [353-G-H; 354-A]

1.5 The prayer made in the criminal miscellaneous application by the petitioners to quash the detention order cannot be granted. While dismissing the special leave petition as withdrawn, this Court granted liberty to the petitioners to avail such remedy as may be available in law in challenging the order of detention and the grounds on which detention order has been passed after its execution. The order of detention has not been executed so far in view of the contumacious conduct of the second petitioner. He is alleged to have absconded initially. Then on December 14, 2009 High Court, by an interim order directed that the detenue shall not be arrested till the next date of hearing, i.e. December 22, 2009. The said interim order was continued until the disposal of writ petition by the High Court and thereafter, that interim order was continued by this Court in the special leave petition. In the writ petition also an interim order has been in operation. In view of the order dated July 13, 2010 passed by this Court, the petitioners cannot be permitted to challenge the order of detention until its execution. Thus, the leave to make additional prayer for quashing the detention order by means of criminal miscellaneous application is rejected. However, it is clarified that after the execution of the detention order, the petitioners would be at liberty to challenge the detention order in accordance with law. [Paras 65, 66 and 67] [354-C, G-H; 355-A-D]

1.6. Since the criminal miscellaneous application is rejected, the argument that the impugned order of

detention was passed way back on September 23, 2009; the impugned order was preventive in nature and the maximum period of detention as per law is one year, which would have lapsed by now and, therefore, no purpose for the execution of the detention order survives, is rejected. The detention order could not be executed because of the contumacious conduct of the second petitioner and, therefore, he cannot take advantage of his own wrong. [Para 68] [355-E-F]

Motor General Traders and Anr. v. State of Andhra Pradesh and Ors. **(1984) 1 SCC 222: 1984 (1) SCR 594;** *John Vallamattom and another v. Union of India* **(2003) 6 SCC 611: 2003 (1) Suppl. SCR 638;** *Satyawati Sharma (Dead) by LRs. v. Union of India and Anr.* **(2008) 5 SCC 287: 2008 (6) SCR 566;** I.R. Coelho (Dead) by LRs. v. State of T.N. **(2007) 2 SCC 1: 2007 (1) SCR 706;** *State of Bombay v. Atma Ram Sridhar Vaidya* **1951 SCR 167;** *Bhut Nath Mete v. The State of West Bengal* **(1974) 1 SCC 645: 1974 (3) SCR 315;** *Haradhan Saha v. The State of West Bengal and Ors.* **(1975) 3 SCC 198: 1975 (1) SCR 778;** *Kanchanlal Maneklal Chokshi v. State of Gujarat and Ors.* **(1979) 4 SCC 14: 1980 (1) SCR 54;** *Smt. Hemlata Kantilal Shah v. State of Maharashtra and Anr.* **(1981) 4 SCC 647: 1982 (1) SCR 1028;** *State of Punjab v. Sukhpal Singh* **(1990) 1 SCC 35: 1989 (1) Suppl. SCR 420;** *Rekha v. State of Tamil Nadu Through Secretary to Government and Anr.***(2011) 5 SCC 244: 2011 (4) SCR 740;;** *Attorney General for India and Ors. v. Amratlal Prajivandas and Ors.* **(1994) 5 SCC 54: 1994 (1) Suppl. SCR 1;** *A.K. Gopalan v. The State of Madras* **1950 SCR 88;** *Khudiram Das v. The State of West Bengal and Ors.* **(1975) 2 SCC 81:1975 (2) SCR 832;** *Additional Secretary to the Government of India and Ors. v. Smt. Alka Subhash Gadia and Anr.* **1992 Suppl (1) SCC 496: 1990 (3) Suppl. SCR 583;** *Sunil Fulchand Shah v. Union of India and Ors.* **(2000) 3 SCC 409: 2000 (1) SCR 945;** *R.K. Garg v. Union of India and Ors.* **(1981) 4 SCC 675: 1982 (1) SCR 947;** *Kesavananda Bharati*

Sripadagalvaru v. State of Kerala and Anr. **(1973) 4 SCC 225;** *Indira Nehru Gandhi v. Shri Raj Narain* **(1975) Supp SCC 1:** *Minerva Mills Limited and Ors. v. Union of India and Ors.* **(1980) 3 SCC 625: 1981 (1) SCR 206;** *Waman Rao and Ors. v. Union of India and Ors.* **(1981) 2 SCC 362: 1981 (2) SCR 1;** *Maharao Sahib Shri Bhim Singhji v. Union of India and Ors.* **(1981) 1 SCC 166 – referred to.**

United States v. Anthony Salemo and Vincent Cafaro **481 US 739– referred to.**

"The Limits of Preventive Detention" by Rinat Kitai Sangero **2009 p 904-932 – referred to.**

Case Law Reference:

1984 (1) SCR 594	**Referred to.**	**Para 16**
2003 (1) Suppl. SCR 638	**Referred to.**	**Para 16**
2008 (6) SCR 566	**Referred to.**	**Para 16**
2007 (1) SCR 706	**Referred to.**	**Para 17**
1951 SCR 167	**Referred to.**	**Para 18**
1974 (3) SCR 315	**Referred to.**	**Para 18**
1975 (1) SCR 778	**Referred to.**	**Para 18**
1980 (1) SCR 54	**Referred to.**	**Para 18**
1982 (1) SCR 1028	**Referred to.**	**Para 18**
1989 (1) Suppl. SCR 420	**Referred to.**	**Para 18**
2011 (4) SCR 740	**Referred to.**	**Para 18**
481 US 739	**Referred to.**	**Para 21**
1994 (1) Suppl. SCR 1	**Referred to.**	**Para 24**
1950 SCR 88	**Referred to.**	**Para 37**
1975 (2) SCR 832	**Referred to.**	**Para 40**
1990 (3) Suppl. SCR 583	**Referred to.**	**Para 43**
2000 (1) SCR 945	**Referred to.**	**Para 45**
1982 (1) SCR 947	**Referred to.**	**Para 49**
1973 (4) SCC 225	**Referred to.**	**Para 51**
(1975) Supp SCC 1	**Referred to.**	**Para 51**
1981 (1) SCR 206	**Referred to.**	**Para 51**
1981 (2) SCR 1	**Referred to.**	**Para 51**
(1981) 1 SCC 166	**Referred to.**	**Para 51**
2002 (3) SCR 268	**Relied on.**	**Para 61**

CRIMINAL ORIGINAL JURSIDICTION : Writ Petition (Crl) No. 65 of 2010.

Under Article 32 of the Constitution of India.

Vikram Chaudhari, Nikhil Jain, Preeti Singh, Gagan Deep Sharma for the Petitioners.

P.P. Malhotra, ASG, R.P. Bhatt, Ranjana Narayan, Wasim Quadri, Arvind K. Sharma for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The central issue in this petition under Article 32 of the Constitution concerns constitutional validity of Section 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, 'COFEPOSA') to the extent it empowers the competent authority to make an order of detention against any person 'with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange'.

2. It is necessary to state few material facts which have

given rise to this petition. The first petitioner – Dropti Devi – is the mother of second petitioner – Raj Kumar Aggarwal. In respect of second petitioner an order of detention has been passed on September 23, 2009 by Smt. Rasheda Hussain, Joint Secretary to the Government of India, specially empowered under Section 3(1) of the COFEPOSA (as amended). The said order reads as follows :

"No. 673/02/2009-Cus. VIII
Government of India
Ministry of Finance
Department of Revenue
Central Economic Intelligence Bureau
COFEPOSA Unit
6th Floor, 'B' Wing, Janpath Bhawan,
Janpath, New Delhi – 110001

Dated 23rd September, 2009

ORDER

Whereas, I Smt. Rasheda Hussain, Joint Secretary to the Government of India, specially empowered under Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (as amended), am satisfied with respect to the person known as Shri Raj Kumar Aggarwal @ Munna, R/o SU-184, G.F. Near Park Citi Hostel Pitampura, New Delhi that with a view to preventing him from acting in any manner prejudicial to the conservation and augmentation of foreign exchange in future, it is necessary to make the following order:-

Now, therefore, in exercise of the powers conferred by Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended), I direct that the said Shri Raj Kumar Aggarwal @ Munna , be detained and kept in custody in the Central Jail, Tihar, New Delhi.

Sd/-
(Rasheda Hussain)
Joint Secretary to the Government of India"

3. The above detention order came to be passed in the backdrop of the following events. On February 17, 2009 the premises of Ambika Electronics situate at 136, MCD Market, Karol Bagh, New Delhi was raided by the Office of the Directorate of Enforcement, New Delhi. In the course of search, Indian currency amounting to Rs. 8.9 lacs (approximately) was recovered along with some documents. The enforcement authorities took into custody the passport of second petitioner (hereinafter referred to as 'detenue') as well. On that day itself, i.e. February 17, 2009 Office of the Directorate of Enforcement also raided the residential premises of detenue's brother Anil Kumar Aggarwal at Pitam Pura, New Delhi and another commercial premises of Ambika Electronics at Beadanpura, Karol Bagh, New Delhi and M/s. Bhagwati Electronics, 135 Municipal Market, Karol Bagh, New Delhi belonging to one Kapil Jindal were also raided. The detenue was also taken away by the officials of the Directorate of Enforcement to their office at Jamnagar House, Akbar Road, New Delhi in the intervening night of February 17, 2009 and February 18, 2009. The detenue was interrogated and his statement was recorded. On February 19, 2009 the detenue retracted from the statement recorded in the previous night. The detenue was summoned on various occasions but he did not appear before the authorities on the ground of his illness. On May 15, 2009 the detenue appeared before the authorities and his statement was recorded on that day and subsequently on May 18, 2009. May 20, 2009 and May 28, 2009. The evidence gathered in the course of searches and the follow up action revealed that the detenue was indulging in hawala activities, the last of such activity being on April 24, 2009. Hence, the detention order which has been quoted above.

4. Initially a writ petition was filed before this Court challenging the detention order but that was withdrawn. The first

petitioner then filed a writ petition before Delhi High Court being W.P. (Crl.) No. 1787 of 2009 challenging the detention order dated September 23, 2009.

5. The Division Bench of the Delhi High Court on December 14, 2009 by an interim order directed that the detenue – Raj Kumar Aggarwal shall not be arrested till the next date of hearing, i.e. December 22, 2009.

6. On December 22, 2009 the Division Bench allowed the application for impleadment of Raj Kumar Aggarwal as petitioner no. 2, issued rule and made interim order dated December 14, 2009 absolute during the pendency of writ petition, subject to his joining the investigation as and when called. The court on that day also issued a direction to the detenue to remain present in the matter during the course of hearing.

7. The Division Bench completed the hearing on February 4, 2010 and reserved the judgment in the matter. On March 18, 2010, the Division Bench dismissed the writ petition. While dealing with the effect of Foreign Exchange Management Act, 1999 (for short, 'FEMA') and the repeal of Foreign Exchange Regulation Act, 1973 (for short, 'FERA') , the Division Bench relied upon a decision of this Court in *Union of India & Anr. vs. Venkateshan S. and another*[1] and observed that if the activity of any person was prejudicial to the conservation or augmentation of foreign exchange, the authorities were empowered to make a detention order against such person.

8. Not satisfied with the judgment of the Delhi High Court passed on March 18, 2010, the petitioners filed a special leave petition before this Court and it was mentioned on April 1, 2010. On that day, the Court directed for listing the matter on April 9, 2010 and in the meanwhile continued the interim order that was passed by the High Court operative during the pendency of the writ petition.

1. (2002) 5 SCC 285.

9. It may be noted here that while the above special leave petition was pending, the petitioners preferred the present writ petition. On May 11, 2010 the Court ordered the writ petition to be heard along with special leave petition (Crl.) no. 2698 of 2010. On May 13, 2010, the special leave petition and the present writ petition were listed before the Court. On that day in the special leave petition following interim order was passed:

> "By order dated December 22, 2009, the High Court directed the Petitioner No. 2 i.e. Mr. Raj Kumar Aggarwal to join the investigation as and when called. The grievance made by the respondents is that Mr. Raj Kumar Aggarwal has failed to join the investigation, which is disputed by Mr. Soli J. Sorabjee, learned senior counsel for the petitioners. Mr. Sorabjee further states that Mr. Raj Kumar Aggarwal will present himself on 19th May, 2010 at 11 A.M. in the office of the Enforcement Director, Delhi Zonal Office, Jamnagar House, New Delhi and shall also remain present before the said officer as and when called along with the requisite documents. Mr. Raj Kumar Aggarwal is directed to comply with and act according to the statement made at the Bar by his learned counsel.
>
> Interim orders shall continue subject to the direction given above.
>
> In view of the order passed above, learned senior counsel for the petitioners seeks permission to withdraw the application for extension of interim order granted by this Court on 1.4.2010. The permission, as prayed for, is granted and application is disposed of accordingly.
>
> On the joint request of the learned counsel of the parties, the matter is adjourned to 13th July, 2010."

10. In the writ petition, notice was issued and it was detagged from special leave petition (Crl.) No. 2698 of 2010.

11. On July 13, 2010, the special leave petition was dismissed as withdrawn. The Court passed the following order:

> "The Special Leave Petition is dismissed as withdrawn.
>
> The petitioners are at liberty to avail such remedy as may be available in law challenging the order of detention and the grounds on which detention order has been passed after its execution. In which event, the matter shall be considered on its own merits uninfluenced by the observations made in the impugned order as well as dismissal of this petition. The High Court may consider the request of the petitioners/detenue for expeditious disposal of the writ petition to be filed."

12. We have heard Mr. Vikram Chaudhari, learned counsel for the petitioners and Mr. P.P. Malhotra, learned Additional Solicitor General for the respondents.

13. The crux of the argument advanced by Mr. Vikram Chaudhari is this: Articles 14, 19 and 21 of the Constitution do not contemplate preventive detention for an 'act' where no punitive detention (arrest and prosecution) is even contemplated or provided under law. Such an 'act' cannot be made the basis for a preventive detention and such an 'act' could not be termed as prejudicial so as to invoke the power of preventive detention and, therefore, Section 3(1) of COFEPOSA to the extent noted above is unconstitutional.

14. Elaborating his arguments, Mr. Vikram Chaudhari submitted that there were three other Central Preventive Acts apart from COFEPOSA, namely, (a) National Security Act, 1980, (b) Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 and (c) Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Act, 1974. In all these three enactments, there are corresponding penal provisions in the form of prosecution. However, in COFEPOSA viz., the power to detain a person to

prevent him from indulging in any prejudicial activities relating to conservation or augmentation of foreign exchange is given although there is no corresponding penal punitive law available. He referred to various provisions of FEMA, particularly, Chapter IV that deals with contravention and penalties; Chapter V that provides for adjudication as well as appeal against the order of adjudicating authority vide Sections 16 and 17; Chapter VI that provides for establishment of Directorate of Enforcement; Section 40 that stipulates that the Central Government may in any peculiar circumstances suspend either indefinitely or for a limited period the operation of all or any of the provisions of FEMA and Section 49 which provides for repeal of FERA and sub-section (3) thereof that envisages that no court shall take cognizance of an offence under the repealed Act and submitted that there was major shift in the approach of the Legislature inasmuch as foreign exchange violation has been made a civil compoundable offence only under FEMA.

15. It was argued by learned counsel for the petitioners that a dichotomy had arisen on repeal of FERA as conviction under FERA would be no longer a relevant basis for initiation of proceedings under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) whereas on the same set of accusations detention order under COFEPOSA could be made thereby warranting proceedings under SAFEMA.

16. Relying on the decisions of this Court in *Motor General Traders and another v. State of Andhra Pradesh and others*[2], *John Vallamattom and another v. Union of India*[3] and *Satyawati Sharma (Dead) by LRs. v. Union of India and another*[4], learned counsel for the petitioners contended that impugned portion of Section 3 might not have been unconstitutional at the initial stage when it was enacted but by

2. (1984) 1 SCC 222.
3. (2003) 6 SCC 611.
4. (2008) 5 SCC 287.

reason of the new legal regime articulated in FEMA and replacement of FERA by FEMA, the said provision has become unconstitutional in the changed situation.

17. Learned counsel for the petitioners submitted that though Article 31B of the Constitution provided protection to the laws added to the Ninth Schedule by amendments but, as exposited by this Court in *I.R. Coelho (Dead) by LRs. v. State of T.N.*[5], constitutionality of such laws can be examined and if in judicial review, it is found that any of such laws abrogates or abridges rights guaranteed by Part-III of the Constitution, the Court can invalidate such law. According to him, since the impugned provision violates fundamental rights reflected in Article 21 read with Articles 14 and 19, despite protection granted to COFEPOSA being part of Ninth Schedule, in the judicial review the Court has power to declare the said law unconstitutional.

18. Mr. Vikram Chaudhari contended that preventive detention was aimed at preventing a person from committing prejudicial act which is necessarily an offence capable of inviting penal consequences. If such prejudicial act was not prosecutable in law and such act has not been made part of criminal penal law, preventive detention of a person from committing the prejudicial act which is not an offence is impermissible. In this regard, he sought to draw support from decisions of this Court in *State of Bombay v. Atma Ram Sridhar Vaidya*[6]; *Bhut Nath Mete v. The State of West Bengal*[7]; *Haradhan Saha v. The State of West Bengal and others*[8]; *Kanchanlal Maneklal Chokshi v. State of Gujarat and others*[9]; *Smt. Hemlata Kantilal Shah v. State of Maharashtra and another*[10]; *State of Punjab v. Sukhpal Singh*[11] and *Rekha v. State of Tamil Nadu Through Secretary to Government and Another*[12].

5. (2007) 2 SCC 1.
6. 1951 SCR 167.
7. (1974) 1 SCC 645.
8. (1975) 3 SC 198.
9. (1979) SCC 14

19. As regards the decision of this Court in Venkateshan S.1, learned counsel submitted that in that case the events which led to the detention of the detenue therein had taken place when FERA was in place and FEMA had not come into force and in view of the sunset clause the prosecution for violation of FERA could continue for next two years and, therefore, the said decision was clearly distinguishable. He further submitted that constitutionality of Conservation of Foreign Exchange (COFE) part of COFEPOSA was not in issue. The Court proceeded on the assumption that the past act which was made basis for preventive detention invited punishment by way of prosecution and decided the matter accordingly. He thus, argued that Venkateshan S.1 did not come in the way of the petitioners in assailing the constitutional validity of part of Section 3 of COFEPOSA.

20. Learned counsel vehemently contended that since FEMA did not regard its violation a criminal offence, the whole idea, spirit, intent and object behind the enactment of preventive detention had ceased to exist and the continuation of such provision was violative of Article 21 read with Articles 14 and 19 of the Constitution. He, thus, submitted that the provision for preventive detention under COFEPOSA was wholly unsustainable and untenable.

21. Mr. Vikram Chaudhari in his written submissions has also dealt with legal position with regard to preventive detention existing in USA, England, Australia and Germany. He referred to the excerpts from "The Limits of Preventive Detention" by Rinat Kitai – Sangero 2009 (Pgs. 904-932) and submitted that

10. (1981) 4 SCC 647.
11. (1990) 1 SCC 35.
12. (2011) 5 SCC 244.

A

in USA and in England law regarding preventive detention does not exist except during war time. He, however, did submit that in *United States v. Anthony Salerno and Vincent Cafaro*[13] the constitutionality of pre-trial detention on the ground of dangerousness under the Bail Reform Act of 1984 was upheld and after *Anthony Salerno and Vincent Cafaro*[13] preventive detention laws were adopted in number of U.S. States but the said procedure has been used sparingly and in U.K. under the Prevention of Terrorism (Temporary Provisions) Act, 1984 a person may be detained upto 7 days. In Australia preventive detention orders and prohibited conduct orders are two mechanisms available under criminal law for addressing terrorism concerns and dangerous sex offenders. The preventive detention order permits detention of a person for a short period of time (upto 48 hours) subject to certain procedural rights. In Germany in 1998 law for the prevention of sexual offences and other dangerous criminal acts has been enacted.

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22. Mr. P. P. Malhotra, learned Additional Solicitor General stoutly defended the constitutional validity of the part of Section 3(1) of COFEPOSA put in issue in the writ petition. He extensively referred to the provisions of FERA and FEMA and the preamble of COFEPOSA and submitted that dealings in foreign exchange by a person other than authorised persons/ dealers have serious and deleterious consequences. The foreign exchange is the most precious reserve for national economy and necessary for the economic security of the State and illegal and/or unaccounted transactions through hawala have vide ramifications and are definitely prejudicial to the conservation and augmentation of foreign exchange and since the need for conservation and augmentation of foreign exchange resources of the country continue to exist, preventive mechanism laid down in COFEPOSA warrants its continuance and there is nothing unconstitutional about it.

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13. 481 US 739.

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23. Learned Additional Solicitor General submitted that the legislative power of the Parliament to enact criminal laws and preventive detention laws was traceable from two distinct Entries appearing in Seventh Schedule (List III) of the Constitution, i.e., Entry nos. 1 and 3 respectively. Parliament is, thus, fully competent to enact a law of either type (criminal or preventive detention) or both the types (criminal laws and preventive detention) to deal with any prejudicial activity. He submitted that there was no constitutional prescription that the Legislature must enact a criminal law as well while making a detention law to curb any prejudicial activity. It is not imperative that detention law should co-exist with a criminal law or vice versa.

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24. Mr. P.P. Malhotra submitted that the constitutional validity of COFEPOSA had already been upheld by a 9-Judge Bench of this Court in *Attorney General for India and others v. Amratlal Prajivandas and others*[14]. In Amratlal Prajivandas14 this Court has held that Parliament was competent to enact COFEPOSA. Once constitutional validity of COFEPOSA has been upheld by a 9-Judge Bench of this Court, learned Additional Solicitor General submitted that constitutionality of Section 3 was not open to challenge again. He submitted that in I.R. Coelho5 a 9-Judge Bench of this Court had observed that if the validity of a Ninth Schedule law had already been upheld by this Court, it would not be open to challenge such law again on the principles laid down in the case (i.e., *I.R. Coelho*[5]). However, if a law held to be violative of any rights in Part-III was subsequently incorporated in the Ninth Schedule after April 24, 1973, such a violation/infraction would be open to challenge on the ground that it was destructive of the basic structure of the Constitution. The present case is not covered by the exception carved out in I.R. Coelho5 and moreover, the petitioners have miserably failed to make out a case as to how COFEPOSA or impugned provision was destructive of the basic structure of the Constitution.

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14. (1994) 5 SCC 54.

25. In support of his submissions, learned Additional Solicitor General heavily relied upon the observations made by this Court in *Venkateshan S.*[1].

26. Mr. P.P. Malhotra submitted that the objects and reasons of COFEPOSA clearly showed that the purpose of the enactment was to prevent violation of foreign exchange regulation and smuggling activities which have increasingly deleterious serious effect on the security of the State. Section 3 of COFEPOSA has not been amended or repealed by Parliament. Section 3(1) of COFEPOSA that authorises detention with a view to prevent activities prejudicial to the conservation or augmentation of foreign exchange is valid from constitutional angle.

27. On 26th day of November, 1949, People of India resolved to constitute India into Sovereign Democratic Republic and in the Constituent Assembly adopted, enacted and gave to themselves an instrument of social contract – the Constitution of India – which became effective from January 26, 1950. The Constitution of India is fountainhead of all laws and provides the machinery by which laws are made. Any statutory law, in order to be valid, must be in conformity with the constitutional requirements. There cannot be any departure or deviation from this principle. For the purposes of the present matter, it is not necessary to deal with the diverse features of the Constitution elaborately, suffice, however, to state that Part III that provides for fundamental rights is the most important chapter insofar as individuals and citizens are concerned.

28. Article 12 for the purposes of Part III defines 'the State'.

29. Article 13(2) mandates that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this provision shall be void to the extent of the contravention.

30. Article 14 states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

31. Article 19 protects certain rights of the citizens. It provides that all citizens shall have the right – (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions or co-operative societies; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India and (g) to practice any profession or to carry on any occupation, trade or business. The above clauses (a), (b), (c), (d), (e) and (g) are, however, subject to restrictions set out in Article 19(2)(3)(4)(5) and (6) respectively.

32. Article 21, which is the most sacrosanct and precious of all other Articles insofar as an individual is concerned, guarantees protection of life and personal liberty. It mandates that no person shall be deprived of his life or personal liberty, except according to procedure established by law.

33. Article 31B saves challenge to the Acts and Regulations specified in the Ninth Schedule on the ground of inconsistency with, taking away or abridging any fundamental right. It was brought into statute by the Constitution (First Amendment) Act, 1951. It reads as follows:

> *"31B. Validation of certain Acts and Regulations.*— Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes way or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court of tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

34. COFEPOSA is specified in the Ninth Schedule at Item No. 104. The amendment in COFEPOSA therein by Central Act 20 of 1976 is specified at Item No. 129 in the Ninth Schedule.

35. Article 22 is in two parts. First part that comprises of clauses 1 and 2 is applicable to those persons arrested or detained under a law otherwise than a preventive detention law. The second part that comprises of clauses 4 to 7 applies to persons arrested or detained under the preventive detention law.

36. In the backdrop of the above constitutional provisions and scheme, the issue with regard to constitutional validity of Section 3(1) of COFEPOSA to the extent it empowers the competent authority to make an order of detention against any person with a view to preventing him from acting in any manner prejudicial to the conservation and augmentation of foreign exchange has fallen for consideration.

37. There appears to be consistent line of cases of this Court beginning from 1950 itself which says that preventive detention can constitutionally operate. In *A.K. Gopalan v. The State of Madras*[15], which was decided by this Court within few months of coming into force of our Constitution, the Court upheld the constitutional validity of Section 3(1) of the Preventive Detention Act, 1950 on the touchstone of Articles 13, 14, 19, 21 and 22 of the Constitution.

38. In *Atma Ram Sridhar Vaidya*[6] , Chief Justice Hari Lal Kania said that preventive detention was not by itself considered an infringement of any of the fundamental rights mentioned in Part III of the Constitution. He, however, clarified that this was, of course, subject to the limitations prescribed in clause (5) of Article 22. Echoing the same sentiment, Patanjali Sastri, J. stated, "the Constitution itself has authorised preventive detention and denied to the subject the right of trial before a court of law and of consulting or being defended by a

15. 1950 SCR 88.

legal practitioner of his choice, providing only certain procedural safeguards, the Court could do no more than construe the words used in that behalf in their natural sense consistently with the nature, purpose and scheme of the measure thus authorised, to ascertain what powers are still left to the court in the matter".

39. A Constitution Bench of this Court in Haradhan Saha8 was concerned with constitutional validity of Maintenance of Internal Security Act, 1971 (for short, 'MISA') which enabled the State and its delegated authority to order preventive detention of a person. The Court articulated the concept of preventive detention in contra- distinction to punitive action in the following words :

> "19. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the Executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a court of law and a detention order under the Act. One is a punitive action and the other is a preventive act. In one case a person is punished to prove his guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in Section 3 of the Act to prevent."

With regard to the rights guaranteed to a detenue under Article 22(5), the Court said, "Article 22(5) shows that law as to detention is necessary. The requirements of that law are to be found in Article 22. Article 22 gives the mandate as to what will happen in such circumstances".

39.1. The Court in para 32 (pg. 208 of the Report) drew distinction between the power of preventive detention and punitive detention thus :

> "32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution."

40. In *Khudiram Das v. The State of West Bengal and others*[16], a four-Judge Bench of this Court held that although a preventive detention law may pass the test of Article 22 yet it has to satisfy the requirements of other fundamental rights such as Articles 14 and 19.

40.1. While dealing with the constitutional validity of MISA, the four-Judge Bench in Khudiram Das16 stated in para 12 (pgs. 93-95 of the Report) as follows :

> "12. The next question which then arises for consideration is whether Section 3 of the Act insofar as it empowers the detaining authority to exercise the power of detention on the basis of its subjective satisfaction imposes unreasonable restrictions on the fundamental rights of the petitioner under clauses (a) to (d) and (g) of Article 19, and is, therefore, ultra vires and void. The view taken by the

16. (1975) 2 SCC 81.

> majority in *A.K. Gopalan v. State of Madras,* (1950) SCR 88, was that Article 22 is a self-contained code, and therefore, a law of preventive detention does not have to satisfy the requirements of Articles 14, 19 and 21. This view came to be considered by this Court in three subsequent decisions to all of which one of us (P. Jaganmohan, Reddy, J.) was a party. In *Rustom Cavasjee Cooper v. Union of India* ((1970) 3 SCR 530) it was held by a majority of Judges, only Ray, J., as he then was, dissenting, that though a law of preventive detention may pass the test of Article 22, it has yet to satisfy the requirements of other fundamental rights such as Article 19. The ratio of the majority judgment in *R.C. Cooper's* case was explained in clear and categorical terms by Shelat, J., speaking on behalf of seven Judges in *Shambhu Nath Sarkar v. State of West Bengal* (1973) 1 SCC 856 . The learned Judge said : [SCC p. 879 : SCC (Cri) p. 641, para 39)
>
> > "In Gopalan case the majority court had held that Article 22 was a self-contained code and therefore a law of preventive detention did not have to satisfy the requirements of Articles 19, 14 and 21. The view of Fazl Ali, J., on the other hand, was that preventive detention was a direct breach of the right under Article 19(a)(d) and that a law providing for preventive detention had to be subject to such judicial review as is obtainable under clause (5) of that Article. In *R.C. Cooper v. Union of India* the aforesaid premise of the majority in Gopalan's case was disapproved and therefore it no longer holds the field. Though Cooper's case dealt with the inter-relationship of Article 19 and Article 31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major

premise of the majority in Gopalan's case to be incorrect."

Subsequently in *Haradhan Saha v. State of West Bengal,* (1975) 3 SCC 198, a Bench of five Judges, after referring to the decisions in *A.K. Gopalan's* case and *R.C. Cooper's* case and pointing out the context in which R.C. Cooper's case held that the acquisition of property directly impinged the right of the bank to carry on business, other than banking, guaranteed under Article 19 and Article 31(2) was not a protection against the infringement of that guaranteed right, proceeded on the assumption that the Act which is for preventive detention has to be tested in regard to its reasonableness with reference to Article 19. That decision accepted and applied the ratio in *Shambhu Nath Sarkar's* case as well as R.C. Cooper case to both of which Ray, C.J., was a party. This question, thus, stands concluded and a final seal is put on this controversy and in view of these decisions, it is not open to any one now to contend that a law of preventive detention, which falls within Article 22, does not have to meet the requirement of Article 14 or Article 19. Indeed, in Haradhan Saha's case this Court proceeded to consider the challenge of Article 19 to the validity of the Act and held that the Act did not violate any of the constitutional guarantees embodied in Article 19 and was valid. Since this Court negatived the challenge to the validity of the Act on the ground of infraction of Article 19 and upheld it as a valid piece of legislation in *Haradhan Saha's* case, the petitioner cannot be permitted to reagitate the same question merely on the ground that some argument directed against the constitutional validity of the Act under Article 19 was not advanced or considered by the Court in that case. The decision in Haradhan Saha's case must be regarded as having finally laid at rest any question as to the constitutional validity of the Act on the ground of challenge under Article 19."

41. In *Smt. Hemlata Kantilal Shah*[10] while dealing with detention of the petitioner's husband under Section 3(1) of COFEPOSA and the diverse submissions made on behalf of the petitioner, the Court held that prosecution or the absence of it was not an absolute bar to an order of preventive detention. It was further held: "but, if there be a law of preventive detention empowering the authority to detain a particular offender in order to disable him to repeat his offences, it can do so, but it will be obligatory on the part of the detaining authority to formally comply with the provisions of Article 22(5) of the Constitution".

42. The necessity of preventive detention was succinctly explained by a two-Judge Bench of this Court in *Sukhpal Singh*[11]. In that case, the Court was concerned with detention of the respondent's father under Section 3(2) of the National Security Act, 1980 read with Section 14A as inserted by National Security (Amendment) Act, 1987. In paragraphs 8 and 9 (pgs. 42 - 44 of the Report) this Court held :

"8..........A clear distinction has to be drawn between preventive detention in which anticipatory and precautionary action is taken to prevent the recurrence of apprehended events, and punitive detention under which the action is taken after the event has already happened. It is true that the ordinary criminal process of trial is not to be circumvented and short-circuited by apparently handy and easier resort to preventive detention......

.......To apply what was said in Rex v. Halliday, ex parte Zadig (1917 AC 260), one of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to commit what is enumerated in Section 3 of the Act. No crime is charged. The question is whether a particular person is disposed to commit the prejudicial acts. The duty of deciding this question is thrown upon the State. The justification is

suspicion or reasonable probability and not criminal charge which can only be warranted by legal evidence. It is true that in a case in which the liberty of such person is concerned we cannot go beyond natural construction of the statute. It is the duty of this Court to see that a law depriving the person of his liberty without the safeguards available even to a person charged with crime is strictly complied with. We have, however, to remember that individual liberty is allowed to be curtailed by an anticipatory action only in interest of what is enumerated in the statute."

9. ….. As we have already seen the power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is precautionary power exercised reasonably in anticipation and may or may not relate to an offence. It cannot be considered to be a parallel proceeding. The anticipated behaviour of a person based on his past conduct in the light of surrounding circumstances may provide sufficient ground for detention….".

43. A three-Judge Bench of this Court in Additional Secretary to the *Government of India and others v. Smt. Alka Subhash Gadia and another*[17], was concerned with a criminal appeal preferred by Government of India and its authorities against the judgment of the Bombay High Court which quashed the detention order of the husband of the first respondent issued under Section 3(1) of COFEPOSA. The Court framed the principle question of law: 'whether the detenue or anyone on his behalf is entitled to challenge the detention order without the detenue submitting or surrendering to it'. It was held that the provisions of Articles 21 and 22 read together make it clear that a person can be deprived of his life or personal liberty according to procedure established by law, and if the law made for the purpose is valid, the person who is deprived of his life or liberty has to challenge his arrest or detention, as the case

17. 1992 Suppl (1) SCC 496.

may be, according to the provisions of the law under which he is arrested or detained. The Court further observed: "what is necessary to remember for our purpose is that the Constitution permits both punitive and preventive detention provided it is according to procedure established by law made for the purpose and if both the law and the procedure laid down by it, are valid".

44. A nine-Judge Bench of this Court in *Amratlal Prajivandas*[14] was directly concerned with constitutional validity of COFEPOSA. One of the issues before the Court was whether Parliament was not competent to enact that Act. We shall refer to this judgment a little later as it has substantial bearing on the matter under consideration and requires detailed reference.

45. In *Sunil Fulchand Shah v. Union of India and others*[18], the view of this Court on the question of law under consideration was not unanimous. Chief Justice Dr. A.S. Anand speaking for majority noted: "personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanizing the harsh authority over individual liberty. Since, preventive detention is a form of precautionary State action, intended to prevent a person from indulging in a conduct, injurious to the society or the security of the State or public order, it has been recognised as "a necessary evil" and is tolerated in a free society in the larger interest of security of the State and maintenance of public order. However, the power being drastic, the restrictions placed on a person to preventively detain must, consistently with the effectiveness of detention, be minimal. In a democracy governed by the rule of law, the drastic power to detain a person without trial for security of the State

18. (2000) 3 SCC 409.

and/or maintenance of public order, must be strictly construed. This Court, as the guardian of the Constitution, though not the only guardian, has zealously attempted to preserve and protect the liberty of a citizen. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation".

45.1. In the minority opinion, G.T. Nanavati, J. although differed with the view of majority on the question of law but he also noted: "the distinction between preventive detention and punitive detention has now been well recognised. Preventive detention is qualitatively different from punitive detention/sentence. A person is preventively detained without a trial but punitive detention is after a regular trial and when he is found guilty of having committed an offence. The basis of preventive detention is suspicion and its justification is necessity. The basis of a sentence is the verdict of the court after a regular trial. When a person is preventively detained his detention can be justified only so long as it is found necessary".

46. In the case of Venkateshan S.1 , a two-Judge Bench of this Court was concerned with the judgment and order of the Karnataka High Court whereby it quashed and set aside the detention order passed by the Joint Secretary, Ministry of Finance, Department of Revenue, Government of India under Section 3(1) of COFEPOSA on the ground that what was considered to be a criminal violation of FERA has ceased to be so on the repeal of FERA which is replaced by FEMA. The Court considered the two situations of preventive detention contemplated by COFEPOSA, the objectives of FEMA and the repeal of FERA and discussed the matter thus:

"8. Hence, the limited question would be — whether a person who violates the provisions of FEMA to a large extent can be detained under the preventive detention Act, namely, the COFEPOSA Act. As stated above, the object

of FEMA is also promotion of orderly development and maintenance of foreign exchange market in India. Dealing in foreign exchange is regulated by the Act. For violation of foreign exchange regulations, penalty can be levied and such activity is certainly an illegal activity, which is prejudicial to conservation or augmentation of foreign exchange. From the objects and reasons of the COFEPOSA Act, it is apparent that the purpose of the Act is to prevent violation of foreign exchange regulations or smuggling activities which are having increasingly deleterious effect on the national economy and thereby serious effect on the security of the State. Section 3 of the COFEPOSA Act, which is not amended or repealed, empowers the authority to exercise its power of detention with a view to preventing any person inter alia from acting in any manner prejudicial to the conservation or augmentation of foreign exchange. If the activity of any person is prejudicial to the conservation or augmentation of foreign exchange, the authority is empowered to make a detention order against such person and the Act does not contemplate that such activity should be an offence.

9. The COFEPOSA Act contemplates two situations for exercise of power of preventive detention — (a) to prevent violation of foreign exchange regulations; and (b) to prevent smuggling activities. Under Section 2(e) of the COFEPOSA Act, "smuggling" is to be understood as defined under clause (39) of Section 2 of the Customs Act, 1962 which provides that "smuggling" in relation to any act or omission will render such goods liable to confiscation under Section 111 or Section 113. Section 111 contemplates confiscation of improperly imported goods and Section 113 contemplates confiscation of goods attempted to be improperly exported. This has nothing to do with the penal provisions i.e. Sections 135 and 135-A of the Customs Act which provide for punishment of an offence relating to smuggling activities. Hence, to contend

that for exercising power under the COFEPOSA Act for detaining a person, he must be involved in criminal offence is not borne out by the said provisions.

10. The other important aspect is that the COFEPOSA Act and FEMA occupy different fields. The COFEPOSA Act deals with preventive detention for violation of foreign exchange regulations and FEMA is for regulation and management of foreign exchange through authorised person and provides for penalty for contravention of the said provisions. The object as stated above is for promoting orderly development and maintenance of foreign exchange market in India. Preventive detention law is for effectively keeping out of circulation the detenu during a prescribed period by means of preventive detention (*Poonam Lata v. M.L. Wadhawan,* (1987) 3 SCC 347). The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community (*Khudiram Das v. State of W.B.,* (1975) 2 SCC 81). The Constitution Bench while dealing with the constitutional validity of the Maintenance of Internal Security Act, 1971 (MISA), in *Haradhan Saha v. State of W.B.,* (1975) 3 SCC 198, held: (SCC pp. 208-09, paras 32-33)

> "32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.
>
> 33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu."

In light of the above reasoning, the Court while setting aside the order of the High Court held, "in our view the order passed by the High Court holding that what was considered to be the criminal violation of FERA has ceased to be criminal offence under FEMA, the detention order cannot be continued after 1-6-2000, cannot be justified".

47. The Constitution recognizes preventive detention though it takes away the liberty of a person without any enquiry or trial. Preventive detention results in negation of personal liberty of an individual; it deprives an individual freedom and is not seen as compatible with rule of law, yet the framers of the Constitution placed the same in Part III of the Constitution. While giving to an individual the most valuable right – personal liberty – and also providing for its safeguard, the Constitution has perceived preventive detention as a potential solution to prevent the danger to the state security. The security of the State being the legitimate goal, this Court has upheld the power of the Parliament and State Legislatures to enact laws of preventive detention. The Court has time and again given the expression 'personal liberty' its full significance and asserted how valuable, cherished, sacrosanct and important the right of liberty given

to an individual in the Constitution was and yet legislative power to enact preventive detention laws has been upheld in the larger interest of state security.

48. The power of Parliament to enact a law of preventive detention for reasons connected with (a) defence, (b) foreign affairs, (c) security of India; (d) security of State, (e) maintenance of public order or (f) the maintenance of supplies and services essential to the community, is clearly traceable to Article 22, Article 246 and Schedule Seven, List I Entry 9 and List III Entry 3. With specific reference to COFEPOSA, a nine-Judge Bench of this Court in Amratlal Prajivandas14 has held that the enactment was relatable to Entry 3 of List III inasmuch as it provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community besides Entry 9 of List I. In the words of this Court (para 23 pg. 73 of the Report):

> "…COFEPOSA is clearly relatable to Entry 3 of List III inasmuch as it provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community besides Entry 9 of List I……."

49. In *Amratlal Prajivandas*[14] constitutionality of COFEPOSA was directly in issue. The Court made the following weighty prefatory remarks in paragraph 1 (pg. 62 of the Report) highlighting the importance of regulation and control of foreign exchange:

> "Till the wind of liberalisation started blowing across the Indian economic landscape over the last year or two, the Indian economy was a sheltered one. At the time of Independence, India did not have an industrial base worth the name. A firm industrial base had to be laid. Heavy industry was the crying need. All this required foreign exchange. The sterling balances built up during World War II were fast dissipating. Foreign exchange had to be conserved, which meant prohibition of import of several unessential items and close regulation of other imports. It was also found necessary to raise protective walls to nurture and encourage the nascent industries. These controls had, however, an unfortunate fall-out. They gave rise to a class of smugglers and foreign exchange manipulators who were out to frustrate the regulations and restrictions — profit being their sole motive, and success in life the sole earthly judge of right and wrong. As early as 1947, the Central Legislature found it necessary to enact the Foreign Exchange Regulation Act, 1947 and Imports and Exports (Control) Act, 1947. Then came the Import (Control) Order, 1955 to place the policy regarding imports on a surer footing. In the year 1962, a new Customs Act replaced the antiquated Sea Customs Act, 1878. The menace of smuggling and foreign exchange violations, however, continued to rise unabated. Parliament then came forward with the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA). It provided for preventive detention of these antisocial elements".

The Court in paragraphs 3 to 7 referred to COFEPOSA, SAFEMA and FERA, the amendments carried out in these Acts, and the constitutional protection given to COFEPOSA and SAFEMA. The preamble and the provisions of COFEPOSA were noted in paragraphs 9 to 14. The provisions of SAFEMA were noted in paragraphs 15 to 19. In paragraph 20 (pg. 71 of the Report) , the Court made following clarificatory observations:

> "……Though a challenge to the constitutional validity of 39th, 40th and 42nd Amendments to the Constitution was levelled in the writ petitions on the ground that the said Amendments — effected after the decision in *Kesavananda Bharati v. State of Kerala,* (1973) 4 SCC 225) — infringe the basic structure of the Constitution, no

A serious attempt was made during the course of arguments to substantiate it. It was generally argued that Article 14 is one of the basic features of the Constitution and hence any constitutional amendment violative of Article 14 is equally violative of the basic structure. This simplistic argument overlooks the raison d'etre of Article 31-B — at any rate, B its continuance and relevance after Bharati — and of the 39th and 40th Amendments placing the said enactments in the Ninth Schedule. Acceptance of the petitioners' argument would mean that in case of post-Bharati constitutional amendments placing Acts in the Ninth C Schedule, the protection of Article 31-B would not be available against Article 14. Indeed, it was suggested that Articles 21 and 19 also represent the basic features of the Constitution. If so, it would mean a further enervation of Article 31-B. Be that as it may, in the absence of any effort D to substantiate the said challenge, we do not wish to express any opinion on the constitutional validity of the said Amendments. We take them as they are, i.e., we assume them to be good and valid. We must also say that no effort has also been made by the counsel to establish E in what manner the said Amendment Acts violate Article 14."

Then, in paragraph 21, the Court observed that COFEPOSA was a law relating to preventive detention and it has, therefore, to conform to the provisions in clauses (4) to (7) of Article 22. F The Court quoted following observations in *R.K. Garg v. Union of India & Ors.*[19]:

"The court must always remember that 'legislation is directed to practical problems, that the economic G mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'; 'that H

19. (1981) 4 SCC 675.

A exact wisdom and nice adaptation of remedy are not always possible' and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one B may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The C courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Roig Refining Co., 94 L.Ed. 381, be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a D ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, E it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse F of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex G economic issues."

(emphasis added)

In the above backdrop, the Court considered the question, H whether Parliament was not competent to enact COFEPOSA

and SAFEMA in paragraph 23 (pgs. 73-74 of the Report) as follows:

> "23. It is argued for the petitioners that COFEPOSA is not relatable to Entry 9 of List I of the Seventh Schedule to the Constitution inasmuch as the preventive detention provided therefor is not for reasons connected with defence, foreign affairs or security of India. Even Entry 3 of List III, it is submitted, does not warrant the said enactment. So far as SAFEMA is concerned, it is argued, it is not relatable to any of the Entries 1 to 96 in List I or to any of the Entries in List III. We are not prepared to agree. COFEPOSA is clearly relatable to Entry 3 of List III inasmuch as it provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community besides Entry 9 of List I. While Entry 3 of List III speaks of "security of a State", Entry 9 of List I speaks of "security of India". Evidently, they are two distinct and different expressions. "Security of a State" is a much wider expression. A State with a weak and vulnerable economy cannot guard its security well. It will be an easy prey to economic colonisers. We know of countries where the economic policies are not dictated by the interest of that State but by the interest of multinationals and/or other powerful countries. A country with a weak economy is very often obliged to borrow from International Financial Institutions who in turn seek to dictate the economic priorities of the borrowing State — it is immaterial whether they do so in the interest of powerful countries who contribute substantially to their fund or in the interest of their loan. In the modern world, the security of a State is ensured not so much by physical might but by economic strength — at any rate, by economic strength as much as by armed might. It is, therefore, idle to contend that COFEPOSA is unrelated to the security of the State. Indeed in the very preamble to the Act, Parliament states that the violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy thereby casting serious adverse effect on the security of the State. Be that as it may, it is not necessary to pursue this line of reasoning since we are in total agreement with the approach evolved in Union of India v. H.S. Dhillon, (1971) 2 SCC 779 — a decision by a Constitution Bench of seven Judges. The test evolved in the said decision is this in short: Where the legislative competence of Parliament to enact a particular statute is questioned, one must look at the several entries in List II to find out (applying the well-known principles in this behalf) whether the said statute is relatable to any of those entries. If the statute does not relate to any of the entries in List II, no further inquiry is necessary. It must be held that Parliament is competent to enact that statute whether by virtue of the entries in List I and List III or by virtue of Article 248 read with Entry 97 of List I. In this case, it is not even suggested that either of the two enactments in question are relatable to any of the entries in List II. If so, we need not go further and enquire to which entry or entries do these Acts relate. It should be held that Parliament did have the competence to enact them."

The Court concluded that Parliament did have the competence to enact COFEPOSA and SAFEMA.

50. The constitutionality of COFEPOSA has been already upheld by a nine-Judge Bench of this Court. Its constitutionality is again sought to be assailed by the petitioners in the present matter on the ground that with the change of legal regime by repeal of FERA and enactment of FEMA (the provisions contained in FEMA did not regard its violation a criminal offence) the intent and object behind the enactment of preventive detention in COFEPOSA had ceased to exist and continuation of impugned provision in COFEPOSA was violative of Article 21 read with Articles 14 and 19 of the Constitution.

51. In *I.R. Coelho*[5], this Court had an occasion to consider the power of judicial review in relation to the Acts falling under the Ninth Schedule. After discussing *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.*[20], *Indira Nehru Gandhi v. Shri Raj Narain*[21], *Minerva Mills Limited and others v. Union of India and others*[22], *Waman Rao and others v. Union of India and others*[23] and *Maharao Sahib Shri Bhim Singhji v. Union of India and others*[24] and relevant Articles of the Constitution, particularly, Article 31B and 368, in paragraph 131, the Court referred to the decision in Amratlal Prajivandas14 . With regard to decision in Amratlal Prajivandas14 in paragraph 132, the Court held : "It is evident from the aforenoted passage that the question of violation of Articles 14, 19 or 21 was not gone into. The Bench did not express any opinion on those issues. No attempt was made to establish violation of these provisions. In para 56, while summarising the conclusion, the Bench did not express any opinion on the validity of the Thirty-ninth and Fortieth Amendment Acts to the Constitution of India placing COFEPOSA and SAFEMA in the Ninth Schedule. These Acts were assumed to be good and valid. No arguments were also addressed with respect to the validity of the Forty-second Amendment Act".

51.1. The Court affirmed the view taken in *Waman Rao*[24] that the Acts inserted in the Ninth Schedule after April 24, 1973 would not receive full protection.

51.2. In paragraph 151 (pg. 111 of the Report), the Court recorded its conclusions. Clauses (iii) and (v) thereof are relevant for the present purposes which read as follows:

20. (1973) 4 SCC 225.

21. (1975) Supp SCC 1.

22. (1980) 3 SCC 625.

23. (1981) 2 SCC 362.

24. (1981) 1 SCC 166.

"(iii) All amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

(v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24-4-1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder."

52. Para 151(v) in *I.R. Coelho*[5] leaves no manner of doubt that where the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by the judgment. The constitutional validity of COFEPOSA has already been upheld by this Court in *Amratlal Prajivandas*[14] and, therefore, it is not open for challenge again. On this ground alone the challenge to the constitutional validity of the impugned provision must fail. Despite this, we intend to consider the forceful submission made by the learned counsel for the petitioners that on repeal of FERA and enactment of FEMA (FEMA did not regard its violation of criminal offence) an act where no punitive detention (arrest and prosecution) is even contemplated or provided

under law, such an act cannot be made the basis for preventive detention and any law declaring it to be prejudicial to the interest of the State so as to invoke the power of preventive detention is violative of Articles 14, 19 and 21 of the Constitution and must be struckdown.

53. FERA was enacted to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency for the conservation of the foreign exchange resources of the country and the proper utilization thereof in the interest of the economic development of the country. Section 2(b) defined 'authorised dealer'. Section 6 provided, inter alia, for authorisation of any person by the Reserve Bank of India (RBI) to deal in foreign exchange. The restrictions on dealing in foreign exchange were provided in Section 8. Sub-sections (1) and (2) of Section 8 read as follows :

> "8. Restrictions on dealing in foreign exchange.—(1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange:
>
> Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-changer.
>
> Explanation.—For the purposes of this sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.

> (2) Except with the previous general or special permission of the Reserve Bank, no person, whether an authorised dealer or a money-changer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank".

FERA contained penal provisions. Section 50 provided for imposition of fiscal penalties while Section 56 made provision for prosecution and punishment. FERA stood repealed by FEMA in 1999.

54. Before we refer to FEMA, a brief look at the COFEPOSA may be appropriate. COFEPOSA came into force on December 19, 1974. Its preamble reads as under:

> "An Act to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith.
>
> WHEREAS violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State;
>
> AND WHEREAS having regard to the persons by whom and the manner in which such activities or violations are organised and carried on, and having regard to the fact that in certain areas which are highly vulnerable to smuggling, smuggling activities of a considerable magnitude are clandestinely organised and carried on, it is necessary for the effective prevention of such activities and violations to provide for detention of persons concerned in any manner therewith;"

55. Section 3 of COFEPOSA provides for power to make

orders detaining certain persons. Sub-section (1) thereof to the extent it is relevant, it reads as follows :

> "S.3 - Power to make orders detaining certain persons
>
> 1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of the State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from--
>
> (i) smuggling goods, or
>
> (ii) abetting the smuggling of goods, or
>
> (iii) engaging in transporting or concealing or keeping smuggled goods, or
>
> (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
>
> (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,
>
> it is necessary so to do, make an order directing that such person be detained:"

Sub-section (3) mandates compliance set out therein as required in Article 22(5). Certain other safeguards as required under Article 22, particularly, sub-clause (a) to Clause (4) and sub-clause (c) to Clause (7) of Article 22 of the Constitution have been provided in Sections 8 and 9. Maximum period of

detention is provided in Section 10. Notwithstanding the provision contained in Section 10, Section 10A provides for extension of period of detention in the situations contemplated therein and to the extent provided. Section 11 empowers the Central Government or the State Government, as the case may be, to revoke any detention order.

56. As noted above, FERA has been repealed by FEMA. FEMA was enacted to consolidate and amend the law relating to foreign exchange with the objective of facilitating the external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. Section 2(c) of FEMA defines 'authorised person' which means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of Section 10 to deal in foreign exchange or foreign securities. RBI may authorise any person to deal in foreign exchange or in foreign securities as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit. Section 10 provides for the complete procedure for authorisation of any person to deal in foreign exchange. Section 13 provides for fiscal penalty to the extent of thrice the sum involved in such contravention where such amount is quantifiable or upto two lac rupees where the amount is not quantifiable and where such contravention is a continuing one, further penalty which may extend to Rs. 5000/- for every day after the first day during which the contravention continues. On failure of a person to make full payment of the penalty imposed on him, Section 14 is an enforcement provision. If a person remains in default in discharge of the penalty awarded to him, he is liable to civil imprisonment. Section 15 provides for compounding of contravention. By Section 49, FERA has been repealed and sub-section (3) thereof provides : "Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under Section 51 of the repealed

Act after the expiry of a period of two years from the date of the commencement of this Act."

57. It is true that provisions of FERA and FEMA differ in some respects, particularly in respect of penalties. It is also true that FEMA does not have provision for prosecution and punishment like Section 56 of FERA and its enforcement for default is through civil imprisonment. However, insofar as conservation and/or augmentation of foreign exchange is concerned, the restrictions in FEMA continue to be as rigorous as they were in FERA. FEMA continues with the regime of rigorous control of foreign exchange and dealing in the foreign exchange is permitted only through authorised person. While its aim is to promote the orderly development and maintenance of foreign exchange markets in India, the Government's control in matters of foreign exchange has not been diluted. The conservation and augmentation of foreign exchange continues to be as important as it was under FERA. The restrictions on the dealings in foreign exchange continue to be as rigorous in FEMA as they were in FERA and the control of the Government over foreign exchange continues to be as complete and full as it was in FERA.

58. The importance of foreign exchange in the development of a country needs no emphasis. FEMA regulates the foreign exchange. The conservation and augmentation of foreign exchange continues to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardizing the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non-compliance results in civil imprisonment of the defaulter. The whole intent and idea behind COFEPOSA is to prevent violation of foreign exchange regulations or smuggling activities which have serious and deleterious effect on the national economy. In today's world the physical and geographical invasion may be difficult but it is easy to imperil the security of a State by disturbing its

economy. The smugglers and foreign exchange manipulators by flouting the regulations and restrictions imposed by FEMA – by their misdeeds and misdemeanours – directly affect the national economy and thereby endanger the security of the country. In this situation, the distinction between acts where punishments are provided and the acts where arrest and prosecution are not contemplated pales into insignificance. We must remember : the person who violates foreign exchange regulations or indulges in smuggling activities succeeds in frustrating the development and growth of the country. His acts and omissions seriously affect national economy. Therefore, the relevance of provision for preventative detention of the anti-social elements indulging in smuggling and violation and manipulation of foreign exchange in COFEPOSA continues even after repeal of FERA.

59. The menace of smuggling and foreign exchange violations has to be curbed. Notwithstanding the many disadvantages of preventive detention, particularly in a country like ours where right to personal liberty has been placed on a very high pedestal, the Constitution has adopted preventive detention to prevent the greater evil of elements imperiling the security, the safety of State and the welfare of the Nation.

60. On the touchstone of constitutional jurisprudence, as reflected by Article 22 read with Articles 14, 19 and 21, we do not think that the impugned provision is rendered unconstitutional. There is no constitutional mandate that preventive detention cannot exist for an act where such act is not a criminal offence and does not provide for punishment. An act may not be declared as an offence under law but still for such an act, which is an illegal activity, the law can provide for preventive detention if such act is prejudicial to the state security. After all, the essential concept of preventive detention is not to punish a person for what he has done but to prevent him from doing an illegal activity prejudicial to the security of the State. Strictly speaking, preventive detention is not

regulation (many people call it that way), it is something much more serious as it takes away the liberty of a person but it is accepted as a necessary evil to prevent danger to the community. The law of preventative detention arms the State with precautionary action and must be seen as such. Of course, the safeguards that the Constitution and preventive detention laws provide must be strictly insisted upon whenever the Court is called upon to examine the legality and validity of an order of preventive detention.

61. The following features, (i) detention order was issued on February 8, 2000 and the detenue was served with the same on February 15, 2000; (ii) the events had taken place when FERA was in place as FEMA had come into force only with effect from June 1, 2000; in view of the sunset clause in FEMA the prosecution for violation of FERA could continue for next two years; (iii) High Court had held the continued detention after coming into force of FEMA to be bad; (iv) the constitutionality of Conservation of Foreign Exchange (COFE) part of COFEPOSA was not in issue and the facts brought the prejudicial act within the mischief of FERA inviting penal consequences, were highlighted by the learned counsel for the petitioners to distinguish Venkateshan S.1 . We are afraid, the above features hardly render Venkateshan S.1 inapplicable to the issue raised before us. We are in complete agreement with the position stated in Venkateshan S.1: "if the activity of any person is prejudicial to the conservation or augmentation of foreign exchange, the authority is empowered to make a detention order against such person and the Act does not contemplate that such activity should be an offence".

62. It is too naïve to suggest that in today's economic scenario of abundant foreign exchange and booming foreign trade, contravention of foreign exchange laws does not pose any threat to the national interest for which a person has to be detained.

63. In view of the above, we do not find any merit in

challenge to the constitutional validity of impugned part of Section 3(1) of COFEPOSA.

64. Then comes the question upon the prayer made by means of criminal miscellaneous application for permitting the petitioners to make an additional prayer: "This Hon'ble Court may be pleased to quash the detention order bearing No. 673/02/2009 – CUS/VIII dated September 23, 2009".

65. The prayer made in the criminal miscellaneous application by the petitioners cannot be granted for more than one reason. For, petitioners initially filed a writ petition (Crl. No. 97/2009) under Article 32 of the Constitution before this Court challenging the detention order dated September 23, 2009. The said writ petition was dismissed by this Court as withdrawn on December 4, 2009. The petitioners have not stated the above fact in the present writ petition.

66. The petitioners then filed a writ petition before Delhi High Court. That writ petition was dismissed by the High Court on March 18, 2010 on the ground that the petition was filed at pre-execution stage. The petitioners filed special leave petition (Crl. No. 2698 of 2010) before this Court challenging the judgment of the Delhi High Court. During the pendency of special leave petition, the petitioners filed the present writ petition wherein the only prayer made is that impugned part of Section 3(1) of COFEPOSA be declared unconstitutional. Presumably, the detention order was not challenged because special leave petition was already pending. Later on, the special leave petition was withdrawn by the petitioners. While dismissing the special leave petition as withdrawn, this Court granted liberty to the petitioners to avail such remedy as may be available in law in challenging the order of detention and the grounds on which detention order has been passed after its execution (emphasis supplied). The order of detention in question has not been executed so far in view of the contumacious conduct of the second petitioner. He is alleged to have absconded initially. Then on December 14, 2009 Delhi

High Court, by an interim order directed that the detenue shall not be arrested till the next date of hearing, i.e. December 22, 2009. The said interim order was continued until the disposal of writ petition by the High Court and thereafter that interim order was continued by this Court in the special leave petition. In the writ petition also an interim order has been in operation. In view of the order dated July 13, 2010 passed by this Court, the petitioners cannot be permitted to challenge the order of detention until its execution.

67. In view of the above, the leave to make additional prayer for quashing the detention order dated September 23, 2009 by means of criminal miscellaneous application does not deserve to be granted and is rejected. However, it is clarified that after the execution of the detention order, the petitioners shall be at liberty to challenge the detention order in accordance with law.

68. Since we have rejected the criminal miscellaneous application, the argument of the learned counsel for the petitioners that the impugned order of detention was passed way back on September 23, 2009; the impugned order was preventive in nature and the maximum period of detention as per law is one year, which would have lapsed by now and, therefore, no purpose for the execution of the detention order survives is noted to be rejected. The detention order could not be executed because of the contumacious conduct of the second petitioner and, therefore, he cannot take advantage of his own wrong.

69. Writ petition and criminal miscellaneous application, for the reasons indicated above, are liable to be rejected and are rejected.

N.J. Writ Petition and Criminal Miscellaneous application dismissed.

SHAMBHU PRASAD SHARMA
v.
SHRI CHARANDAS MAHANT & ORS.
(Civil Appeal No. 4847 of 2012)

JULY 03, 2012

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

Representation of People Act, 1951 – Election petition – Declaration sought by the defeated candidate that the nomination papers filed by the remaining candidates was improperly and illegally accepted – Affidavit not submitted in the proper format, without any averment whether there were any dues outstanding against the candidate towards any financial institution or the government – Petition dismissed by the High Court on the ground that the same did not disclose any cause of action – On appeal, held: Any departure from the prescribed format for disclosure of information about the dues, if any, payable to the financial institutions or the government will not be of much significance, especially when the declaration made by the returned candidate in his affidavit clearly stated that no such dues were recoverable from the deponent – Thus, the departure from the format not of a substantial character on which the nomination papers of the returned candidate could be lawfully rejected by the returning officer – However, defeated candidate was required to not only allege material facts relevant to such improper acceptance, but further assert that the election of the returned candidate had been materially affected by such acceptance – There was no such assertion in the petition – Mere improper acceptance assuming that any such improper acceptance was supported by assertion of material facts by the defeated candidate, would not disclose a cause of action to call for trial of the election petition on merit unless the same is alleged to have materially affected the result of the returned candidate – Thus, the order passed by the High Court upheld.

Appellant-defeated candidate filed an election petition before the High Court seeking a declaration to the effect that the nomination papers filed by the candidates who contested the election had been improperly and illegally accepted. The appellant contended that the nomination papers filed by respondents were incomplete for want of a proper affidavit required to be filed in terms of the orders passed by this Court in **Union of India v. Association for Democratic Reforms and Anr.* and the instructions issued by the Election Commission requiring the candidates to file such affidavits along with their nomination papers, containing any averment whether there were any dues outstanding against the candidate towards any financial institution or the government. Respondent no. 1-returned candidate filed an application under Order VII Rule 11 CPC read with Section 86(1) of the Representation of People Act, 1951 alleging that the petition did not disclose any cause of action nor were the provisions of Sections 81 and 82 of the Act complied with. The High Court allowed the application and dismissed the election petition on the ground that the same did not make a concise statement of the material facts on which the appellant relied and thus, failed to disclose a cause of action. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 The directions issued by this Court in **Union of India v. Association for Democratic Reforms and Anr.*, and those issued by the Election Commission make the filing of an affidavit an essential part of the nomination papers, so that absence of an affidavit may itself render a nomination paper *non-est* in the eye of law. But where an affidavit has been filed by the candidate and what is pointed out is only a defect in the format of the affidavit or the like, the question of acceptance or rejection of the paper shall have to be viewed in the light of sub-section (4) to Section 36 of the Representation of People Act, 1951 which states that the returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character. Even the instructions issued to the Returning Officers in the Hand Book published by the Election Commission point out that a nomination paper shall not be rejected unless the defect is of a substantial character. Thus, it is evident that the form of the nomination papers is not considered sacrosanct. What is to be seen is whether there is a substantial compliance of the requirement as to form. Every departure from the prescribed format cannot, therefore, be made a ground for rejection of the nomination paper. [Paras 12 and 13] [366-D-G; 367-A]

1.2 In the instant case, the appellant alleges that the affidavit did not in the prescribed format state whether the candidates had any outstanding liabilities qua financial institutions or the government. The departure from the format may assume some importance if the appellant alleged that there were such outstanding liabilities which were concealed by the candidates. That, however, is not the case of the appellant. Any departure from the prescribed format for disclosure of information about the dues, if any, payable to the financial institutions or the government will not be of much significance, especially when the declaration made by the returned candidate in his affidavit clearly stated that no such dues were recoverable from the deponent. The departure from the format was not, in the circumstances, of a substantial character on which the nomination papers of the returned candidate could be lawfully rejected by the returning officer. [Para 15] [367-D-F]

1.3 The allegation that other candidates had also not submitted affidavits in proper format, rendering the acceptance of their nomination papers improper, the appellant was required to not only allege material facts relevant to such improper acceptance, but further assert

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that the election of the returned candidate had been materially affected by such acceptance. There is no such assertion in the election petition. Mere improper acceptance assuming that any such improper acceptance was supported by assertion of material facts by the appellant-petitioner, would not disclose a cause of action to call for trial of the election petition on merit unless the same is alleged to have materially affected the result of the returned candidate. [Para 16] [367-G-H; 368-A-B]

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Union of India v. Association for Democratic Reforms and Anr.* **(2002) 5 SCC 29: 2002 (3) SCR 696*;* *People's Union For Civil Liberties (PUCL) and Anr. v. Union of India and Anr.* **(2003) 4 SCC 399: 2003 (2) SCR 1136 – referred to.**

Case Law Reference:

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2002 (3) SCR 696	**Referred to**	**Para 3, 6, 7, 10, 12**
2003(2) SCR 1136	**Referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4847 of 2012.

E

From the Judgment & Order dated 17.08.2010 of the High Court of Judicature at Bilaspur at Chhattisgarh in Election Petition No. 15 of 2009

R.D. Upadhyay, Asha Upadhyay, JP Tripathy, T. Syed for the Appellant.

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Rajiv Dhawan, Ravindra Srivastava, Navin Prakash, Anup, Meenakshi Arora, Meenakshi Lekhi, Harish Pandey, Vibhu Shankar Mishra, Rakshil Bharti for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal arises out of an order passed by the High Court of Judicature of Chhattisgarh, at Bilaspur whereby Election Petition No.15 of 2009 filed by the appellant has been dismissed on the ground that the same does not make a

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concise statement of the material facts on which the appellant relies and hence fails to disclose a cause of action.

3. Election to No.4 Korba Parliamentary Constituency in the State of Chhattisgarh was held as a part of the general elections of the year 2009. As many as twenty two candidates filed their nomination papers for election from the above constituency but with the withdrawal of nominations by four of such candidates, only seventeen candidates were left in the fray besides the appellant-petitioner who contested as an independent candidate and respondent No.1 set up by the Indian National Congress Party. The margin of victory between respondent No.1 and Karuna Shukla set up by the Bhartiya Janta Party who emerged as his nearest rival was around 20,000 votes. The appellant who polled 23136 votes then filed Election Petition No.15 of 2009 before the High Court of Chhattisgarh at Bilaspur in which he sought a declaration about his having been elected unopposed apart from a declaration to the effect that the nomination papers filed by the remaining 17 candidates had been improperly and illegally accepted. The appellant's case as set out in the election petition primarily was that the nomination papers filed by respondents 2 to 18 were incomplete for want of a proper affidavit required to be filed in terms of the orders passed by this Court in *Union of India v. Association for Democratic Reforms and Anr.* (2002) 5 SCC 294 and the instructions issued by the Election Commission requiring the candidates to file such affidavits along with their nomination papers. The appellant alleged that while he had filed an affidavit in the prescribed format along with his nomination papers which was found to be in order by the Returning Officer, the nomination papers filed by the remaining candidates were not accompanied by the requisite affidavits in Form 3 ka (iii) thereby rendering the nomination papers incomplete, hence liable to be rejected. An objection to that effect appears to have been raised even before the Returning Officer, who examined and rejected the same in terms of his order dated 31st March, 2009. The Returning Officer held that the nomination papers

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filed by all the candidates were accompanied by the requisite affidavits and that there was no deficiency in the same to justify their rejection. The election petition questioned the said finding and assailed the order passed by the Returning Officer as being perverse. The appellant alleged that in terms of the order passed by this Court in the judgment referred to above and the directions issued by the Election Commission the essential information required to be furnished in the affidavit particularly whether there were any dues outstanding against the candidate towards any financial institution or the government had not been supplied in the requisite format by the candidates whose nomination papers were accepted which was reason enough for the rejection of the nomination papers filed by them and declaration of the appellant- petitioner as having been elected unopposed to the Lok Sabha from that constituency.

4. The election petition was contested by the returned candidate by filing an application under Order VII Rule 11 of CPC read with Section 86(1) of the Representation of People Act, 1951. The application alleged that the petition did not disclose any cause of action nor were the provisions of Sections 81 and 82 of the Act complied with. The election petition did not, according to the respondent, contain any averment regarding the existence of any un-discharged liability towards any financial institution or the government nor were material facts stated to disclose a cause of action.

5. The High Court has, in terms of the order impugned before us, allowed the said application and dismissed the election petition holding that the petition did not indeed disclose any cause of action and was, therefore, not maintainable. The High Court recorded a finding that the appellant had not annexed affidavits filed by other candidates to demonstrate how the same were not in the format prescribed for the purpose nor was it the case of the election petitioner that the respondents had any un-discharged liability towards any financial institution or the government for that matter. It also relied upon the fact

that the Returning Officer had in no uncertain terms recorded a finding that the requirement of filing an affidavit in support of nomination papers containing the requisite information in terms of orders passed by this Court had been complied with in each case and that there was nothing irregular or deficient in the affidavits or nomination papers to call for their rejection. The High Court noted that the returned candidate had also stoutly denied the allegations that the affidavit filed was not in the prescribed form or that there was any distortion or concealment of information in the same.

6. The requirement of filing an affidavit arises from the decision of this Court in Union of India v. Association for *Democratic Reforms and Anr* (supra). This Court had in that case examined the nature and the extent of jurisdiction exercised by the Election Commission under Article 324 of the Constitution and held that the same was wide enough to include all powers necessary for smooth conduct of elections and that the word “elections” was used in a wide sense to include the entire process of election which comprises several stages and embraces several steps in that process. This Court held that the Election Commission could invoke its power under Article 324 till the Parliament brought a suitable legislation on the subject. This Court recognized the right of the voters in this country to know about the particulars and antecedents of the candidates who would represent them in the Parliament where laws concerning their liberty and property may be enacted, and declared that the right of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution would include the freedom of the voter to cast his vote, for which purpose the voter was entitled to know everything that would enable him to make the right choice. It was with that salutary object in mind that this Court issued directions to the Election Commission to call for information on affidavit from each one of the candidates seeking election to the Parliament or the State Legislatures as an essential part of his nomination

papers furnishing therein information on the following aspects in relation to his/her candidature:

> "1) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past — if any, whether he is punished with imprisonment or fine.
>
> (2) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law. If so, the details thereof.
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> (3) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependants.
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> (4) Liabilities, if any, particularly whether there are any overdues of any public financial institution or government dues.
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> (5) The educational qualifications of the candidate."

7. As a sequel to the above directions the Parliament amended Representation of People Act, 1951 to introduce Sections 33-A and 33-B with Representation of People (Third Amendment) Act 2002. Section 33-A made it obligatory for every candidate to furnish information whether or not he has been accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the Court and whether he has been convicted of an offence other than those referred to in sub-section (1) or sub-section (2) or covered in sub-section (3) of Section 8 and sentenced to imprisonment of one year or more. Sub-section (2) to Section 33-A required a candidate or his proposer to deliver to the Returning Officer an affidavit sworn by the candidate in the prescribed form along with nomination papers in which the information specified above is set out. Section 33-B, however, purported to neutralise the effect of the directions

issued by this Court in *Union of India v. Association for Democratic Reforms and Anr* (supra) and declared that no candidate shall be liable to disclose or furnish any information, in respect of his election, which is not required to be disclosed or furnished under the Act or the Rules made thereunder. The constitutional validity of the above additions to the statute was challenged before this Court in People's Union For *Civil Liberties (PUCL) and Anr. v. Union of India and Anr.* (2003) 4 SCC 399. This Court while upholding the vires of Section 33-A declared Section 33-B to be constitutionally invalid being in violation of Article 19(1)(a) of the Constitution. This Court reiterated the directions given in *Union of India v. Association for Democratic Reforms and Anr* (supra) and directed the Election Commission to issue revised instructions keeping in view the observations made in the judgment delivered by this Court. This Court also held that the order issued by the Election Commission relating to the disclosure of assets and liabilities will continue to hold good and be operative although direction No.4 in so far as verification of assets and liabilities by means of a summary enquiry and rejection of nomination papers on the ground of furnishing wrong information or suppression of material information was concerned, the same shall not be enforced. In para 123 (9) this Court observed:

> "(9) The Election Commission has to issue revised instructions to ensure implementation of Section 33-A subject to what is laid down in this judgment regarding the cases in which cognizance has been taken. The Election Commission's orders related to disclosure of assets and liabilities will still hold good and continue to be operative. However, Direction 4 of para 14 insofar as verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing wrong information or suppressing material information should not be enforced."

8. Coming to the facts of the present case, the appellant

assailed the election on the ground that the affidavits filed by the contesting candidates were not in the prescribed format. This is evident from the averments made in para 5 of the election petition where the appellant stated thus:

> "5. That, on 31st March, 2009, the petitioner filed an objection before the Election Officer, Korba, stating that except the petitioner himself, the nomination forms of the other candidates are incorrect and invalid because the other candidates had not filed form No.3(K)(III) affidavits showing debts/dues of the Government. Due to not filing the affidavit in the required prescribed form their candidature become invalid and deemed to be an incomplete nomination paper within the meaning of Section 33(A) & 33 (B) of the representation Act of the people Act, 1961 which reads as under, the same is enclosed with this petition as 'Annexure P-1'."

9. To the same effect is para 14A of the election petition where the appellant has set out the grounds for setting aside the election of the elected candidate in the following words:

> "A. The nomination papers filed by Respondents No.2 to 18 were incomplete due to want of proper affidavit whom Respondent No.1 has accepted and committed material illegality. Above acceptance are contrary to Section 100(1)D(I)(N) of Representation of People Act, 1951 hence liable to be declared improper and illegal voter voted in their favour would not have noted in their favour which has materially affected the result of this petitioner."

10. In para 14C also the appellant's case was that the nomination papers could not have been accepted without an affidavit disclosing the outstanding government dues as required under the order of this Court in the case of *Union of India v. Association for Democratic Reforms and Anr* (supra). Suffice it to say that the case pleaded by the appellant was not

one of complete failure of the requirement of filing an affidavit in terms of the judgment of this Court and the instructions given by the Election Commission but a case where even according to the appellant the affidavits were not in the required format.

11. What is significant is that the election petition did not make any averment leave alone disclose material facts in that regard suggesting that there were indeed any outstanding dues payable to any financial institution or the government by the returned candidate or any other candidate whose nomination papers were accepted. The objection raised by the appellant was thus in the nature of an objection to form rather than substance of the affidavit, especially because it was not disputed that the affidavits filed by the candidates showed the outstandings to be nil.

12. The directions issued by this Court, and those issued by the Election Commission make the filing of an affidavit an essential part of the nomination papers, so that absence of an affidavit may itself render a nomination paper non-est in the eye of law. But where an affidavit has been filed by the candidate and what is pointed out is only a defect in the format of the affidavit or the like, the question of acceptance or rejection of the paper shall have to be viewed in the light of sub-section (4) to Section 36 of the Act which reads:

> "36 (4): The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character."

13. Even the instructions issued to the Returning Officers point out that a nomination paper shall not be rejected unless the defect is of a substantial character. The instructions issued to the Returning Officers in the Hand Book published by the Election Commission enumerates though not exhaustively, what can be said to be grounds for rejection of the nomination papers. Para 10.1 (VII) reads:

"10.1 You must reject a nomination paper, if:

xxxxxxxxx

(vii) The nomination paper is not substantially in the prescribed form, or

Xxxxxxxxxxx"

14. From the above it is evident that the form of the nomination papers is not considered sacrosanct. What is to be seen is whether there is a substantial compliance of the requirement as to form. Every departure from the prescribed format cannot, therefore, be made a ground for rejection of the nomination paper.

15. In the case at hand, the appellant alleges that the affidavit did not in the prescribed format state whether the candidates had any outstanding liabilities qua financial institutions or the government. Now a departure from the format may assume some importance if the appellant alleged that there were such outstanding liabilities which were concealed by the candidates. That, however, is not the case of the appellant. Any departure from the prescribed format for disclosure of information about the dues, if any, payable to the financial institutions or the government will not be of much significance, especially when the declaration made by the returned candidate in his affidavit clearly stated that no such dues were recoverable from the deponent. The departure from the format was not, in the circumstances, of a substantial character on which the nomination papers of the returned candidate could be lawfully rejected by the returning officer.

16. Coming to the allegation that other candidates had also not submitted affidavits in proper format, rendering the acceptance of their nomination papers improper, we need to point out that the appellant was required to not only allege material facts relevant to such improper acceptance, but further

assert that the election of the returned candidate had been materially affected by such acceptance. There is no such assertion in the election petition. Mere improper acceptance assuming that any such improper acceptance was supported by assertion of material facts by the appellant- petitioner, would not disclose a cause of action to call for trial of the election petition on merit unless the same is alleged to have materially affected the result of the returned candidate.

17. In the result this appeal fails and is hereby dismissed but in the circumstances without any order as to costs.

N.J. Appeal dismissed.

A. NAWAB JOHN & ORS.
v.
V.N. SUBRAMANIYAM
(Civil Appeal Nos. 4838-4840 of 2012)

JULY 3, 2012

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

Court Fees Act, 1870: Filing of plaint – Deficient court fee – Right of defendant to raise objection – Held: Question of court fee is a matter between the plaintiff and the Court – If the Court comes to the conclusion that the court fee paid in the lower court is not sufficient, the court shall require the party to make good the deficiency – The legislature did not intend to give any advantage to the defendants on account of the payment of the inadequate Court fee by the plaintiffs – In a case where the plaint is filed within the period of limitation prescribed by law but with deficit court fee and the plaintiff seeks to make good the deficit of the court fee beyond the period of limitation, the Court, though has discretion u/s.149 CPC, must scrutinise the explanation offered for the delayed payment of the deficit court fee carefully because exercise of such discretion would certainly have some bearing on the rights and obligations of the defendants or persons claiming through the defendants – It necessarily follows that s.149 CPC does not confer an absolute right in favour of a plaintiff to pay the court fee as and when he pleases – It only enables a plaintiff to seek the indulgence of the Court to permit the payment of court fee at a point of time later than the presentation of the plaint – The exercise of the discretion by the Court is conditional upon the satisfaction of the Court that the plaintiff offered a legally acceptable explanation for not paying the court fee within the period of limitation – Code of Civil Procedure, 1908 – s.149.

Code of Civil Procedure, 1908: s.149; O.7, r.11 –

Rejection of plaint sought on ground of deficiency of court fees – Held: O.7 r.11 requires a plaint to be rejected, inter alia, where the relief claimed is undervalued and/or the plaint is written on a paper insufficiently stamped, and, in either case, the plaintiff fails to either correct the valuation and/or pay the requisite court fee by supplying the stamp paper within the time fixed by the court – However, s.149 speaks about the power to make up deficiency of court-fees – When s.149 speaks about a document with respect to which court fee is required to be paid, it takes within its sweep not only plaints but various other documents with respect to which court fee is required to be paid under the appropriate law including written statements in a suit – Therefore, from the language of s.149 it follows that when a plaint is presented to a Court without the payment of appropriate court fee payable thereon, undoubtedly the Court has the authority to call upon the plaintiff to make payment of the necessary court fee – Such an authority of the Court can be exercised ***at any stage*** *of the suit – Therefore, any amount of lapse of time does not fetter the authority of the Court to direct the payment of such deficit court fee – As a logical corollary, even the plaintiff cannot be said to be barred from paying the deficit court fee because of the lapse of time – s.149 confers power on the Court to accept the payment of deficit court fee even beyond the period of limitation prescribed for the filing of a suit, if the plaint is otherwise filed within the period of limitation – Limitation is only a prescription of law; and Legislature can always carve out exceptions to the general rules of limitation, such as s.5 of the Limitation Act which enables the Court to condone the delay in preferring the appeals etc. – Limitation Act – Court Fees Act, 1870.*

Transfer of Property Act, 1882:

s.52 – Pendente lite purchaser's application for impleadment – Held: Should normally be allowed or considered liberally.

s.52 – Effect of – Held: Effect of s.52 is not to render transfers affected during the pendency of a suit by a party to the suit void but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit.

Tamil Nadu Court Fees and Suits Valuation Act, 1955: ss.4, 5, 12 – Held: No document which is chargeable with a fee under the Act shall ***be acted on*** *by any* ***court*** *or any public office unless the appropriate fee payable under the Act in respect of such a document is paid – When a document on which court fee is payable is received in any court or public office, though the whole or any part of the appropriate court fee payable on such document has not been paid, either because of a mistake or inadvertence of the Court, the Court, in its discretion, may allow the payment of the deficit court fee within such time as may be fixed – Upon such payment, such document "shall have the same force and effect" as if the court fee had been paid in the first instance – Indisputably, the expression "document" takes within its sweep a plaint contemplated under the Code of Civil Procedure – Court Fees Act, 1870.*

Judicial discretion: Exercise of – Scope – Held: It is well settled that the judicial discretion is required to be exercised in accordance with the settled principles of law – It must not be exercised in a manner to confer an unfair advantage on one of the parties to the litigation.

In a suit for specific performance of agreement of sale, the suit was valued at Rs.13 lacs on which the plaintiff calculated court fee at Rs.99,875 under Section 42 of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. However, the plaint was presented on 20.08.1998 with court-fee of only Rs.2,000/-. The plaint was returned by the Court on 24.08.1998 with various objections including the deficiency in the court-fee. The plaintiffs represented (1st representation) the plaint after a long

delay on 3.5.2002 along with a court-fee of Rs.96,000/-, with an application to condone the delay in representation. On 3.6.2002, the plaint was again returned on the ground deficit of the court-fee. The plaint was represented on 22.1.2004 (second representation) remitting a further amount of Rs.2,875/- court-fee along with applications to condone the delay in representation. On the same day, the plaint was once again returned with certain objections. On 9.4.2004, the plaint was once again represented (3rd representation) with an application to condone the delay of 70 days in representation.

On 15.4.2004, the suit was taken on record by the Court. On 5.10.2004, the original defendant was set *ex parte*. On the same day, an application was filed by the sole respondent for impleadment as a party defendant to the said suit on the ground that he had purchased the suit property on 8.3.1999. The trial court allowed the impleadment application and the sole respondent became second defendant in the suit.

The respondent filed revision petition before the High Court challenging the decision of the trial court to condone the delay of 1328 days in the first of the three representations of the plaint. Another revision petition was filed challenging the order by which, the trial court condoned the delay of 585 days in the second of the representation. During the pendency of the two revision petitions, second defendant (sole respondent) filed his written statement and also filed application invoking Order 7 Rule 11, CPC for rejection of the plaint. The application filed under Order 7 Rule 11 CPC by the second defendant/respondent was dismissed and a revision was filed challenging the same. The said revision petition and revision petition challenging the delay in filing first two representations were heard together and allowed by the High Court by a common order. The

instant appeals were filed challenging the order of the High Court.

Dismissing the appeals, the Court

HELD: 1. Section 52 of the Transfer of Property Act incorporates doctrine of *lis pendens* and it stipulates that during the pendency of any suit or proceeding in which any right to immovable property is, directly or specifically, in question, the property, which is the subject matter of such suit or proceeding cannot be "transferred or otherwise dealt with", so as to affect the rights of any other party to such a suit or proceeding. It is settled legal position that the effect of Section 52 is not to render transfers affected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The *pendente lite* purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the Court. Such being the scope of Section 52, two questions arise: whether a *pendente lite* purchaser (1) is entitled to be impleaded as a party to the suit; (2) once impleaded what are the grounds on which he is entitled to contest the suit. This Court on more than one occasion held that when a *pendente lite* purchaser seeks to implead himself as a party - defendant to the suit, such application should be liberally considered. [Paras 16-19] [386-A-B; 387-B-C-F-G]

Jayaram Mudaliar v. Ayyaswami and Others, **(1972) 2 SCC 200: 1973 (1) SCR 139;** *Vinod Seth v. Devinder Bajaj* **(2010)8 SCC 1;** *Sanjay Verma v. Manik Roy,* **AIR 2007 SC 1332: 2006 (10) Suppl. SCR 469 – relied on.**

Belkamy v. Subina **(1857) De. GEJ 566 – referred to.**

2. The question of court fee is a matter between the plaintiff and the Court. Sub-section 1 of Section 12 of the Court Fees Act, 1870 gives finality to the decision of the trial court on the questions relating to valuation. Sub-Section 2 however provides that the appellate or revisional Court can direct the deficiency to be made good if it comes to the conclusion that the lower court had decided the issue to the detriment of the revenue. In view of the finality attached under sub-section (1) to the decision of the trial court and the time of the limited scope of the appellate court's power to examine whether the lower court wrongly decided the question to the detriment of the revenue, the conclusion obviously is inevitable the defendant has no right to file a revision petition against the decision of the trial court. However the position under the Madras Court Fees Act, 1955 is different. Section 12(2) expressly provides for the defendant's right to raise the question of the court fees. Section 12(4)(a) provides that even the appellate Court can go into the question of the correctness of the decision of the lower court (rendered under Section 12(2)) either on its own motion or on the application of any of the parties. If the Court comes to the conclusion that the court fee paid in the lower court is not sufficient, the court shall require the party to make good the deficiency. The sub-section (c) of Section 12(4) provides for the dismissal of only the appeal **in case of the failure to make good the deficit of Court fee if the same pertains to that portion of the decree by which a portion of the plaintiff's claim stood dismissed by the trial court. However in the case of the default in making good portion of the court fee pertaining decree in favour of the plaintiff, the Section only mandates the recovery of the amount by resort to the Revenue Recovery Act but does not command the suit to be dismissed. Obviously, the legislature did not intend to give any advantage to the defendants on account of the payment of the inadequate Court fee by the plaintiffs.**

Therefore, the law is clear that though a defendant is entitled under the Tamil Nadu Act to bring it to the notice of the Court that the amount of court fee paid by the plaintiff is not in accordance with law, the defendant cannot succeed in the suit only on that count. But the dispute of the second defendant is not regarding the amount of the court fee but the acceptance of the court fee after the expiry of the period of limitation applicable to the suit. [paras 20-22] [389-C-F-H; 390-A, C-D; 391-B-F; 394-A-D]

Rathnavarma Raja v. Smt. Vimala **AIR 1961 SC 1299: 1961 SCR 1015 – relied on.**

SL Lakshmana Ayyar vs. TSPLP Palaniappa Chettiar **AIR 1935 Mad.927 – referred to.**

3. The law relating to the valuation of the suits and the payment of court fees in the State of Tamil Nadu is "The Tamil Nadu Court Fees and Suits Valuation Act, 1955". By Section 87 of the said Act, two enactments known as Court Fees Act 1870 and Suits Valuation Act 1887 (which governed the field of the valuation of suits and payment of court fees) were repealed. The Tamil Nadu Act prescribes the method and manner of the determination of valuation of the suits and the appropriate court fee payable with reference to various kinds of suits and appeals etc. Section 4 of the Act stipulates that no document which is chargeable with a fee under the said Act shall be acted on **by any** court **or any public office unless the appropriate fee payable under the Act (Court fee) in respect of such a document is paid. Section 5 stipulates when a document on which court fee is payable is received in any court or public office, though the whole or any part of the appropriate court fee payable on such document has not been paid, either because of a mistake or inadvertence of the Court, the Court, in its discretion, may allow the payment of the deficit court fee**

within such time as may be fixed. Section 5 further declares that upon such payment, such document "shall have the same force and effect" as if the court fee had been paid in the first instance. Indisputably, the expression "document" appearing under Section 4 and 5 takes within its sweep a plaint contemplated under the Code of Civil Procedure. Under Section 28 of the Court Fees Act 1870, it is categorically declared that "no document which ought to bear a stamp under this Act shall be of any validity unless and until it is properly stamped". However, it is further provided in the same Section that a Court may permit the payment of appropriate court fee in its discretion and if the deficit is made good "every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance". The language of the Tamil Nadu Act is different. Though Section 4 declares no document in respect to which court fee is required to be paid under the Act but not paid shall be acted upon, it does not declare the document to be without any validity. [Paras 24- 26] [394-H; 395-A-C-G-H; 396-A-E]

4. Order VII Rule 11 CPC requires a plaint to be rejected, inter alia, where the relief claimed is undervalued and/or the plaint is written on a paper insufficiently stamped, and, in either case, the plaintiff fails to either correct the valuation and/or pay the requisite court fee by supplying the stamp paper within the time fixed by the court. Rule 13 categorically declares that the rejection of a plaint shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. However, Section 149 of the Code talks about the power to make up deficiency of court-fees. Section 149 does not deal only with court fees payable on a plaint. The said Section also deals with every document with respect to which court fee is required to be paid under the appropriate law. Order VIII of the Code provides for

set-off and counter claims under Rule 6 and 6A. Under Section 8 of the Tamil Nadu Act, it is declared that "a written statement pleading a set-off or counter claim shall be chargeable with fee in the same manner as a plaint". Therefore, when Section 149 of the Code speaks about a document with respect to which court fee is required to be paid, it takes within its sweep not only plaints but various other documents with respect to which court fee is required to be paid under the appropriate law including written statements in a suit.Therefore, from the language of Section 149 CPC it follows that when a plaint is presented to a Court without the payment of appropriate court fee payable thereon, undoubtedly the Court has the authority to call upon the plaintiff to make payment of the necessary court fee. Such an authority of the Court can be exercised at any stage **of the suit. Therefore, any amount of lapse of time does not fetter the authority of the Court to direct the payment of such deficit court fee. As a logical corollary, even the plaintiff cannot be said to be barred from paying the deficit court fee because of the lapse of time. [Paras 27– 28] [396-E-F; 397-A-B-D-H; 398-A]**

5. The question whether there is a deficit of court fee paid with respect to a plaint depends on two factors: (1) the valuation of the suit, and (2) the determination of the appropriate court fee payable thereupon. There can occur an error (either advertently or otherwise), on either of the counts. Under Section 12(1) of the Tamil Nadu Act, primarily it is the obligation of the Court to examine all the relevant material and determine whether the proper fee payable on the plaint is paid or not. Under Section 12(2) of the Tamil Nadu Act, the defendant can also raise objections to either the valuation of the suit or the determination of the court fee payable. The determination of the accuracy of the valuation of the suit and/or the appropriate court fee payable thereon, in either of the contingencies is required to be made by the Court. If the Court reaches the conclusion that the appropriate court fee is not paid, the consequences stipulated in Section 12(2) to (4) should follow. If such conclusion is reached by the trial Court**, the trial Court is mandated to reject the plaint if the plaintiff fails to pay the necessary court fee even after being called upon by the trial Court – necessarily meaning that no adjudication on the merits of the case can be made. The consequences of such a conclusion if reached by the** appellate Court**, in the course of hearing of the appeal, are stipulated under Section 12(4)(c). [Paras 32-33] [400-D-F; 401-A-C]**

6. Under Order VII Rule 11, a plaint, which has not properly valued the relief claimed therein or is insufficiently stamped, is liable to be rejected. However, under Rule 13, such a rejection by itself does not preclude the plaintiff from presenting a fresh plaint. It naturally follows that in a given case where the plaint is rejected under Order VII Rule 11 and the plaintiff chooses to present a fresh plaint, necessarily the question arises whether such a fresh plaint is within the period of limitation prescribed for the filing of the suit. If it is to be found by the Court that such a suit is barred by limitation, once again it is required to be rejected under Order VII Rule 11 Clause (d). However, Section 149 CPC confers power on the Court to accept the payment of deficit court fee even beyond the period of limitation prescribed for the filing of a suit, if the plaint is otherwise filed within the period of limitation. Therefore, the rigour of Order VII Rule 11 CPC and also Section 4 of the Tamil Nadu Act is mitigated to some extent by the Parliament when it enacted Section 149 CPC. Limitation is only a prescription of law; and Legislature can always carve out exceptions to the general rules of limitation, such as Section 5 of the Limitation Act which enables the Court to condone the delay in preferring the appeals etc. [Para 35] [401-F-H; 402-A-C]

7. It is well settled that the judicial discretion is required to be exercised in accordance with the settled principles of law. It must not be exercised in a manner to confer an unfair advantage on one of the parties to the litigation. In a case where the plaint is filed within the period of limitation prescribed by law but with deficit court fee and the plaintiff seeks to make good the deficit of the court fee beyond the period of limitation, the Court, though has discretion under Section 149 CPC, must scrutinise the explanation offered for the delayed payment of the deficit court fee carefully because exercise of such discretion would certainly have some bearing on the rights and obligations of the defendants or persons claiming through the defendants. (The case on hand is a classic example of such a situation.) It necessarily follows that Section 149 CPC does not confer an absolute right in favour of a plaintiff to pay the court fee as and when it pleases the plaintiff. It only enables a plaintiff to seek the indulgence of the Court to permit the payment of court fee at a point of time later than the presentation of the plaint. The exercise of the discretion by the Court is conditional upon the satisfaction of the Court that the plaintiff offered a legally acceptable explanation for not paying the court fee within the period of limitation. The discretion under Section 149 was not exercised by the trial Court in accordance with the principles of law. [Paras 37, 39] [402-D-H; 403-A, F]

Mannan Lal v. Mst. Chhotka Bibi (dead) by Lrs. & Ors. **AIR 1971 SC 1374: 1971 (1) SCR 253;** *P.K. Palanisamy v. N. Arumugham & Anr.,* **(2009) 9 SCC 173: 2009 (11) SCR 342 – relied on.**

K. Natarajan v. P.K. Rajasekaran, **(2003) 2 M.L.J. 305;** *Smt. Saila Bala Dassi v. Smt. Nirmala Sundari Dassi and Another* **1958 SCR 1287: AIR 1958 SC 394;** *Gavaranga Sahu Vs. Batakrishna Patro*, **(1909) ILR 32 Mad 305 (FB);**

Faizullah Vs. Mauladad, **AIR 1929 PC 147 – referred to.**

Case Law Reference:

(2003) 2 M.L.J. 305	**referred to**	**Para 12(3)**
1973 (1) SCR 139	**relied on**	**Para 16**
(1857) De. GEJ 566	**referred to**	**Para 16**
(2010) 8 SCC 1	**relied on**	**Para16**
2006 (10) Suppl. SCR 469	**relied on**	**Para 17**
1958 SCR 1287	**referred to**	**Para 19**
AIR 1935 Mad.927	**referred to**	**Para 20**
1961 SCR 1015	**relied on**	**Para 21**
1971 (1) SCR 253	**referred to**	**Para 29**
(1909) ILR 32 Mad 305 (FB)	**referred to**	**Para 30**
AIR 1929 PC 147	**referred to**	**Para 30**
2009 (11) SCR 342	**relied on**	**Para 36**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4838-4840 of 2012.

From the Judgment & Order dated 22.12.2006 of the High Court of Judicature at Madras in CRP (PD) Nos. 657, 658 and 797 of 2006.

S. Gurukrishna Kumar, A. Prasanna Venkat, Srikala Gurukrishna Kumar for the Appellants.

R. Venkataramani, Aljo Joseph, V. Senthil Kumar, Balaji Srinivasan for the Respondent.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. The 5 petitioners herein filed O.S.No.100 of 2004, against one Sengoda Gounder, who is not a party to the Special Leave Petition, essentially, for the specific performance of a registered agreement dated 22-03-1995, of sale of the suit scheduled land admeasuring approximately Acs.2-00 and delivery of possession of the same; in the alternative, it was prayed that the defendant be directed to refund the amount of Rs.12,15,125/- with interest, etc.

3. The parties are referred to in this Judgment as they are arrayed in the abovementioned Suit.

4. It is the case of the Plaintiffs that the abovementioned defendant was indebted to one Mr. Radhakrishnan and also to the Tamil Nadu Industrial Investment Corporation Limited (for short 'TNIIC"). It is alleged in the plaint that Sengoda Gounder wanted to clear the debts to the abovementioned two persons before the property is actually conveyed to the plaintiffs. For the said purpose, Sengoda Gounder collected an amount of Rs.12,15,125/- in instalments from the plaintiffs. In spite of receipt of such payment, Sengoda Gounder did not execute the sale deed, on some pretext or other. Therefore, the Suit.

5. During the pendency of the Suit, the sole respondent herein, filed an Application praying that he be impleaded as a party defendant to the said Suit, on the ground that he purchased the suit scheduled property on 08-03-1999 for a consideration of Rs.3,93,560/-. It appears from the record that the said I.A. was allowed and the sole respondent herein was impleaded as the second defendant in the abovementioned Suit. Consequent upon the said impleadment, the plaint came to be amended by inserting para 10A, the details of which are not necessary for the present purpose.

6. Initially, the Suit was valued at Rs.13,31,663-00 ps. on which the plaintiff calculated that a court-fee of Rs.99,875-75 ps. is payable, under Section 42 of The Tamil Nadu Court Fees and Suits Valuation Act, 1955" (hereinafter referred to as the

'Tamil Nadu Act' for the sake of convenience). The plaint was presented on 20-08-1998 with deficit court-fee. Only an amount of Rs.2,000/- was paid. The plaint was returned by the Court on 24-08-1998 with various objections including the deficiency in the court-fee. The plaintiffs represented (1st representation) the plaint after a long delay on 03-05-2002 along with a court-fee of Rs.96,000/-, with an Application to condone the delay in representation. On 03-06-2002, the plaint was again returned, inter alia, on the ground that there still was a deficit of the court-fee. Eventually, the plaint was represented on 22-01-2004 (2nd representation) remitting a further amount of Rs.2,875/- court-fee along with Applications to condone the delay in representation, etc. On the same day, the plaint was once again returned with certain objections. On 09-04-2004, the plaint was once again represented (3rd representation) with an application to condone the delay of 70 days in representation. On 15-04-2004, the Suit was numbered as O.S.No.100 of 2004 by the Court. On 05-10-2004, Sengoda Gounder was set ex parte. On the same day, however, the sole respondent herein filed implead-petition in I.A.No.1532 of 2004, which was allowed by an order dated 09-03-2005.

7. The respondent herein filed C.R.P.(PD) No.658 of 2006, before the High Court of Madras, challenging the decision of the Trial Court in I.A.No.76 of 2004 to condone the delay of 1328 days in the first of the abovementioned three representations of the plaint. Another C.R.P.(PD) No.657 of 2006 was filed challenging the order of the Trial Court I.A.No.75 of 2004, dated 22-01-2004, by which, the Trial Court condoned the delay of 585 days in the second of the abovementioned representations.

8. During the pendency of the abovementioned two C.R.Ps., the 2nd defendant (sole respondent herein) filed his written statement and also filed Application in I.A.No.3 of 2006, invoking Order-7 Rule-11 of the Code of Civil Procedure to reject the plaint. A week thereafter, on 29-12-2005, the plaintiffs filed I.A.No.1 of 2006, seeking amendment of the plaint.

A

9. I.A.No.1 of 2006 filed by the plaintiffs was allowed by an order dated 16-02-2006. Aggrieved by the same, the sole respondent carried the matter in Revision to the High Court in C.R.P.(PD) No.769 of 2006, which was dismissed by an order dated 25-04-2006. I.A.No.3 of 2006 filed by the 2nd defendant/ respondent herein, was dismissed by an order dated 31-03-2006, and a Revision in C.R.P.(PD)No.797 of 2006, filed challenging the same.

B

10. Eventually, in C.R.P.(PD)No.797 of 2006 along with C.R.P.Nos.658 & 657 of 2006, were heard together and allowed by the High Court by a common order dated 22-12-2006, setting aside the orders passed in I.A.Nos.76, 75 of 2004 and 3 of 2006. The operative portion of the order is as under:

C

> "In the result, all the three CRPs are allowed. The numbering of the suit No. 100 of 2004 by the District Court, Erode and renumbering the same as O.S.No.4 of 2005 on its transfer by the Additional District Judge (FTC-IV), Erode at Bhavani is set aside the consequently the trial Court is directed to struck off the said suit from its file."

D

E

Hence, the S.L.P.

11. Initially, the Suit was presented before the Sub-Court, Bhavani, but finally represented (3rd representation) to the District Court, Erode, due to the change brought about in the pecuniary jurisdiction of the Civil Courts by Tamil Nadu Act No.1 of 2004, which came into force w.e.f., 29-12-2003 and numbered as O.S.No.100 of 2004. Subsequently, the same was transferred to Additional District Court (FTC-IV), Bhavani and renumbered as O.S.No.4 of 2005. The initial presentation and the 1st two representations, mentioned earlier, of the Suit were to the Sub Court, Bhavani, and the final representation was to the District Court, Erode. The delay in representation, on the 1st two occasions, was condoned by the Sub Court, Bhavani.

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A

12. The 2nd defendant made the following submissions before the High Court and before us also:

(1) that the Sub Court, Bhavani lacked jurisdiction to consider and order the 1st of the two delay condonation petitions (I.A.Nos. 76 and 75 of 2004) in view of the fact that there was no Suit pending, in the eye of law, before the Sub Court as on 22-01-2004 (the date on which the abovementioned IAs were allowed) because of the Amendment to the Civil Courts Act;

B

C

(2) the plaintiffs did not invoke Section 149 of the Code, while seeking the condonation of delay in representing the plaint and making good the deficit court-fee, therefore, the plaint ought to have been rejected;

D

(3) The delay in representation was condoned without notice to the defendant. In view of the decision of the High Court of Madras in K. Natarajan v. P.K. Rajasekaran, (2003) 2 M.L.J. 305, such a procedure, when the court fee is paid beyond the period of limitation for filing the Suit, is illegal; and

E

(4) the Trial Court mechanically condoned the delay without appreciating the legal position that, condonation of a huge delay without any proper explanation is uncalled for and militates against the provisions of the C.P.C.

F

13. Whereas the plaintiffs argued before the High Court;

(1) that the 2nd defendant is a purchaser pendente lite (plaint initially presented on 20-08-1998 and the 2nd defendant, admittedly, purchased the suit scheduled property on 08-03-1999) and, therefore, has no locus standi to contest the suit in view of the fact that the 1st defendant chose not to contest the suit;

G

(2) the sale in favour of the 2nd defendant is sham and nominal; and

H

(3) payment of court-fee is purely a matter between the State and the plaintiffs and, therefore, the 2nd defendant has no locus to raise any objection on that count.

14. In order to examine the correctness of the High Court's findings, two preliminary questions / objections raised by the plaintiffs regarding the locus standi of the 2nd defendant to maintain the three Civil Revision Petitions, which were disposed of by the common Judgment under challenge, is required to be examined first.

15. The first preliminary objection is that the 2nd defendant, being a pendente lite purchaser, has no locus standi to question the correctness of the decision of the Trial Court to condone the delay in representation of the plaint. To understand the legal rights and obligations of a pendente lite purchaser, it is necessary to examine the jurisprudential background of the doctrine of lis pendens and its statutory expression.

16. This Court in *Jayaram Mudaliar v. Ayyaswami and Others,* (1972) 2 SCC 200 (paras 42 to 44) quoted with approval a passage from the Commentaries on the Laws of Scotland, by Bell, which explains the doctrine of lis pendens:

> "**43.** ………….. Bell, in his commentaries on the Laws of Scotland, said that it was grounded on the maxim : "Pendent elite nibil innovandum". He observed:
>
> > "It is a general rule which seems to have been recognised in all regular systems of jurisprudence, that during the pendence of an action, of which the object is to vest the property or obtain the possession of real estate, a purchaser shall be held to *take that estate as it stands in the person of the seller,* and to be bound by the claims which shall ultimately be pronounced."

Section 52* of the Transfer of Property Act, (for short 'the T.P.Act') incorporates doctrine of lis pendens and it stipulates that during the pendency of any suit or proceeding in which any right to immovable property is, directly or specifically, in question, the property, which is the subject matter of such suit or proceeding cannot be "transferred or otherwise dealt with", so as to affect the rights of any other party to such a suit or proceeding. The Section is based on the principle:

> "………..that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject to be defeated by the some course of proceeding."
>
> *Belkamy v. Subina* (1857) De. GEJ 566 at 588.

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*. Section 52 of the Transfer of Property Act

"52 Transfer of property pending suit relating thereto—During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of compentent jurisdiction, and to continue until the suit proceeding has been disposed of by a final decree or order and complete satisfication or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

Quoted with approval by this Court in *Vinod Seth v. Devinder Bajaj* (2010)8 SCC 1.

17. It is settled legal position that the effect of Section 52 is not to render transfers affected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the Court.

> "The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court."
>
> *[Sanjay Verma v. Manik Roy, AIR 2007 SC 1332, para 12]*

18. Such being the scope of Section 52, two questions arise: whether a pendente lite purchaser (1) is entitled to be impleaded as a party to the suit; (2) once impleaded what are the grounds on which he is entitled to contest the suit.

19. This Court on more than one occasion held that when a pendente lite purchaser seeks to implead himself as a party - defendant to the suit, such application should be liberally considered. This Court also held in *Smt. Saila Bala Dassi v. Smt. Nirmala Sundari Dassi and Another,* AIR 1958 SC 394, that, "justice requires", a pendente lite purchaser "should be given an opportunity to protect his rights". It was a case, where the property in dispute had been mortgaged by one of the respondents to another respondent. The mortgagee filed a suit,

obtained a decree and 'commenced proceedings for sale of the mortgaged property'. The appellant Saila Bala, who purchased the property from the judgment-debtor subsequent to the decree sought to implead herself in the execution proceedings and resist the execution. That application was opposed on various counts. This Court opined that Saila Bala was entitled (under Section 146 of the C.P.C.) to be brought on record to defend her interest because, as a purchaser pendent elite, she would be bound by the decree against her vendor. There is some divergence of opinion regarding the question, whether a 28pendent elite purchaser is entitled, as a matter of right, to get impleaded in the suit, this Court in (2005) 11 SCC 403, held that :

> "Further pending the suit, *the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party.* But the transferee endent elite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee *endent elite* to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a *lis pendens* transferee a party, under Order 22 Rule 10 an alienee *endent elite* may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. *The court has held that a transferee endent elite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his* predecessor-in-interest is made a party to the litigation; *he*

> *is entitled to be heard in the matter on the merits of the case."*
>
> [Emphasis supplied]

The preponderance of opinion of this Court is that a pendente lite purchaser's application for impleadment should normally be allowed or "considered liberally".

20. That the question of court fee is a matter between the plaintiff and the Court is a principle which has been followed for a long time. The Madras High Court in *SL Lakshmana Ayyar vs. TSPLP Palaniappa Chettiar,* AIR 1935 Mad.927 held " under the prevailing usage, the court fully goes into the question relating to the Court fee, only upon an objection taken in the written statement by the defendant, but as the judicial committee points out in 36 M.L.1437 the Court fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, and from that view it follows, that although in actual practice a defendant is permitted to object that the proper Court fee has not been paid, he has, strictly speaking, no legal right to raise such a plea, but his function must be deemed to be, subject to the court's leave, merely to assist in it coming to a proper decision."

Though this judgment does not refer to any statutory provisions, Section 12 of the Court Fees Act, 1870 supports this view. Sub section 1 gives finality to the decision of the trial court on the questions relating to valuation.

> " (1) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this Chapter on a plaint or memorandum of appeal, shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit".

Sub-Section 2 however provides that the appellate or revisional Court can direct the deficiency to be made good if it comes to

the conclusion that the lower court had decided the issue to the detriment of the revenue.

> (2) "But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of section 10, paragraph (ii), shall apply."

In view of the finality attached under sub-section (1) to the decision of the trial court and the time of the limited scope of the appellate court's power to examine whether the lower court wrongly decided the question to the detriment of the revenue, the conclusion obviously is inevitable the defendant has no right to file a revision petition against the decision of the trial court.

21. However the position under the Madras Court fees act, 1955 is different. Section 12(2) expressly provides for the defendant's right to raise the question of the court fees:-

> "(2) *Any defendant may,* by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim but, subject to the next succeeding sub-section, not later, *plead that the subject matter of the suit has not been properly valued or that the fee paid is not sufficient.* All questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. If the Court decides that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient, the Court shall fix a date before which the plaint shall be amended in accordance with the Court's decision and the deficit fee shall be paid. If the plaint be not amended or if the deficit fee be not paid within the time allowed, the plaint shall be rejected and the Court shall

pass such order as it deems just regarding costs of the suit."

[Emphasis supplied]

Section 12(4)(a) provides that even the appellate Court can go into the question of the correctness of the decision of the lower court (rendered under Section 12(2)) either on its own motion or on the application of any of the parties. (obviously including the defendants)

(4)(a)Whenever a case comes up before a Court of Appeal, it shall be lawful for the Court, **either of its own motion or on the application of any of the parties**, to consider the correctness of any order passed by the lower Court affecting the fee payable on the plaint or in any other proceeding in the lower Court and determine the proper fee payable thereon.

Explanation.—A case shall be deemed to come before3 a Court of appeal even if the appeal relates only to a part of the subject matter of the suit.

[Emphasis supplied]

If the Court comes to the conclusion that the court fee paid in the lower court is not sufficient, the court shall require the party to make good the deficiency.

"(b) If the Court of Appeal decides that the fee paid in the lower Court is not sufficient, the Court shall require the party liable to pay the deficit fee within such time as may be fixed by it."

However, this Court in *Rathnavarma Raja v. Smt. Vimala* AIR 1961 SC 1299 held:-

"2. *The Court Fees Act was enacted to collect revenue for the benefit of the State and not to arm a contesting*

party with a weapon of defence to obstruct the trial of an action. By recognising that the defendant was entitled to contest the valuation of the properties in dispute as if it were a matter in issue between him and the plaintiff and by entertaining petitions preferred by the defendant to the High Court in exercise of its revisional jurisdiction against the order adjudging court fee payable on the plaint, all progress in the suit for the trial of the dispute on the merits has been effectively frustrated for nearly five years. We fail to appreciate what grievance the defendant can make by seeking to invoke the revisional jurisdiction of the High Court on the question whether the plaintiff has paid adequate court fee on his plaint. *Whether proper court fee is paid on a plaint is primarily a question between the plaintiff and the State.* How by an order relating to the adequacy of the court fee paid by the plaintiff, the defendant may feel aggrieved, it is difficult to appreciate. Again, the jurisdiction in revision exercised by the High Court under Section 115 of the Code of Civil Procedure is strictly conditioned by clauses (a) to (c) thereof and may be invoked on the ground of refusal to exercise jurisdiction vested in the Subordinate Court or assumption of jurisdiction which the court does not possess or on the ground that the court has acted illegally or with material irregularity in the exercise of its jurisdiction. The defendant who may believe and even honestly that proper court fee has not been paid by the plaintiff has still no right to move the superior courts by appeal or in revision against the order adjudging payment of court fee payable on the plaint. But counsel for the defendant says that by Act 14 of 1955 enacted by the Madras Legislature which applied to the suit in question, the defendant has been invested with a right not only to contest in the trial court the issue whether adequate court fee has been paid by the plaintiff, but also to move the High Court in revision if an order contrary to his submission is passed by the court. Reliance in support of that contention is placed upon sub-section (2) of Section

12. That sub-section, insofar as it is material, provides:

3. But *this section only enables the defendant to raise a contention as to the proper court fee payable on a plaint and to assist the court in arriving at a just decision on that question.* Our attention has not been invited to any provision of the Madras Court Fees Act or any other statute which enables the defendant to move the High Court in revision against the decision of the Court of first instance on the matter of court fee payable in a plaint. The Act, it is true by Section 19, provides that for the purpose of deciding whether the subject-matter of the suit or other proceeding has been properly valued or whether the fee paid is sufficient, the court may hold such enquiry as it considers proper and issue a commission to any other person directing him to make such local or other investigation as may be necessary and report thereon. The anxiety of the Legislature to collect court fee due from the litigant is manifest from the detailed provisions made in Chapter III of the Act, but those provisions do not arm the defendant with a weapon of technicality to obstruct the progress of the suit by approaching the High Court in revision against an order determining the court fee payable."

[Emphasis supplied]

In our opinion the above conclusion is clearly supportable from the language of sub-section (4)(c).

(c) If the deficit fee is not paid within the time fixed and the default is in respect of a relief which has been dismissed by the lower Court and which the appellant seeks in appeal, the appeal shall be dismissed, but if the default is in respect of a relief which has been decreed by the lower Court, the deficit fee shall be recoverable as if it were an arrear of land revenue."

It can be seen, the sub-section (c) provides for the dismissal of *only the appeal* in case of the failure to make good the deficit of Court fee if the same pertains to that portion of the decree by which a portion of the plaintiff's claim stood dismissed by the trial court. However in the case of the default in making good portion of the court fee pertaining decree in favour of the plaintiff, the Section only mandates the recovery of the amount by resort to the Revenue Recovery Act but does not command the Suit to be dismissed. Obviously the legislature did not intend to give any advantage to the defendants on account of the payment of the inadequate Court fee by the plaintiffs.

22. Therefore the law is clear that though a defendant is entitled under the Tamil Nadu Act to bring it to the notice of the Court that the amount of court fee paid by the plaintiff is not in accordance with law, the defendant cannot succeed in the suit only on that count. But the dispute of the 2nd defendant is not regarding the amount of the court fee but the acceptance of the court fee after the expiry of the period of limitation applicable to the suit.

23. The next question that is required to be examined is that if appropriate court fee is not paid at the time of the filing of the plaint, can the suit be said to be a valid suit in the eye of law. A further question arising out of the above is – what is the effect of the payment of appropriate court fee subsequent to the expiry of the period of limitation prescribed by law for the filing of a suit in a case where the plaint is filed within the period of limitation applicable to such case. Ancillary to the above question is the question whether, in such a case, the defendant is entitled to notice before the Court accepts the payment of the deficit Court fee.

24. The law relating to the valuation of the suits and the payment of court fees in the State of Tamil Nadu is "The Tamil Nadu Court Fees and Suits Valuation Act, 1955". By Section 87 of the said Act, two enactments known as The Court Fees

Act 1870 and The Suits Valuation Act 1887 (which governed the field of the valuation of suits and payment of court fees) are repealed. It may not be either necessary or profitable to go into the scheme of the repealed enactments except to take note of the historical fact for certain limited purpose.

25. The Tamil Nadu Act prescribes the method and manner of the determination of valuation of the suits and the appropriate court fee payable with reference to various kinds of suits and appeals etc. Section 4 of the Act stipulates that no document which is chargeable with a fee under the said Act shall **be acted on** by any **court** or any public office unless the appropriate fee payable under the Act (Court fee) in respect of such a document is paid.

> "4. Levy of fee in Courts and public offices
>
> No document which is chargeable with fee under this Act shall —
>
> (i) be filed, exhibited or recorded in, or be acted on or furnished by, any Court including the High Court, or
>
> (ii) be filed, exhibited or recorded in any public office, or be acted on or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated as chargeable under this Act:
>
> Provided that, whenever the filing or exhibition in a Criminal Court of a document in respect of which the proper fee has not been paid is in the opinion of the Court necessary to prevent a failure of justice, nothing contained in this section shall be deemed to prohibit such filing or exhibition."

26. Section 5 stipulates when a document on which court fee is payable is received in any court or public office, though the whole or any part of the appropriate court fee payable on such document has not been paid, either because of a mistake

or inadvertence of the Court, the Court, in its discretion, may allow the payment of the deficit court fee within such time as may be fixed. Section 5 further declares that upon such payment, such document "shall have the same force and effect" as if the court fee had been paid in the first instance. Indisputably, the expression "document" appearing under Section 4 and 5 takes within its sweep a plaint contemplated under the Code of Civil Procedure (hereinafter 'the Code' for short). It may be pertinent to mention that under Section 28[1] of the Court Fees Act 1870, it is categorically declared that "no document which ought to bear a stamp under this Act shall be of any validity unless and until it is properly stamped". However, it is further provided in the same Section that a Court may permit the payment of appropriate court fee in its discretion and if the deficit is made good "every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance". The language of the Tamil Nadu Act is different. Though Section 4 declares no document in respect to which court fee is required to be paid under the Act but not paid shall be acted upon, it does not declare the document to be without any validity.

27. Order VII Rule 11 CPC requires a plaint to be rejected, inter alia, where the relief claimed is undervalued and/or the plaint is written on a paper insufficiently stamped, and, in either case, the plaintiff fails to either correct the valuation and/or pay the requisite court fee by supplying the stamp paper within the time fixed by the court. Rule 13 categorically declares that the

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1. 28. Stamping documents inadvertently received—No document which ought to bear a stamp under this Act shall be of any validity unless and until it is properly stamped.

   But, if any such document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the Presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order that such document be stamped as he may direct; and, on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.

rejection of a plaint shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. However, Section 149 of the Code stipulates as follows:

> *"149 Power to make up deficiency of court-fees*
>
> Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

It can be seen from the language of Section 149, it does not deal only with court fees payable on a plaint. The said Section also deals with every document with respect to which court fee is required to be paid under the appropriate law. It may be further mentioned that Order VIII of the Code provides for set-off and counter claims under Rule 6 and 6A. Under Section 8 of the Tamil Nadu Act, it is declared that "a written statement pleading a set-off or counter claim shall be chargeable with fee in the same manner as a plaint". Therefore, when Section 149 of the Code speaks about a document with respect to which court fee is required to be paid, it takes within its sweep not only plaints but various other documents with respect to which court fee is required to be paid under the appropriate law including written statements in a suit.

28. Therefore, from the language of Section 149 CPC it follows that when a plaint is presented to a Court without the payment of appropriate court fee payable thereon, undoubtedly the Court has the authority to call upon the plaintiff to make payment of the necessary court fee. Such an authority of the Court can be exercised *at any stage* of the suit. It, therefore,

appears to us that any amount of lapse of time does not fetter the authority of the Court to direct the payment of such deficit court fee. As a logical corollary, even the plaintiff cannot be said to be barred from paying the deficit court fee because of the lapse of time.

29. This Court in AIR 1971 SC 1374- *Mannan Lal v. Mst. Chhotka Bibi (dead) by Lrs. & Ors.* interpreting Sec. 149 CPC held:-

> "The above section therefore mitigates the rigour of Section 4 of the Court Fees Act and it is for the Court in its discretion to allow a person who has filed a memorandum of appeal with deficient court-fee to make good the deficiency and the making good of such deficiency cures the defect in the memorandum not from the time when it is made but from the time when it was first presented in Court.
>
> In our view in considering the question as to the maintainability of an appeal when the Court fee paid was insufficient to start with but the deficiency is made good later on the provisions of the Court Fees Act and the Code of Civil Procedure have to be read together to form a harmonious whole and no effect should be made to give precedence to provisions in one over those of the other unless the express words of a statute clearly override those of the other.
>
> It was further held at para 14:-
>
> "There can in our opinion be no doubt that Sec.4 of the Court Fees Act is not the last word on the subject and the Court must consider the provisions of both the Act and the Code to harmonise the two sets of provisions which can only be done by reading Section 149 as a proviso to Section 4 of the Court Fees Act by allowing the deficiency to be made good within a period of time fixed by it. *If the*

deficiency is made good no possible objection can be raised on the ground of the bar of limitation: the memorandum of appeal must be treated as one filed within the period fixed by the Limitation Act subject to any express provision to the contrary in that Act and the appeal must be treated as pending from the date when the memorandum of appeal was presented in court. In our view it must be treated as pending from the date of presentation not only for the purpose of limitation but also for the purpose of sufficiency as to court-fee under Section 149 of the Code."

[Emphasis supplied]

30. It was a case where by an Act of the U.P. Legislature the appellate jurisdiction provided under the Letters Patent of Her Majesty dated 17th March, 1866 was abolished. However, Sec.3 of the U.P. Act saved the pending Letters Patent appeals. The question before this Court was whether Letters Patent appeal presented to the Allahabad High Court prior to the commencement of the Abolition Act but without affixing appropriate court fees stamp can be said to be a pending appeal. This Court on a consideration of the relevant provisions of the law and also the decisions of the Madras High Court in *Gavaranga Sahu Vs. Batakrishna Patro,* (1909) ILR 32 Mad 305 (FB) and *Faizullah Vs. Mauladad,* AIR 1929 PC 147 reached the conclusion that such an appeal was a 'pending appeal' for the purpose of the Abolition Act.

31. We may mention here that the subject matter of dispute in the above mentioned case was a Letters Patent Appeal. However, the Full Bench decision of the Madras High Court, quoted with approval by this Court (supra), dealt with the question whether the payment of deficit in court fee beyond the period of limitation prescribed for filing the suit would retrospectively render the plaint (originally presented within the period of limitation but with deficit court fee) a validly presented plaint:

"The argument advanced in that case before the Court appears to have been to the effect that a plaint which was not sufficiently stamped within the period of limitation was not a valid plaint at all. In the order of reference the law on the subject was set forth in some detail and the learned referring Judge opined that an insufficiently stamped plaint did not become a new plaint when the deficiency was supplied. The learned Judges of the Full Bench fully agreed with the view taken in the order of reference and with the reasons upon which it was based and merely added that Section 149 of the Civil Procedure Code of 1908 was in accordance with this view."

In substance, the Full Bench Madras High Court held that such a plaint would be a validly presented plaint. This Court approved the said decision.

32. The question whether there is a deficit of court fee paid with respect to a plaint depends on two factors: (1) the valuation of the suit, and (2) the determination of the appropriate court fee payable thereupon. There can occur an error (either advertently or otherwise), on either of the abovementioned counts. Under Section 12(1) of the Tamil Nadu Act (which is relevant for our purpose), primarily it is the obligation of the Court to examine all the relevant material and determine whether the proper fee payable on the plaint is paid or not. As already noticed, under Section 12(2)[2] of the Tamil Nadu Act,

2. 12 Decision as to proper fee in other Courts.

(2) Any defendant may, by his written Statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim but, subject to the next succeeding sub-section, not later, plead that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before evidence affecting such defendant, on the merits of the claim. If the Court decides that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient, the Court shall fix a date before which the plaint shall be amended in accordance with the Court's decision and the deficit fee shall be paid. If the plaint be not amended or if the deficit fee be not paid within the time allowed, the plaint shall be rejected and the Court shall pass such order as it deems just regarding costs of the suit.

the defendant can also raise objections to either the valuation of the suit or the determination of the court fee payable. The determination of the accuracy of the valuation of the suit and/ or the appropriate court fee payable thereon, in either of the contingencies mentioned above, is required to be made by the Court. If the Court reaches the conclusion that the appropriate court fee is not paid, the consequences stipulated in Section 12(2) to (4) should follow.

33. If such conclusion is reached by the *trial Court,* the trial Court is mandated to reject the plaint if the plaintiff fails to pay the necessary court fee even after being called upon by the trial Court – necessarily meaning that no adjudication on the merits of the case can be made. The consequences of such a conclusion if reached by the *appellate Court,* in the course of hearing of the appeal, are stipulated under Section 12(4)(c), which is already taken note of earlier.

34. That leads us to the next question regarding the legal character of Section 149. Is it a provision conferring authority on the Court to call upon a plaintiff to make payment of court fee which was found to be due but short paid on the plaint or is it a provision conferring a right on the plaintiff to make good the deficit court fee at any point of time irrespective of the provisions of the law of limitation and other provisions and principles of law.

35. We have already noticed that under Order VII Rule 11, a plaint, which has not properly valued the relief claimed therein or is insufficiently stamped, is liable to be rejected. However, under Rule 13, such a rejection by itself does not preclude the plaintiff from presenting a fresh plaint. It naturally follows that in a given case where the plaint is rejected under Order VII Rule 11 and the plaintiff chooses to present a fresh plaint, necessarily the question arises whether such a fresh plaint is within the period of limitation prescribed for the filing of the suit. If it is to be found by the Court that such a suit is barred by limitation, once again it is required to be rejected under Order

VII Rule 11 Clause (d). However, Section 149 CPC, as interpreted by this Court in *Mannan Lal* (supra), confers power on the Court to accept the payment of deficit court fee even beyond the period of limitation prescribed for the filing of a suit, if the plaint is otherwise filed within the period of limitation. Therefore, the rigour of Order VII Rule 11 CPC and also Section 4 of the Tamil Nadu Act is mitigated to some extent by the Parliament when it enacted Section 149 CPC. We may not forget that Limitation is only a prescription of law; and Legislature can always carve out exceptions to the general rules of limitation, such as Section 5 of the Limitation Act which enables the Court to condone the delay in preferring the appeals etc.

36. This court on more than one occasion held that the jurisdiction under Section 149 CPC is discretionary in nature. [See *P.K. Palanisamy Vs. N. Arumugham & Anr.,* (2009) 9 SCC 173 and (2012) 13 SCC 539]

37. It is well settled that the judicial discretion is required to be exercised in accordance with the settled principles of law. It must not be exercised in a manner to confer an unfair advantage on one of the parties to the litigation. In a case where the plaint is filed within the period of limitation prescribed by law but with deficit court fee and the plaintiff seeks to make good the deficit of the court fee beyond the period of limitation, the Court, though has discretion under Section 149 CPC, must scrutinise the explanation offered for the delayed payment of the deficit court fee carefully because exercise of such discretion would certainly have some bearing on the rights and obligations of the defendants or persons claiming through the defendants. (The case on hand is a classic example of such a situation.) It necessarily follows from the above that Section 149 CPC does not confer an absolute right in favour of a plaintiff to pay the court fee as and when it pleases the plaintiff. It only enables a plaintiff to seek the indulgence of the Court to permit the payment of court fee at a point of time later than the presentation of the plaint. The exercise of the discretion by the

Court is conditional upon the satisfaction of the Court that the plaintiff offered a legally acceptable explanation for not paying the court fee within the period of limitation.

38. On the facts of the case on hand, the High Court recorded its conclusion as follows:

> "………. the Subordinate Judge has erred in allowing the I.A. Nos.75 and 76 of 2004 by exercising the discretion without analysing the bona fides of the plaintiffs case and without giving notice to the defendant."

Such a conclusion was recorded on the basis of the finding:

> "Apart from *that sufficient cause was not shown* in the two affidavits filed in support of the application to condone the delay of representation in I.A. No.76/2004 the reason given was that due to non availability of stamp paper, proper court fee could not be paid. In I.A. No.75/2004 no reason has been stated for such deficit court fee. Even for the delay also the conventional reason of jaundice has been stated and the plaintiffs alleged that they have been taking Siddha treatment for such ailment. Even such affidavits have been filed only by the counsels and not by the parties. But accepting such reasons, the delay in representation as well as the payment of deficit court fee has been accepted by the court below."

[Emphasis supplied]

39. We do not see any reason to take a different view than that are taken by the High Court. The discretion under Section 149 was not exercised by the trial Court in accordance with the principles of law. The appeal is, therefore, required to be dismissed on that count alone. In view of such a conclusion, we do not think it necessary to examine the other questions raised by the 2nd defendant.

40. The appeal is dismissed.

D.G. Appeals dismissed.

THE CHURCH OF CHRIST CHARITABLE TRUST & EDUCATIONAL CHARITABLE SOCIETY, REPRESENTED BY ITS CHAIRMAN

v.

M/S PONNIAMMAN EDUCATIONAL TRUST REPRESENTED BY ITS CHAIRPERSON/ MANAGING TRUSTEE

(Civil Appeal No. 4841 of 2012)

JULY 03, 2012

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

CODE OF CIVIL PROCEDURE, 1908:

O. 7, r.1 read with rr. 14(1), 14(2) and Forms 47 and 48 in Appendix A - Suit for specific performance - Agreement of sale between plaintiff and second defendant - Plaint stating that second defendant as power of attorney-holder as also agreement holder of first defendant executed agreement of sale - Application for rejection of plaint as against first defendant - Held: The plaintiff-respondent to get a decree for specific performance has to prove that there is a subsisting agreement in his favour and the second defendant has the necessary authority under the power of attorney - Neither the documents were filed nor terms thereof set out in the plaint - In view of the shortfall in the plaint averment and non-compliance of statutory provisions, the single Judge of the High Court has correctly concluded that in the absence of any cause of action shown as against the appellant-first defendant, the suit cannot be proceeded either for specific performance or for the recovery of money advanced which according to the plaintiff was given to the second defendant in the suit and rightly rejected the plaint as against the first defendant - Cause of action.

O. 7, r.11 - Rejection of plaint - Suit for specific

performance - Power of attorney - Held: A power of attorney has to be strictly construed - In order to agree to sell or effect a sale by a power of attorney, it should also expressly authorize the power to the agent to execute sale agreement/ sale deed i.e., (a) to present the document before the Registrar; and (b) to admit execution of the document before the Registrar - Deeds and documents.

O. 7, r.11 - Rejection of plaint - Held: The power under O.7 r. 11 can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial - In order to consider O. 7, r. 11, the court has to look into the averments in the plaint and the averments in the written statement are immaterial.

O. 7, r.11 - Application for rejection of plaint - Non-joinder of party - Held: To reject the plaint even before registration of the plaint on one or more grounds mentioned in O. 7, r. 11, the other defendants need not necessarily be heard at all as it does not affect their rights - In the instant case, second defendant is not a necessary party nor does the applicant-first defendant seek any relief against him - Besides, the plea as to the non-joinder of party cannot be raised for the first time before Supreme Court if the same was not raised before the trial court and has not resulted in failure of justice.

SPECIFIC RELIEF ACT, 1963:

s. 20 - Held: The jurisdiction to grant specific performance is discretionary - In view of the conduct of the plaintiff, bereft of required materials as mandated by the statutory provisions, the plaint is liable to be rejected, as the cause of action pleaded in the plaint is vitiated - Code of Civil Procedure, 1908 - O.7, r. 11.

The appellant Society-1st defendant, on 9.1.1990, entered into an agreement of sale of certain property in

favour of defendant no. 2. On 19.10.1990, the appellant-Society executed a registered power of attorney in favour of defendant no. 2 for limited purpose enabling him to represent the Society before the authorities. However, the said power of attorney was revoked on 15.10.1991 by a registered document. Since defendant no. 2 failed to comply with the commitments, the appellant-Society, on 19.11.1991 cancelled the agreement of sale dated 7.1.1990. The suit filed by defendant no. 2 challenging the said cancellation was withdrawn in the year 2006. Meanwhile, on 4.8.2001, defendant no. 2 entered into a Memorandum of Understanding with the respondent-plaintiff to sell certain portion of property as the agreement-holder and power of attorney agent of the appellant-Society. On 24.11.2004, the respondent-plaintiff filed C.S. No. 115 of 2005 for specific performance of agreement dated 4.8.2001 and also filed an application for interim injunction. Defendant no. 1-appellant Society filed an application under O.7, r.11 CPC for rejection of the plaint. The single Judge of the High Court rejected the plaint as regards the plaintiff-Society (defendant no.1). However, the Division Bench allowed the appeal against rejection of the plaint. Aggrieved, defendant no. 1-Society filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 It is clear from the provisions of O.7, r. 11 of the Code of Civil Procedure, 1908 that where the plaint does not disclose a cause of action, or there are other defects as mentioned in r.11 itself, the court has no other option except to reject the same. Further, the power under O.7 r. 11 can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial. In order to consider O. 7, r. 11, the court has to look into the averments in the plaint and the

averments in the written statement are immaterial. If the allegations are vexatious and meritless and not disclosing a clear right or material(s) to sue, it is the duty of the trial Judge to exercise his power under O. 7 r.11. [para 6] [415-H; 416-A-B; F-G; 417-F-G]

T. Arivandandam vs. T.V. Satyapal & Anr., **1978 (1) SCR 742 = (1977) 4 SCC 467 - relied on**

Raptakos Brett & Co. Ltd. vs. Ganesh Property **1998 (1) Suppl. SCR 485 = (1998) 7 SCC 184 and** *Mayar (H.K.) Ltd. and Others vs. Owners & Parties, Vessel M.V. Fortune Express and Others* **2006 (1) SCR 860 = (2006) 3 SCC 100 referred to.**

1.2 While scrutinizing the plaint averments, it is the bounden duty of the trial court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. [para 8] [417-H; 418-A-B]

A.B.C. Laminart Pvt. Ltd. & Anr. vs. A.P. Agencies, Salem **1989 (2) SCR 1 = (1989) 2 SCC 163;** *Bloom Dekor Ltd. vs. Subhash Himatlal Desai & Ors.* **1994 (3) Suppl. SCR 322 = (1994) 6 SCC 322 - relied on.**

1.3 Order 7, r. 14 mandates that the plaintiff has to produce the documents on which the cause of action is based. In paragraph 4 of the plaint, it is alleged that the 2nd defendant as agreement holder and also as the registered power of attorney holder of the 1st defendant executed the agreement of sale. Therefore, the plaintiff has to produce the power of attorney when the plaint is

presented by him and if he is not in possession of the same, he has to state as to in whose possession it is. In the case on hand, only the agreement between the plaintiff and the second defendant has been filed along with the plaint. If he is not in possession of the power of attorney, it being a registered document, he should have filed a registration copy of the same. There is no explanation even for not filing the registration copy of the power of attorney. Instead of explaining in whose custody the power of attorney is, the plaintiff has simply stated 'Nil'. It clearly shows non-compliance of O. 7, r. 14(2). [419-F-H; 420-A-C]

1.4 Neither the documents were filed along with the plaint nor the terms thereof have been set out in the plaint. The two documents were to be treated as part of the plaint as being the part of the cause of action. It is settled law that where a document is sued upon and its terms are not set out in the plaint but referred to in the plaint, the said document gets incorporated by reference in the plaint. [para 13] [420-D-E]

U.S. Sasidharan vs. K. Karunakaran and Another **1989 (3) SCR 958 = (1989) 4 SCC 482 and** *Manohar Joshi vs. Nitin Bhaurao Patil and Another* **1995 (6) Suppl. SCR 421 = (1996) 1 SCC 169 - referred to.**

1.5 It is settled that a power of attorney has to be strictly construed. In order to agree to sell or effect a sale by a power of attorney, it should also expressly authorize the power to the agent to execute the sale agreement/ sale deed i.e., (a) to present the document before the Registrar; and (b) to admit execution of the document before the Registrar. A perusal of the power of attorney, in the instant case, shows that in only authorizes certain specified acts but not any act authorizing entering into an agreement of sale or to execute sale deed or admit execution before the Registrar. [para 14] [420-G-H; 421-A]

Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Another **2011 (11) SCR 848 = (2012) 1 SCC 656 - referred to.**

1.6 Further, though the plaint avers that the 2nd defendant is the agreement holder of the 1st defendant, but the said agreement is not produced, nor the date of agreement is given in the plaint. In terms of Form Nos. 47 and 48 of Appendix A, failure to mention the date violates the statutory requirement and if the date is one which attracts the bar of limitation, the plaint has to conform to O. 7, r. 6 and specifically plead the ground upon which exemption from limitation is claimed. It was rightly pointed out that in order to get over the bar of limitation all the required details have been omitted. [para 15] [422-E-G]

1.7 Thus, the plaint has not shown a complete cause of action of privity of contract between the plaintiff and the 1st defendant or on behalf of the 1st defendant. Under s. 20 of the Specific Relief Act, 1963, it is settled that the jurisdiction to grant specific performance is discretionary. In view of the conduct of the plaintiff, bereft of required materials as mandated by the statutory provisions, the plaint is liable to be rejected at this stage itself as the cause of action pleaded in the plaint is vitiated. [para 16-17] [423-A-B; D-E, G-H]

Mohammadia Cooperative Building Society Ltd. vs. Lakshmi Srinivasa Cooperative Building Society Ltd. and Others **2008 (7) SCR 762 = (2008) 7 SCC 310 - relied on.**

Sirigineedi Subbarayadu vs. Kopanathi Tatayya, **1937 Madras Weekly Notes 1158, 1159.;** *Ramaswamy Gounder vs. K.M. Venkatachalam* **1976(1) Madras Law Journal 243, 248, 249 - referred to.**

2.1 To reject the plaint even before registration of the plaint on one or more grounds mentioned in O. 7, r. 11 of the Code, the other defendants need not necessarily be heard at all as it does not affect their rights. A plea as to the non-joinder of the party cannot be raised for the first time before this Court if the same was not raised before the trial court and has not resulted in failure of justice. Besides, in the case on hand, the application for rejection of the plaint of the appellant-1st defendant seeks no relief against the respondent-2nd defendant. It is settled legal position that a party against whom no relief is claimed in the application is not a necessary party at all. [para 17-18] [423-H; 424-A-D-E; G-H]

Saleem Bhai & Ors. vs. State of Maharashtra and Others **2002 (5) Suppl. SCR 491 = (2003) 1 SCC 557;** *State of U.P. vs. Ram Swarup Saroj* **(2000) 3 SCC 699 - relied on.**

2.2 The appellant- 1st defendant is not seeking rejection of the plaint in part., but has prayed for rejection of the plaint as a whole for the reason that it does not disclose a cause of action and not fulfilling the statutory provisions. In addition to the same, it is brought to the notice of this Court that this contention was not raised before the High Court. [para 20] [425-F-G]

Roop Lal Sathi vs. Nachhattar Singh Gill **1983 (1) SCR 702 = (1982) 3 SCC 487 - held inapplicable.**

2.3 In view of the shortfall in the plaint averments, statutory provisions, namely, O. 7, rr. 11, 14(1) and 14(2) and Form Nos. 47 and 48 in Appendix A of the Code which are also statutory in nature, this Court holds that the single Judge of the High Court has correctly concluded that in the absence of any cause of action shown as against the appellant-1st defendant, the suit cannot be proceeded either for specific performance or for the recovery of money advanced, which according to

the plaintiff was given to the 2nd defendant in the suit, and rightly rejected the plaint as against the 1st defendant. Unfortunately, the Division bench failed to consider all those relevant aspects and erroneously reversed the decision of the single Judge. Therefore, the judgment and order passed by the Division Bench of the High Court is set aside and the order of the single Judge restored. [para 21] [425-H; 426-A-C]

Case Law Reference:

2002 (5) Suppl. SCR 491	**relied on**	**para 6**
1998 (1) Suppl. SCR 485	**relied on**	**para 6**
2006 (1) SCR 860	**relied on**	**para 6**
1978 (1) SCR 742	**relied on**	**para 7**
1989 (2) SCR 1	**relied on**	**para 9**
1994 (3) Suppl. SCR 322	**relied on**	**para 10**
1989 (3) SCR 958	**referred to**	**para 13**
1995 (6) Suppl. SCR 421	**referred to**	**para 13**
2011 (11) SCR 848	**referred to**	**para 14**
1937 Madras Weekly Notes 1158, 1159	**referred to**	**para 16**
1976(1) Madras Law Journal 243, 248, 249	**referred to**	**para 16**
2008 (7) SCR 762	**relied on**	**para 16**
(2000) 3 SCC 699	**referred to**	**para 17**
1983 (1) SCR 702	**held inapplicable**	**para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4841 of 2012.

From the Judgment & Order dated 16.08.2011 of the High Court of Judicature at Madras in O.S.A. No. 100 of 2006.

Ranjit Kumar, Nalini Chidambaram, Mukul Rohatgi, L. Nageshwar Rao, V. Kanagaraj, R. Balasubramaniam, R. Krishnaswamy, V. Ramasubramanian, V. Balachandran, Ashish Mohan, T. Meikandan, K.K. Mohan, Geetanjali Mohan, T. Harish Kumar, P. Prasanth for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 16.08.2011 passed by the High Court of judicature at Madras in O.S.A. Nos.100-102 of 2006 whereby the Division Bench of the High Court while rejecting OSA Nos. 101 and 102 of 2006 allowed the appeal being OSA No. 100 of 2006 filed by the respondent herein in respect of the rejection of the plaint against the appellant herein (1st defendant in the suit) by the learned single Judge of the High Court.

3. Brief facts:

(a) On 07.01.1990, the appellant-Society (first defendant), the owner of the property situated at Door No. 35, Lock Street, Kottur, Chennai entered into an Agreement for Sale of the property in favour of one S. Velayutham - 2nd defendant in the suit on the condition that the transaction should be completed within 6 months after obtaining clearance from Income Tax and other departments and also received an amount of Rs. 5 lakhs as an advance. On 19.10.1990, the 1st defendant-Society executed a registered power of attorney in favour of the 2nd defendant limited for the purpose of empowering him to represent the Society before the statutory authorities. On 15.10.1991, the 1st defendant-Society revoked the registered power of attorney executed in favour of the 2nd defendant by a registered document alleging various reasons. On 19.11.1991, as the 2nd defendant failed to comply with the commitments

made, the 1st defendant-Society cancelled the agreement for sale dated 07.01.1990.

(b) Questioning the said cancellation, the 2nd defendant instituted C.S. No. 1576 of 1991 against the 1st defendant-Society before the High Court of Madras for specific performance of the agreement dated 07.01.1990. In the said suit, an injunction was granted restraining the 1st defendant-Society from alienating the property. In the year 2006, the said suit was withdrawn by the 2nd defendant.

(c) M/s Karthik Granites Pvt. Ltd., a sister concern of the respondent herein filed C.S. No. 915 of 1994 on the file of the High Court for specific performance of the agreement to sell the larger extent of 56 grounds based on an alleged agreement entered into with the 2nd defendant which was dismissed as settled on the basis of the Memorandum of Understanding (MoU) dated 13.02.1997.

(d) Again on 04.08.2001, a Memorandum of Understanding (MoU) was entered into between the respondent herein and 2nd defendant in which 2nd defendant agreed to sell the remaining portion of the property, viz., 28 grounds and 1952 sq. ft. to the respondent, sister concern of M/s Karthik Granites Pvt. Ltd. as the agreement holder and power of attorney agent of the appellant. On 24.11.2004, the plaintiff-respondent herein filed C.S. No. 115 of 2005 for specific performance of the agreement dated 04.08.2001. The plaintiff-respondent also filed O.A. No. 132 of 2005 in the said suit praying for an interim injunction restraining the defendants from, in any way, dealing with or alienating the suit property pending disposal of the suit. The 1st defendant therein-the Society also filed Application No. 3560 of 2005 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short "the Code") praying for rejection of the plaint. On 18.01.2006, the plaintiff-respondent filed Application No.179 of 2006 for amendment of the plaint.

(e) The learned single Judge of the High Court rejected

the plaint insofar as 1st defendant is concerned and directed that the suit can be proceeded against the 2nd defendant. The applications bearing Nos. O.A.No.132 of 2005 and 179 of 2006 filed by the plaintiff-respondent for interim injunction and amendment of the plaint were also rejected by the learned single Judge.

(f) Challenging the said orders, the plaintiff-respondent filed appeals before the Division Bench of the High Court. By impugned order dated 16.08.2011, the Division Bench while dismissing the appeals against the order rejecting the applications for amendment and for interim injunction, allowed the appeal against the rejection of the plaint.

(g) Aggrieved by the said judgment insofar as it allowed the appeal against the rejection of the plaint, the appellant-Society (1st defendant) has filed this appeal by way of special leave petition before this Court.

4. Heard Mr. K. Parasaran and Mr. Ranjit Kumar, learned senior counsel for the appellant and Mr. Mukul Rohatgi, learned senior counsel for the respondent.

Points for consideration:

5. The points for consideration in this appeal are:

a) whether the learned single Judge of the High Court was justified in ordering rejection of the plaint insofar as the first defendant (appellant herein) is concerned; and

b) whether the Division Bench of the High Court was right in reversing the said decision?

6. Since the appellant herein, as the first defendant before the trial Judge, filed application under Order VII Rule 11 of the Code for rejection of the plaint on the ground that it does not show any cause of action against him, at the foremost, it is useful to refer the relevant provision:

Order VII Rule 11 of the Code:

"*11. Rejection of plaint*- The plaint shall be rejected in the following cases:-

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provision of Rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the Court, insufficiently stamped and not rectified within the time fixed by the Court,

barred by any law, failed to enclose the required copies and the plaintiff fail to comply with the provisions of Rule 9, the Court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order VII Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial. This position was explained by this Court in *Saleem Bhai & Ors. vs. State of Maharashtra and Others,* (2003) 1 SCC 557, in which, while considering Order VII Rule 11 of the Code, it was held as under:

"9. A perusal of Order VII Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 CPC at any stage of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court……."

It is clear that in order to consider Order VII Rule 11, the Court has to look into the averments in the plaint and the same can be exercised by the trial Court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been

reiterated in *Raptakos Brett & Co. Ltd. vs. Ganesh Property* (1998) 7 SCC 184 and *Mayar (H.K.) Ltd. and Others vs. Owners & Parties, Vessel M.V. Fortune Express and Others* (2006) 3 SCC 100.

7. It is also useful to refer the judgment in *T. Arivandandam vs. T.V. Satyapal & Anr.,* (1977) 4 SCC 467, wherein while considering the very same provision, i.e. Order VII Rule 11 and the duty of the trial Court in considering such application, this Court has reminded the trial Judges with the following observation:

> "5. ……….The learned Munsif must remember that if on a meaningful - for formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII, Rule 11 C.P.C. taking care to see that the ground mentioned therein is fulfilled. And if clever drafting has created the illusion of a cause of action nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr.XI) and must be triggered against them….."

It is clear that if the allegations are vexatious and meritless and not disclosing a clear right or material(s) to sue, it is the duty of the trial Judge to exercise his power under Order VII Rule 11. If clever drafting has created the illusion of a cause of action as observed by Krishna Iyer J., in the above referred decision, it should be nipped in the bud at the first hearing by examining the parties under Order X of the Code.

Cause of Action:

8. While scrutinizing the plaint averments, it is the bounden

duty of the trial Court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue.

9. In *A.B.C. Laminart Pvt. Ltd. & Anr. vs. A.P. Agencies, Salem* (1989) 2 SCC 163, this Court explained the meaning of "cause of action" as follows:

> "12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

10. It is useful to refer the judgment in *Bloom Dekor Ltd. vs. Subhash Himatlal Desai & Ors.* (1994) 6 SCC 322, wherein a three Judge Bench of this Court held as under:

> "28. By "cause of action" it is meant every fact, which, if traversed, it would be necessary for the plaintiff to prove

in order to support his right to a judgment of the Court, (Cooke v. Gill, 1873 LR 8 CP 107). In other words, a bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit."

It is mandatory that in order to get relief, the plaintiff has to aver all material facts. In other words, it is necessary for the plaintiff to aver and prove in order to succeed in the suit.

Forms 47 and 48 of Appendix A of the Code

11. Mr. K. Parasaran, learned senior counsel by taking us through Form Nos. 47 and 48 of Appendix A of the Code which relate to suit for specific performance submitted that inasmuch as those forms are statutory in nature with regard to the claim filed for the relief for specific performance, the Court has to be satisfied that the plaint discloses a cause of action. In view of Order VII Rule 11(a) and 11(d), the Court has to satisfy that the plaint discloses a cause of action and does not appear to be barred by any law. The statutory forms require the date of agreement to be mentioned to reflect that it does not appear to be barred by limitation. In addition to the same, in a suit for specific performance, there should be an agreement by the defendant or by a person duly authorized by a power of attorney executed in his favour by the owner.

12. In the case on hand, the plaintiff-respondent to get a decree for specific performance has to prove that there is a subsisting agreement in his favour and the second defendant has the necessary authority under the power of attorney. Order VII Rule 14 mandates that the plaintiff has to produce the documents on which the cause of action is based, therefore, he has to produce the power of attorney when the plaint is presented by him and if he is not in possession of the same, he has to state as to in whose possession it is. In the case on hand, only the agreement between the plaintiff and the second defendant has been filed along with the plaint under Order VII Rule 14(1). As rightly pointed out by the learned senior counsel

for the appellant, if he is not in possession of the power of attorney, it being a registered document, he should have filed a registration copy of the same. There is no such explanation even for not filing the registration copy of the power of attorney. Under Order VII Rule 14(2) instead of explaining in whose custody the power of attorney is, the plaintiff has simply stated 'Nil'. It clearly shows non-compliance of Order VII Rule 14(2).

13. In the light of the controversy, we have gone through all the averments in the plaint. In paragraph 4 of the plaint, it is alleged that the 2nd defendant as agreement holder of the 1st defendant and also as the registered power of attorney holder of the 1st defendant executed the agreement of sale. In spite of our best efforts, we could not find any particulars showing as to the documents which are referred to as "agreement holder". We are satisfied that neither the documents were filed along with the plaint nor the terms thereof have been set out in the plaint. The abovementioned two documents were to be treated as part of the plaint as being the part of the cause of action. It is settled law that where a document is sued upon and its terms are not set out in the plaint but referred to in the plaint, the said document gets incorporated by reference in the plaint. This position has been reiterated in *U.S. Sasidharan vs. K. Karunakaran and Another* (1989) 4 SCC 482 and *Manohar Joshi vs. Nitin Bhaurao Patil and Another* (1996) 1 SCC 169.

Power of Attorney:

14. Next, we have to consider the power of attorney. It is settled that a power of attorney has to be strictly construed. In order to agree to sell or effect a sale by a power of attorney, the power should also expressly authorize the power to agent to execute the sale agreement/sale deed i.e., (a) to present the document before the Registrar; and (b) to admit execution of the document before the Registrar. A perusal of the power of attorney, in the present case, only authorizes certain specified acts but not any act authorizing entering into an agreement of sale or to execute sale deed or admit execution before the

Registrar. In a recent decision of this Court in *Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Another* (2012) 1 SCC 656, the scope of power of attorney has been explained in the following words:

> "20. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorises the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1-A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.
>
> 21. In *State of Rajasthan v. Basant Nahata,* (2005) 12 SCC 77. this Court held: (SCC pp. 90 & 101, paras 13 & 52)
>
> "13. A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.
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> *　　　*　　　*
>
> 52. Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers of Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."
>
> An attorney-holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor."

15. It is clear that from the date the power of attorney is executed by the principal in favour of the agent and by virtue of the terms the agent derives a right to use his name and all acts, deeds and things done by him are subject to the limitations contained in the said deed. It is further clear that the power of attorney holder executed a deed of conveyance in exercise of the power granted under it and conveys title on behalf of the grantor. In the case on hand, though the plaint avers that the 2nd defendant is the agreement holder of the 1st defendant, the said agreement is not produced. It was also pointed out that the date of agreement is also not given in the plaint. We have already mentioned Form Nos. 47 and 48 of Appendix A and failure to mention date violates the statutory requirement and if the date is one which attracts the bar of limitation, the plaint has to conform to Order VII Rule 6 and specifically plead the ground upon which exemption from limitation is claimed. It was rightly pointed out on the side of the appellant that in order to get over the bar of limitation all the required details have been omitted.

Relief of Specific Performance is discretionary:

16. Under Section 20 of the Specific Relief Act, 1963, it is settled that the jurisdiction to grant specific performance is discretionary. The above position has been reiterated by the Division Bench of the Madras High Court even in 1937 vide *Sirigineedi Subbarayadu vs. Kopanathi Tatayya,* 1937 Madras Weekly Notes 1158, 1159. The same view has been reiterated once again by the Madras High Court in *Ramaswamy Gounder vs. K.M. Venkatachalam* 1976(1) Madras Law Journal 243, 248, 249 paras 11-13. The similar view has been reiterated by this Court in *Mohammadia Cooperative Building Society Ltd. vs. Lakshmi Srinivasa Cooperative Building Society Ltd. and Others* (2008) 7 SCC 310.

Non-joinder of Defendant No. 2 in the application filed under Order VII Rule 11

17. In view of the conduct of the plaintiff, bereft of required materials as mandated by the statutory provisions, the plaint is liable to be rejected at this stage itself as the cause of action pleaded in the plaint is vitiated. Learned senior counsel for the respondent vehemently contended that inasmuch as in the application for rejection of plaint, the 1st defendant has not impleaded the 2nd defendant, the said application is liable to be dismissed on the ground of non-joinder of the 2nd defendant, who is a necessary party. On the other hand, learned senior counsel for the appellant submitted that 2nd defendant is not a necessary party to the application for rejection of plaint and according to him non-joinder of the 2nd defendant does not affect the merit of the application as the plaintiff alone is a necessary party to the application for rejection of plaint. The stand taken by the appellant, who has filed the application for rejection of the plaint, is sustainable and acceptable. We have already adverted to the averments in the plaint and we have held that the plaint has not shown a complete cause of action of privity of contract between the plaintiff and the first defendant or on behalf of the 1st defendant. To reject the plaint even

before registration of the plaint on one or more grounds mentioned in Order VII Rule 11 of the Code, the other defendants need not necessarily be heard at all as it does not affect their rights. As a matter of fact, this Court in *Saleem Bhai* (supra) held that the plaint can be rejected even before the issuance of summons. This Court has taken a view that the trial Court can exercise its power under Order VII Rule 11 of the Code at any stage of the suit i.e. before registering the plaint or after issuance of summons to the defendants or at any time before the conclusion of the trial. We respectfully agree with the said view and reiterate the same. On the other hand, when the plaintiff itself persists in not impleading a necessary party in spite of objection, the consequences of non-joinder may follow. However, the said objection should be taken in the trial Court itself so that the plaintiff may have an opportunity to rectify the defect. The said plea cannot be raised in this Court for the first time. This position has been reiterated in *State of U.P. vs. Ram Swarup Saroj* (2000) 3 SCC 699. We hold that a plea as to the non-joinder of the party cannot be raised for the first time before this Court if the same was not raised before the trial Court and has not resulted in failure of justice. In the case of non-joinder, if the objection is raised for the first time before this Court, the Court can always implead the party on the application wherever necessary. However, in the case on hand, for the disposal of application filed for rejection of the plaint under Order VII Rule 11, 2nd defendant is not a necessary party, hence he need not be impleaded. Accordingly, we reject the said objection of the respondent herein.

18. Apart from the above aspect, in the case on hand, the application for rejection of the plaint of the appellant-1st defendant seeks no relief against the respondent herein-2nd defendant. It is settled legal position that a party against whom no relief is claimed in the application is not a necessary party at all.

19. Mr. Mukul Rohatgi, learned senior counsel for the

respondent pointed out that the learned single Judge while accepting the case of the appellant-1st defendant in allowing the application for rejection of plaint has taken into consideration extraneous material, i.e., the suit filed by M/s Karthik Granites (P) Ltd. (C.S.No. 915 of 1994) and the Memorandum of Understanding (MoU) dated 13.02.1997. It is brought to our notice that it is the counsel for the plaintiff who relied on these two extraneous materials beyond the plaint for sustaining the plaint though that material was sought to be incorporated by amendment of the plaint. Apart from these, in addition to the application for rejection of the plaint, two other applications, namely, for injunction and for amendment of plaint were also taken up together which led to the situation considering materials other than the plaint averments for the purpose of considering the application for rejection of the plaint. Accordingly, the contention of the learned senior counsel for the respondent is liable to be rejected.

20. Finally, learned senior counsel for the respondent submitted that in view of a decision of this Court in *Roop Lal Sathi vs. Nachhattar Singh Gill* (1982) 3 SCC 487, rejection of the plaint in respect of one of the defendants is not sustainable. We have gone through the facts in that decision and the materials placed for rejection of plaint in the case on hand. We are satisfied that the principles of the said decision does not apply to the facts of the present case where the appellant-1st defendant is not seeking rejection of the plaint in part. On the other hand, the 1st defendant has prayed for rejection of the plaint as a whole for the reason that it does not disclose a cause of action and not fulfilling the statutory provisions. In addition to the same, it is brought to our notice that this contention was not raised before the High Court and particularly in view of the factual details, the said decision is not applicable to the case on hand.

21. In the light of the above discussion, in view of the shortfall in the plaint averments, statutory provisions, namely,

Order VII Rule 11, Rule 14(1) and Rule 14(2), Form Nos. 47 and 48 in Appendix A of the Code which are statutory in nature, we hold that the learned single Judge of the High Court has correctly concluded that in the absence of any cause of action shown as against the 1st defendant, the suit cannot be proceeded either for specific performance or for the recovery of money advanced which according to the plaintiff was given to the 2nd defendant in the suit and rightly rejected the plaint as against the 1st defendant. Unfortunately, the Division bench failed to consider all those relevant aspects and erroneously reversed the decision of the learned single Judge. We are unable to agree with the reasoning of the Division Bench of the High Court.

22. In the light of the above discussion, the judgment and order dated 16.08.2011 passed by the Division Bench of the High Court in OSA No. 100 of 2006 is set aside and the order dated 25.01.2006 passed by the learned single Judge in Application No. 3560 of 2005 is restored. The civil appeal is allowed with costs.

R.P. Appeal allowed.

SHREEJITH L.
v.
DEPUTY DIRECTOR (EDUCATION) KERALA & ORS.
(Civil Appeal No. 4848 of 2012 etc.)

JULY 3, 2012

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

SERVICE LAW:

Compassionate appointment - Period of limitation for making application - Held: In view of the statutory rules and Para 19 of G.O. dated 24.5.1999, application for compassionate appointment has to be made within two years from the date of death of the Government servant - In the case of minors, the permissible period for making application is three years from the date the minor attains majority - An application for appointment on compassionate basis has to be made within the period stipulated for the purpose - Availability of vacancy has nothing to do with the making of the application itself - Kerala Education Act - Kerala Education Rules - rr. 9A and 51B - G.O. dated 24.5.1999.

Compassionate appointment - Married daughter claiming appointment on the ground of death of her mother while in service - Application filed after 14 years of attaining the majority - Held: Delay assumes greater significance keeping in view the fact that the applicant has got married and has now settled with her husband comprising a separate family - Appointment of the applicant may not in that view lead to any financial help for the other members of the family left behind by the deceased - Orders passed by the authorities allowing the claim are set aside.

Compassionate appointment - Format of application

- Held: The substance of the application is important and not the form - If the application in substance conveyed the request for a compassionate appointment and provided the information required for considering the request, the very fact that the information was not in a given format would not have been a good reason to turn down the request - The scheme is meant to be a beneficial one aimed at helping those in need of assistance on account of an untimely demise in the family - Constitution of India - Article 136.

The instant appeals arose out of the claims for compassionate appointment on teaching/non-teaching posts made by the dependants of the employees who died while in service in the State of Kerala on different teaching/non-teaching posts.

Disposing of the appeals, the Court

HELD: 1. Appointments on compassionate basis are recognised as a permissible mode of induction into service under the Kerala Education Rules framed under the Kerala Education Act. It is evident from a plain reading of rr. 9A and 51B that appointments under the statutory rules are further regulated by the terms of government orders issued on the subject. A conjoint reading of the Statutory Rules and para 19 of the Government Order dated 24.05.1999 would show that the compassionate appointment scheme itself permits applications to be made within two years from the date of death of the government servant. In the case of minors the permissible period for making applications is three years from the date the minor attains majority. [para 9 and 11] [435-G-H; 436-H; 437-A-B]

2.1 In the case of respondent no. 5 in C.A. No. 4848 of 2012, the application for appointment as a Lower Grade Sanskrit Teacher was made within three years of his

attaining majority. It is manifest that the scheme not only permitted making of an application but when read in conjunction with r. 9A entitled respondent No.5 to seek such an appointment subject to his fulfilling other requirements stipulated in the scheme. It is nobody's case that respondent No.5 did not satisfy other conditions stipulated in the Government Order nor was his request for appointment as Junior Grade Sanskrit Teacher rejected on any such ground. That being so, the High Court was justified in holding that the prayer for appointment made by respondent No.5 should have been allowed. [para 11] [437-B-D]

2.2 It is true that the appellant had worked for nearly five years after his appointment against the vacancy but it is equally true that he could not legally oppose or grudge the claim made by respondent No.5 in the light of the provisions of the scheme and the statutory rules on the subject, particularly, when his appointment itself had been made entirely at the discretion of the Manager of the institution, and was not preceded by any public notice or advertisement inviting candidates from the open market to apply for appointment against the available vacancy on the basis of competitive selection process. There is no reason to interfere with the view taken by the High Court. [para 12] [437-E-H; 438-A]

3. Respondent No.1 in C.A. No. 4954 of 2009 had attained majority on 8.5.1995 whereas the application for compassionate appointment was made on 10.9.2007. This application was, on the face of it, beyond the period stipulated in the scheme for making such a claim. The High Court appears to have confused an application required to be filed within the period stipulated for the purpose, with the availability of a vacancy against which such an application could be considered by the Manager. These were two distinctly different matters. What was important was the making of an application for

appointment on compassionate basis within the period stipulated for the purpose. Whether or not a vacancy is available had nothing to do with the making of the application itself. Respondent No.1 having failed to make the application within the period stipulated in the scheme, could not claim a compassionate appointment especially when there was nothing on record to suggest that the family was in penury notwithstanding the lapse of a considerable period since the demise of the bread-winner; during which period respondent No.1 had got married and settled down in life and supports a family. The High Court was, therefore, clearly in error in issuing a mandamus to the Manager to appoint respondent no. 1 on compassionate basis which order calls for interference and is reversed. [para 15] [439-C-G]

4. In the case of respondent No. 4 in C.A. No. 33421 of 2009, the Manager of the school had on receipt of the application within the period of limitation, not only acknowledged the request for appointment but also recognised that the applicant possessed the requisite qualification for appointment as a Hindi Teacher. The request was not, however, granted as no vacancy in the cadre was available in the school at that time. If the application in substance conveyed the request for a compassionate appointment and provided the information which the Manager required for considering the request, the very fact that the information was not in a given format would not have been a good reason to turn down the request. The scheme is meant to be a beneficial scheme aimed at helping those in need of assistance on account of an untimely demise in the family. Inasmuch as the Assistant Educational Officer and even the High Court found respondent No.4 to be eligible for appointment and directed the Manager to make such an appointment, they committed no error to warrant interference under Art. 136 of the Constitution. [para 20] [441-B-E-G]

5. In the case of respondent No.1 in C.A. No. 31908 of 2010, whose mother had died in harness and the father was a Naval Officer, the application filed by her was indeed belated having been filed 14 years after she attained majority. There is no explanation, for the inordinate delay. Delay assumes greater significance keeping in view the fact that respondent No.1 has got married and has now settled with her husband comprising a separate family. The appointment of respondent no. 1 may not in that view lead to any financial help for the other members of the family left behind by the deceased. While it is true that marriage by itself does not in view of the language employed in the scheme, disqualify the person concerned from seeking a compassionate appointment, the fact remains that delay of more than 14 years could itself prove fatal to the prayer for a compassionate appointment. The orders passed by the Educational Officer and the Government allowing the claim and those by the High Court in the writ petition and in writ appeal upholding the orders of the Department are, therefore, unsustainable and, as such, set aside. [para 24] [443-C-E]

6.1 As regards respondent no. 7 in C.A. No. 4467 of 2010, upon remand the District Educational Officer correctly found him to be eligible for an appointment having made an application in time. The said order was erroneously set aside by the single Judge of the High Court on the ground that the application had been filed beyond the period of limitation. The error was, however, corrected by the Division Bench by holding that the refusal of the Manager in accepting the application filed for appointment of respondent No.7 was only a strategy of the Manager to ward off the claim made before him. The Division Bench also correctly held that if the application was found to be defective for any reason the Manager should have, instead of rejecting the same

summarily given an opportunity to respondent No.7 to correct the mistake by filing a proper application in accordance with rules. [para 27] [445-F-H; 446-A]

Baiju Kumar v. D.E.O., Trivandrum **(2003) 3 KLT 240 - referred to.**

6.2 In case an application is made by legal heirs of a deceased employee claiming the benefit of the scheme for compassionate appointment, the deficiencies and defects, if any, in the said application ought to be pointed out to the concerned to enable him to remove the same within a reasonable time. But if the defects are not removed within the time granted, an adverse inference could be drawn against the person in default. On the contrary, where an application is filed, entertained and eventually declined for a reason other than the form in which the same ought to have been filed, the rejection cannot be supported before the higher authority or in the court on the ground that the application was non-est as the same was not in the prescribed form. The application for appointment filed on behalf of respondent no. 7 could not, therefore, have been rejected on the ground that the same was not in the prescribed form. However, his appointment shall be effective from the date he is actually appointed by the Manager of the Institution. [para 28-29] [447-C-E,H; 448-A-B]

Case Law Reference:

(2003) 3 KLT 240	**referred to**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4848 of 2012 etc.

From the Judgment & Order dated 07.02.2008 of the High Court of Kerala at Ernakulam in W.A. No. 149 of 2008.

WITH

C.A. Nos. 4852, 4851, 4854, 4853 & 4849-4850 of 2012.

C.S. Rajan, V. Giri, A. Raghunath, P.A. Noor Muhamed, Giffara S., Rameshwar Prasad Goyal, Mridula Ray Bharadwaj, Sureshan P., P. Sureshan, V.K. Sidharthan, Boby Augustine, Ranjith K.C. Pillai, Ajay K. Jain, M.P. Vinod, Sadique Mohammed, Neelam Saini, P.V. Dinesh, K.V. Mohan, Bina Madhavan, Praseena E. Joseph, K. Rajeev for the appearing parties.

The Judgment of the Court was delivered by

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

2. These appeals arise out of similar but different orders passed by the High Court of Kerala at Ernakulam whereby the High Court has allowed the claim for compassionate appointment made by the respondents and directed the institutions concerned to appoint them to posts against which they are otherwise eligible for appointment. The factual backdrop in which the writ petitions came to be filed by the respondents and eventually allowed is different in each case but the underlying principle on which the said petitions have been allowed and the provisions on the basis whereof the same have been allowed being common, we propose to dispose of these appeals by this common judgment.

3. In Civil Appeal arsing out of Special Leave Petition (C) No.7556 of 2008 father of respondent No.5 who was working as a 'Peon' in a school known as SHGSHS, Kadakkodu, died-in-harness on 14th October, 2000. Respondent No.5 was a minor aged about 16 years at that time. He attained majority on 21st April, 2002. His mother all the same applied for a compassionate appointment under the prevalent Compassionate Employment Scheme to the Deputy Director (Education) who informed her that respondent No.5 could apply to the management for an appointment as and when he attained majority. The petitioner accordingly applied for appointment as a Sanskrit Teacher on 7th February, 2005. It is not in dispute

that he had the requisite qualification for appointment against the said post.

4. The post of a Lower Grade Sanskrit Teacher fell vacant in the school on 1st June, 2005, but respondent No.5 was informed that his claim will be considered in the next arising vacancy of a non-teaching staff in the school. Even though a representation made to the District Educational Officer resulted in a direction to the Manager of the institution to consider the claim of respondent No.5 yet an appointment order was issued by the Manager in favour of the appellant herein in preference to the claim made by the former.

5. Aggrieved by the denial of an appointment in his favour, respondent No.5 filed W.P. (C) No.21503/2006 in the High Court of Kerala at Ernakulam. During the pendency of the said petition a vacancy of a 'Peon' arose in the school, which was offered to him by the Manager. The High Court disposed of the writ petition permitting respondent No.5 to accept the offer made to him by the Manager and to file a separate petition for redressal of his grievance if he continued to feel aggrieved. His appointment as 'Peon' thus remained without prejudice to the respondent-petitioner's claim against the post of Junior Sanskrit Teacher in the school.

6. Pursuant to the liberty reserved in his favour, respondent No.5 filed W.P. (C) No.16399/2007 in the High Court praying for a certiorari quashing the appointment of the appellant herein and a mandamus directing the Manager to appoint respondent No.5-writ petitioner in his place as a full time Junior Sanskrit Teacher. A single Bench of the High Court allowed the said petition by an order dated 10th December, 2007 quashing the appointment of the appellant herein and directing the Manager to appoint respondent No.5 in his place effective from 1st August, 2006. The above order passed by the High Court was then assailed by the appellant herein in Writ Appeal No.149 of 2008 which appeal has been dismissed by the High Court in terms of the order under challenge before us.

7. Appearing for the appellant, Mr. C.S. Rajan, learned senior counsel, contended that appointments on compassionate basis are made only to give succour to a family in financial distress on account of the untimely death of an earning member. Such appointments cannot, therefore, be made where the family concerned has managed to survive for several years before the claim for appointment is made by someone who was eligible for such appointment. He contended that the claim for appointment in the instant case had been made nearly five years after the demise of the father of respondent No.5 which was liable to be rejected on the ground of being highly belated. The High Court was, argued Mr. Rajan, not justified in setting aside the appointment of the appellant who had worked as a teacher and had been regularly appointed, which appointment was approved even by the Competent Authority in the Department of Education.

8. On behalf of respondent No.5 it was per contra argued that appointments on compassionate basis were regulated by statutory rules framed under the Kerala Education Act and the Government Orders which were made applicable to such appointments. An application filed within the period of limitation under the prescribed rules could not, contended the learned counsel, be rejected on the ground of delay especially when the intervening period was not shown to have resulted in any material change in the economic status of the family who continued to suffer in penury as on the date of demise of the bread-winner of the family.

9. Appointments on compassionate basis are recognised as a permissible mode of induction into service under the Kerala Education Rules framed under the Kerala Education Act. Rule 9A appearing in Chapter XXIVA and Rule 51B appearing in Chapter XIVA of the said Rules are relevant in this regard. While Rule 9A deals with employment of dependants of the non-teaching staff of an aided school dying-in-harness, Rule 51B deals with employment of dependants of

an aided school teacher dying-in-harness. The said rules are as under:-

> "9A: *The manager shall give employment to a dependant of the non-teaching staff of an aided school dying in harness.* Government orders relating to employment assistance to the dependents of Government servants dying in harness shall, mutatis mutandis, apply in the matter of such appointment."
>
> (emphasis supplied)
>
> "51B: The Manager shall give employment to a dependant of an aided school teacher dying in harness. Government orders relating to employment assistance to the dependents of Government servants dying in harness shall mutatis mutandis, apply in the matter of such appointments."

10. It is evident from a plain reading of the above that appointments under the statutory rules are further regulated by the terms of government orders issued on the subject. Government order dated 24th May, 1999 is in this regard relevant, for it stipulates the conditions of eligibility including the family income and the category of appointments that can be made under the compassionate scheme. Qualification for the post, age limit for making appointments and time for filing applications for compassionate appointments are matters regulated by the said order. Para 19 of the Government order stipulates the period of limitation for preferring applications and may be extracted:

> "19. The time limit for preferring applications under the scheme will be 2 years from the date of death of govt. Servants. In the case of minor, the period will be within 3 years after attaining majority."

11. A conjoint reading of the Statutory Rules and para 19 of the Government Order extracted above would show that the

compassionate appointment scheme itself permits applications to be made within two years from the date of death of the government servant. In the case of minors the permissible period for making applications is three years from the date the minor attains majority. It is not in dispute that the application for appointment as a Lower Grade Sanskrit Teacher was made by the respondent on 7th February, 2005 i.e. within three years of his attaining majority. Such being the position under the terms of the scheme, the validity or wisdom whereof is not under challenge before us, it is manifest that the scheme not only permitted making of an application but when read in conjunction with Rule 9A entitled respondent No.5 to seek such an appointment subject to his fulfilling other requirements stipulated in the scheme. It is nobody's case that respondent No.5 did not satisfy other conditions stipulated in the Government Order nor was his request for appointment as Junior Grade Sanskrit Teacher rejected on any such ground. That being so, the High Court was justified in holding that the prayer for appointment made to respondent No.5 should have been allowed.

12. It is true that the appellant had worked for nearly five years after his appointment against the vacancy but it is equally true that he could not legally oppose or grudge the claim made by respondent No.5 in the light of the provisions of the scheme and the statutory rules on the subject. That was particularly so when the appointment of the appellant itself was not made on the basis of any fair or competitive selection process or any other transparent method aimed at evaluating the comparative merit of all those qualified & interested in taking the job. The appointment of the appellant, it was fairly conceded by Mr. Rajan, had been made entirely at the discretion of the Manager of the institution, and was not preceded by any public notice or advertisement inviting candidates from the open market to apply for appointment against the available vacancy. Be that as it may, we are not so much concerned with the validity of the appointment of the appellant in these proceedings as we

are with the entitlement of respondent No.5 to seek an appointment in terms of the Statutory Rules and the prevalent scheme. We, therefore, see no reason to interfere with the view taken by the High Court. The appeal filed by the appellant must consequently fail.

13. In Civil Appeal arising out of Special Leave Petition (C) No.4954 of 2009, father of respondent No.1 had been working as the 'Headmaster' of East Valliyai, U.P. School, who died in harness on 27th April, 1995. Respondent No.1 was a minor at that time who attained majority only on 8th May, 1995 and has got married since then. On 21st July, 2007, the appellant-petitioner No.2 was appointed as a 'Peon' in the East Valliyai, U.P. School. It was thereafter on 10th September, 2007 that respondent No.1 claimed a compassionate appointment. Assistant Educational Officer directed the Manager to consider the said application by an order dated 24th April, 2008. The Manager, however, rejected the claim on the ground that the prayer for appointment was made belatedly. The District Educational Officer upheld the rejection in terms of his order dated 24th June, 2008. The matter was then brought up before the High Court of Kerala at Ernakulam in W.P.(C) No.16815/2008 in which the writ petitioner, respondent No.1 before us, challenged the rejection of her claim for appointment on compassionate basis. By an order dated 20th October, 2008, a single Bench of the High Court allowed the said petition and directed the Manager of the institution to appoint the writ petitioner against the vacancy of 'Peon' that had arisen on 30th June, 2008. Aggrieved by the said order, the Manager of the school filed Writ Appeal No.2211 of 2008 before a Division Bench of the High Court which appeal was dismissed by the High Court in terms of its order dated 13th January, 2009 impugned in this appeal.

14. Appearing for the appellant it was contended by Mr. Rajan that the application filed by respondent No.1 was belated inasmuch as the same was filed 12 years after her attaining majority. He submitted that during the intervening period

respondent No.1 had got married which clearly showed that the family was not in penury to call for any sympathy towards it. The High Court had according to Mr. Rajan, fallen in error in holding that delay in the filing of the application was only technical in nature as the vacancy against which the prayer for compassionate appointment had been made had occurred after about 13 years of the demise of the father of respondent No.1.

15. There is considerable merit in the contention urged by Mr. Rajan. It is not in dispute that respondent No.1 had attained majority on the 8th of May, 1995 whereas the application for compassionate appointment was made on 10th September, 2007. This application was, on the face of it, beyond the period stipulated in the scheme for making such a claim. The High Court appears to have confused an application required to be filed within the period stipulated for the purpose with the availability of a vacancy against which such an application could be considered by the Manager. These were two distinctly different matters. What was important was the making of an application for appointment on compassionate basis within the period stipulated for the purpose. Whether or not a vacancy is available had nothing to do with the making of the application itself. An application could and indeed ought to have been made by respondent No.1 within the time stipulated, regardless whether there was a vacancy already available or likely to become available in the near or distant future. Respondent No.1 having failed to do that, could not claim a compassionate appointment especially when there was nothing on record to suggest that the family was in penury notwithstanding the lapse of a considerable period since the demise of the bread-winner; during which period respondent No.1 had got married and settled down in life and supports a family. The High Court was in that view clearly in error in issuing a mandamus to the Manager to appoint the respondent on compassionate basis which order calls for interference and is hereby reversed.

16. In Civil Appeal arising out of Special Leave Petition

(C) No.33421 of 2009 father of respondent No.4 was working as a 'Peon' who died while in service on 9th September, 1988. Respondent No.4 applied to the Manager of the institution for a compassionate appointment on 2nd May, 1990. The Manager intimated to respondent No.4 by a letter dated 4th June, 1990 that as and when a vacancy occurs, he would be considered for appointment. Respondent No.4 applied again in the prescribed format against a vacancy on 25th May, 2002.

17. On 5th June, 2002 the appellant herein was appointed as a teacher against the available vacancy of a Hindi Teacher. The request made by respondent No.4 was shortly thereafter rejected by the Manager by order dated 17th June, 2002. The Assistant Educational Officer, however, accepted the claim made by respondent No.4 and declined approval to the appointment of the appellant by its order dated 23rd September, 2002. The Assistant Educational Officer held that respondent No.4 was qualified for appointment against the post of Hindi Teacher and the Manager ought to have considered his prayer and appointed him. He accordingly directed the Manager to appoint respondent No.4 against the available vacancy.

18. Aggrieved by the said order the appellant preferred Writ Petition No.7413 of 2007 before the High Court which was dismissed by a single Bench by its order dated 25th September, 2009. Writ Appeal No.2186 of 2009 preferred against the said order was also dismissed by the Division Bench of the High Court in terms of its order dated 6th October, 2009.

19. Mr. Rajan, learned senior counsel, argued that the first application submitted by respondent No.4 for compassionate appointment on 2nd May, 1990 was no doubt within the time prescribed but the same was not in proper format. It was, argued the learned counsel, essential that the application should be not only within the time stipulated for the purpose but also in the prescribed format. Inasmuch as that was not so in

the instant case the application must be deemed to be non est.

20. We regret our inability to accept that submission. The Manager of the school had on receipt of the application from respondent No.4 not only acknowledged the request for appointment but also recognised that respondent No.4 possessed the requisite qualification for appointment as a Hindi Teacher. The request was not, however, granted as no vacancy in the cadre was available in the school at that time. What is noteworthy is that the Manager did not reject the application on the ground that the same was not in the prescribed format or that the application was deficient in disclosing information that was essential for consideration of the prayer for a compassionate appointment. If the authority concerned before whom the application was moved and who was supposed to consider the request, did not find the format of the application to be a disabling factor for a proper consideration thereof, it could not be set up as a ground for rejection of the prayer, by the beneficiary of the appointment made in derogation of the rights of respondent No.4. At any rate, what was important was the substance of the application and not the form. If the application in substance conveyed the request for a compassionate appointment and provided the information which the Manager required for considering the request, the very fact that the information was not in a given format would not have been a good reason to turn down the request. We need to remind ourselves that the scheme is meant to be a beneficial scheme aimed at helping those in need of assistance on account of an untimely demise in the family. Inasmuch as the Assistant Educational Officer and even the High Court found respondent No.4 to be eligible for appointment and directed the Manager to make such an appointment, they committed no error to warrant our interference under Article 136 of the Constitution. The Civil Appeal is, therefore, liable to be dismissed.

21. In Civil Appeals arising out of Special Leave Petition

(C) Nos.31908 of 2010 and 6607-08 of 2011, the mother of respondent No.1 was working as a 'Teacher' who died-in-harness on 4th September, 1979. Respondent No.1 attained majority on 6th December, 1991 and passed her SSLC examination in the year 1993 and Teacher Training Course in the year 2003. Respondent No.1 then applied for a compassionate appointment as a teacher on 9th September, 2005 which request was turned down by the Manager in terms of his letter dated 12th June, 2006. The Manager pointed out that respondent No.1 was a married woman and thus a member of another family. The Manager also pointed out that the father of respondent No.1 being a Naval Officer the family income at the time of demise of her mother was beyond the limit prescribed under the scheme. He also pointed out that the application for appointment was belated having been made nearly 24 years after the demise of her mother.

22. Aggrieved by the said order, respondent No.1 appears to have approached the District Educational Officer, who allowed the claim made by the said respondent in terms of his order dated 22nd October, 2007. A revision was then filed by the Manager against the said order before the Government which was dismissed by order dated 27th June, 2009. Challenging the said order, the Manager filed Writ Petition (C) No.21384 of 2009 before the High Court which was dismissed by a single Bench of the High Court by order dated 12th November, 2009. Writ Appeal No. 2791 of 2009 preferred against the said order having failed, the Manager of the institution has preferred the present appeal. The very same order has been assailed by the appellant in Special Leave Petition (C) Nos.6607-6608 of 2011.

23. It was contended by learned counsel for the appellants that the High Court was in error in dismissing the writ petition filed by the Manager of the institution disregarding the fact that the prayer for appointment on compassionate basis had been made 14 years after respondent No.1 had attained majority. During the intervening period the respondent not only got

married and settled down with her husband in another family but did not in principle qualify for compassionate appointment being the member of the family of her husband. It was also contended that the orders passed by the District Educational Officer and that passed by the Government dismissing the revision petition were unsustainable and ought to be reversed.

24. There is, in our view, considerable merit in the contentions urged on behalf of the petitioners. The application filed by respondent No.1 was indeed belated having been filed 14 years after the respondent attained majority. No explanation, muchless a worthwhile one is forthcoming, for this kind of inordinate and unexplained delay. Delay assumes greater significance keeping in view the fact that respondent No.1 has got married and has now settled with her husband comprising a separate family. The appointment of the said respondent may not in that view lead to any financial help for the other members of the family left behind by the deceased. While it is true that marriage by itself does not in view of the language employed in the scheme, disqualify the person concerned from seeking a compassionate appointment, the fact remains that delay of more than 14 years could itself prove fatal to the prayer for a compassionate appointment. The orders passed by the Educational Officer and the Government and those by the High Court in Writ Petition and in Writ Appeal are therefore unsustainable and, hence liable to be set aside.

25. That leaves us with Civil Appeal arising out of Special Leave Petition (C) No.4467 of 2010. In this case also the High Court had upon consideration of the facts of the case and the provisions of the scheme directed appointment of respondent No.7 as a 'Full-time Menial' against the first vacancy that became available in the school concerned. Father of respondent No.7, it appears, was a 'Full-time Menial' who passed away on 19th July, 2000. Since respondent No.7 was a minor at that time, his mother sent an application addressed to the Manager of the school stating that she was agreeable

to the grant of the job to her son-respondent No.7 in view of the death of her husband. The said letter was returned to the mother of respondent No.7 with a postal endorsement 'unclaimed'. In October 2002 respondent No.7 submitted an application in the prescribed format to the District Educational Officer who returned it to the said respondent to be given to the Manager of the school for consideration. Without considering the said application respondent No.1 appointed appellant No.1 as a 'Full-time Menial' on 11th April, 2003. On 2nd June, 2003, appellant No.3 was also appointed against the vacancy of a 'Full-time Menial'. Similarly, appellant No.2 was appointed as 'Full-time Menial' on 1st February, 2005 when appellant No.1 was upgraded from the post of a 'Full-time Menial', to that of a 'Peon'. The prayer made by respondent No.7 was eventually rejected by the District Educational Officer on the ground that it was belated and was not in terms of the Government Order. Similar claim made by Mrs. Rajeswari was also rejected by the District Educational Officer. Both of them filed separate writ petitions which were disposed of by the High Court remanding the matter to the District Educational Officer for a fresh hearing. Upon remand the District Educational Officer upheld the claim made by respondent No.7 and Mrs. Rajeswari. Aggrieved by the said order, petitioner preferred revision petition before the Government which was dismissed. Appellants No.1 & 2 and respondent No.1 then filed writ petitions in which it was submitted that respondent No.7 and Mrs. Rajeswari were gainfully employed. A Single Bench of the High Court allowed the said petitions holding that respondent No.7 and Mrs. Rajeswari were both disentitled to claim compassionate appointment. In the meantime on 15th December, 2007 appellant No.4 was appointed as 'Full-time Menial'. Writ Appeal No.780 of 2008 filed by Mrs. Rajeswari against the judgment of the single Bench was dismissed by the High Court. By a separate order dated 11th December, 2009, the High Court allowed the appeal filed by respondent No.7, reversed the judgment of the Single Bench in so far as the said respondent was concerned.

26. The material facts are not in dispute. That an application was filed by the mother of respondent No.7 which was returned with an endorsement "unclaimed" is admitted. In para 2 of the writ petition filed by the appellants it was stated as under:

> "The 4th respondent's father Sri. CV Kesavan was a full time menial at CA High School, Purvamba from 4.6.1962. On the verge of his retirement namely on 19.7.2000, Sri Kesavan died. Accordingly, the wife of Sri. Kesavan, namely Smt. KM Chandrika submitted an application on a plain paper on 22.7.2000 before the 1st petitioner seeking appointment under Rule 9A, Chapter XIV KER."

27. The fact that an application was submitted to the District Educational Officer is also beyond dispute keeping in view the endorsement made by District Educational Officer, Palaghat, dated 8th October, 2002, a copy whereof has been placed at page 81 of the S.L.P. As a matter of fact the need for making of such application to the District Educational Officer appears to have arisen on account of refusal of the Manager to receive the application addressed to him. Such being the case, the rejection of the application by the District Educational Officer that the same was belated was wholly unjustified and was rightly set aside by the High Court in the earlier proceedings before it. Upon remand the District Educational Officer correctly found respondent No.7 to be eligible for an appointment having made an application in time which was erroneously set aside by the learned single Bench on the ground that the application had been filed beyond the period of limitation. The error was, however, corrected by the Division Bench by holding that the refusal of the Manager in accepting the application filed for appointment of respondent No.7 was only a strategy of the Manager to ward off the claim made before him. The Division Bench also correctly held that if the application was found to be defective for any reason the Manager should have, instead of rejecting the same summarily

given an opportunity to respondent No.7 to correct the mistake by filing a proper application in accordance with rules. The High Court observed:

> "In this case, the appellant's application was defective, but we are not inclined to hold that the appellant did not raise any claim in time. It was raised by the widow of the employee, who died in harness, on the fourth day of his death. An application or a representation from the widow, cannot be said to be relevant, going by the relevant GO, because, as per the GO, the widow gets the first preference for employment under the dying-in-harness scheme and only with her consent, somebody else's claim can be considered. That is the reason, why she submitted in Ext. P3 that she was agreeing to give employment to the appellant and also made a request for the same. So, definitely, if was a claim, in terms of the Government Order, governing appointment under the dying-in-harness scheme, but, it was defective, in as much it was not submitted in the prescribed format. As held by this Court in Baijukumar's case mentioned above, it is the duty of the Manager to alert the claimant, regarding the existence of a vacancy in his School and ask him to apply in the prescribed format. He has also got a duty to ask the claimant to cure the defects, if any, in the application submitted by him."

28. Learned counsel argued that there was no obligation on the part of the Manager of the school to go in search of the legal heirs left behind by an employee who had died in harness. It was submitted, if an employee of the school died in harness and his legal representatives required any assistance in the form of compassionate appointment it is for them to approach the school in that regard by making an application in the manner prescribed. If the legal heirs did not do so, the Manager could reasonably assume that they were not in need of any assistance for otherwise they would ask for the same. There is merit in that contention. We do not see any obligation on the

part of the institution or the Manager to go in search of the legal heirs of deceased employees or educate them about their right to seek an appointment under the scheme. If a person is eligible for a benefit under the scheme he can and indeed should on his own approach the institution and seek such an appointment. The view expressed by the High Court in *Baiju Kumar v. D.E.O., Trivandrum* (2003) 3 KLT 240, to which a reference has been made in the judgment, appears to be unreasonable albeit in favour of the legal heirs of the employee. Having said that, we have no manner of doubt that in case an application is made by legal heirs of a deceased employee claiming the benefit of the scheme for compassionate appointment, the deficiencies and defects, if any, in the said application ought to be pointed out to the concerned to enable him to remove the same within a reasonable time. But if the defects are not removed within the time granted, an adverse inference could be drawn against the person in default. On the contrary, where an application is filed, entertained and eventually declined for a reason other than the form in which the same ought to have been filed, the rejection cannot be supported before the higher authority or in the Court on the ground that application was non-est as the same was not in the prescribed form. The application for appointment filed on behalf of the respondent could not therefore have been rejected on the ground that the same was not in the prescribed form.

29. It was next argued by learned counsel for the appellant that out of the four appointments made by the institution the one appointed last will have to make way for the appointment of respondent No.7. Mr.Giri , learned counsel appearing for respondent No.7 did not have any quarrel with that proposition, so long as the appointment so made is related back to the date when the first vacancy had become available in the school, those appointed subsequently being adjusted against the subsequent vacancies. It was also fairly conceded by Mr. Giri that since respondent No.7 has not been allowed to work, despite the order passed by the High Court, the salary for the

period the appellant had worked could be paid to him including the petitioner who may have to be ousted to make room for the appointment of respondent No.7. The appointment of respondent No.7 shall in that view be effective from the date he is actually appointed by the Manager of the institution. The appeal filed by the petitioners shall accordingly stand dismissed with the above clarification.

30. In the result;

(i) Civil Appeal arising out of Special Leave Petition (C) No.7556 of 2008 is dismissed.

(ii) Civil Appeal arising out of Special Leave Petition (C) No.4954 of 2009 is however allowed, the judgment and order passed by the High Court in W.P. (C) No.16815 of 2008 and in Writ Appeal No. 2211 of 2008 set aside.

(iii) Civil Appeal arising out of Special Leave Petition (C) No.33421 of 2009 is dismissed.

(iv) Civil Appeals arising out of Special Leave Petition (C) Nos.31908 of 2010 and 6607-08 of 2011 are allowed, the judgment and orders passed by the High Court in W.P. No.21384 of 2009 and in Writ Appeal No.2791 of 2009 are set aside. The order passed by the Government in revision and that passed by the District Educational Officer dated 22nd October, 2007 shall stand quashed. Prayer for compassionate appointment made by respondent No.1 is consequently rejected.

(v) Civil Appeal arising out of Special Leave Petition (C) No.4467 of 2010 is dismissed.

31. The parties are left to bear their own costs in all the appeals.

R.P. Appeals disposed of.

MEDICAL COUNCIL OF INDIA
v.
RAMA MEDICAL COLLEGE HOSPITAL & RESEARCH CENTRE, KANPUR & ANR.
(Civil Appeal No. 4911 of 2012 etc.)

JULY 4, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

INDIAN MEDICAL COUNCIL ACT, 1956:

ss. 10A, 10B(3) and 11 read with Regulations of 1999 and Regulations of 2000 - MBBS Course - Increase in admission capacity - Held: In view of sub-s. (3) of s.10-B, where any medical college increases its admission capacity in any course of study or training, except with the previous permission of the Central Government in accordance with the provisions of s. 10A, no medical qualification granted to any student of such medical college on the basis of the increase in its admission capacity, shall be a recognised medical qualification for the purposes of the Act - s.10A speaks of permission and not recognition on a year to year basis - Recognition follows once the newly-established medical colleges/institutions satisfactorily complete five years with the graduation of the first batch of students admitted to the institution when initial permission is granted -It is the Central Government which is empowered to grant recognition to a medical college or institution on the recommendation made by the Medical Council of India - Single Judge and Division Bench of High Court erred in arriving at the finding that once permission had been granted u/s 10A of the Act, it would amount to grant of recognition and, thereafter, the medical college/institution was free to enhance the number of seats without the permission either of the Council or the Central Government - Judgments of Single Judge and Division Bench of High Court and the directions given to increase the

number of seats from 100 to 150 in the MBBS course run by the Institutions concerned are set aside - Establishment of Medical College Regulations, 1999 - The Opening of a New or Higher Course of Study or Training (including Post-Graduate Course of Study or Training) and Increase of Admission Capacity in any Course of Study or Training (including a Post-Graduate Course of Study or Training) Regulations, 2000.

In the instant appeals and the writ petitions the question for consideration before the Court was: whether the medical colleges/institutions were entitled to increase the number of seats without the prior permission of the Central Government?

Disposing of the matters, the Court

HELD: 1.1 Section 10-A of the Indian Medical Council Act, 1956 provides that no person would be entitled to establish a Medical College except in the manner provided in the Section and that no medical college shall open a new or higher course of study or training, including a post-graduate course of training, which would enable a student of such course or training to qualify himself for the award of recognised medical qualification, except with the previous permission of the Central Government. The said prohibition also extends to the increase in admission capacity in any course of study or training, including post-graduate study or training, except with such previous permission of the Central Government. [para 4] [462-B-D]

1.2 Sub-s. (3) of s.10B in no uncertain terms, provides that where any medical college increases its admission capacity in any course of study or training, except with the previous permission of the Central Government in accordance with the provisions of s. 10A, no medical qualification granted to any student of such medical

college on the basis of the increase in its admission capacity, shall be a recognised medical qualification for the purposes of the Act. Thus, without the previous permission of the Central Government within the scheme, as prescribed u/s 10A, i.e., without the recommendation of the Medical Council, any degree granted would not be recognised as a medical degree which would entitle such degree holder to function as a medical practitioner. [para 45] [484-G-H; 485-A-B]

K.S. Bhoir Vs. State of Maharashtra & Ors. **2001 (5) Suppl. SCR 593 = (2001) 10 SCC 264 - referred to.**

1.3 Section 10A lays down the criteria for grant of permission for establishment of a new medical college and s.10B supplements the same by making it clear that even while increasing the number of seats in a medical college/institution, the procedure indicated in s.10A, and in particular s.10A(2), would have to be followed. At every stage, it is the Council which plays a very important role in either the grant of permission to establish a new medical college or to increase the number of seats. [para 46] [485-C-D]

1.4 Furthermore, the norms relating to eligibility criteria, as set out in the 1999 Regulations as also in the 2000 Regulations, have to be complied with, either for the purpose of grant of permission for establishing a new medical college or for introducing a new course of study along with the intention of increasing the number of students in the medical institution. [para 46] [485-E]

1.5 In Part II of the 2000 Regulations, which deals with the scheme for obtaining the permission of the Central Government to increase the admission capacity in any course of study or training, including Post Graduate course of study or training, in the existing medical colleges/ institutions, another set of "qualification criteria" has been set out in Regulation 3(1), which has created some confusion in the minds of the Judges in the High Court by use of the expression "recognised by the Medical Council of India". What it seeks to indicate is that for the purpose of applying for increase in the number of seats, the medical college must be one which, in the opinion of the Medical Council, was capable of running the Bachelor of Medicine and Bachelor of Surgery/ Post-graduate Course. It also provides that the medical college/ institute which is not yet recognised by the Medical Council for the award of MBBS degree, may also apply for increase of intake in Post Graduate Course in pre-clinical and para-clinical subjects such as Anatomy, Physiology, Biochemistry, Pharmacology, Pathology, Microbiology, Forensic Medicine and Community Medicine, at the time of fourth renewal, i.e, along with the admission of the fifth batch for the MBBS Course, which are courses not connected with the regular course of study. [para 47] [485-F-H; 486-A-C]

1.6 Regulation 8 of the 1999 Regulations makes it clear that irrespective of whether the applicant is the Central Government or a State Government or a private person, the Central Government may, on the recommendation of the Medical Council, issue a Letter of Intent to set up a new medical college and formal permission may be granted initially for a period of one year and may be renewed on yearly basis subject to verification of the achievements of annual targets, once the conditions and modifications indicated in the Letter of Intent are accepted and after consulting the Medical Council of India. Sub-regulation (3) provides, without any ambiguity, that the permission to establish a medical college and to admit students may be granted initially for a period of one year and may be renewed on yearly basis subject to verification of the achievement of annual targets. [para 11] [466-E-H; 467-A]

2.1 Section 10A of the 1956 Act speaks of permission and not recognition on a year to year basis. Recognition follows once the newly-established medical colleges/ institutions satisfactorily complete five years with the graduation of the first batch of students admitted to the institution when initial permission is granted. It also provides with complete clarity that it shall be the responsibility of the applicant to apply to the Medical Council for renewal of permission six months before the expiry of the initial permission and that the process of renewal of permission will continue till all the required formalities are completed and a formal recognition of the medical college is granted. [para 11] [467-A-C]

2.2 Thus, it is very clear that recognition to a degree awarded by a newly-established medical college can be given only after all the requirements for the establishment of the medical college and expansion of the hospital facilities are completed. It has also been stipulated that further admissions shall not be made at any stage unless the requirements of the Council are fulfilled. [para 12] [467-D]

Medical Council of India Vs. State of Karnataka & Ors. **1998 (3) SCR 740 = (1998) 6 SCC 131; and** *Dr. Preeti Srivastava & Anr. vs. State of M.P. & Ors.* **1999 (1) Suppl. SCR 249 = (1999) 7 SCC 120 - relied on.**

State of M.P. Vs. Nivedita Jain **1982 (1) SCR 759 = (1981) 4 SCC 296 - stood overruled.**

Minor P. Rajendran Vs. State of Madras **1968 SCR 786 = AIR 1968 SC 1012;** *Chitra Ghosh Vs. Union of India* **1970 (1) SCR 413 = (1969) 2 SCC 228;** *State of A.P. Vs. Lavu Narendranath* **(1971) 1 SCC 607; and** *Ambesh Kumar (Dr.) Vs. Principal, L.L.R.M. Medical College* **1987 SCR 661 = (1986) Supp. SCC 543 - distinguished.**

2.3 The expression "recognition by the Medical Council of India" has to be read and understood as meaning that the medical college/institution concerned was recognised by the Medical Council of India as having the capacity to run such an institution. It is amply clear from s.10A that what is contemplated thereunder is permission for establishing a new medical college, which is to be granted by the Central Government upon the recommendation of the Council. The use of the expression "recognition" in the Regulation does not affect or alter the intention of the legislature expressed in unambiguous terms in s.10A as well as in ss. 10B and 11 of the 1956 Act. Both the 1956 Act and the Regulations framed by the Medical Council make it very clear that while the Central Government has the authority to recognize the degree awarded by a newly-established medical college/institution, it does so on the evaluation made by the Medical Council and its subsequent recommendation. [para 42] [482-D-H]

2.4 Section 33, which empowers the Medical Council to frame Regulations, provides in Sub-ss (fa) and (fb), the right to the Medical Council to frame a scheme in terms of Sub-s. (2) of s. 10A and also in regard to any other factors under Clause (g) of Sub-s. (7) of s.10A. It is quite clear that the legislature has given the Medical Council of India wide authority to take all steps which are necessary to ensure that a medical institution, either at the time of establishment, or later at the time of applying for increase in the number of seats, has the capacity and the necessary infrastructure, not only to run the college, but also to sustain the increase in the number of seats applied for. To that extent, since the Act is silent, the Regulations which have statutory force will be applicable to the scheme as contemplated under the Act. [para 44] [484-B-D]

2.5 In view of the decision of the Constitution Bench

in Dr. Preeti Srivastava's case, the position is quite clear that in terms of the scheme of the Act and the Regulations framed by the Medical Council of India, it is the Central Government which is empowered to grant recognition to a medical college or institution on the recommendation made by the Medical Council of India. The role of the Medical Council of India in the grant of recognition to a medical college/institution is recommendatory and the Council has no power to grant recognition to a medical institution. Such power lies with the Central government. No provision is available under the Act relating to grant of recognition of a medical college/ institution, since s.10A speaks only of permission and not recognition. The same has been supplemented by the provisions of the 1999 and 2000 Regulations for the purpose of s.10A(7)(g) of the Act. [para 48] [486-E-H; 487-A]

Dr. Preeti Srivastava & Anr. vs. State of M.P. & Ors. **1999 (1) Suppl. SCR 249 = (1999) 7 SCC 120 - relied on.**

2.6 Therefore, the Single Judge and the Division Bench of the High Court erred in arriving at the finding that once permission had been granted u/s 10A of the Act, it would amount to grant of recognition and, thereafter, the medical college/ institution, was free to enhance the number of seats without the permission either of the Council or the Central Government. The judgments of the Single Judge as also of the Division Bench of the High Court, and the directions given to increase the number of seats from 100 to 150 in the MBBS course run by the writ petitioners are set aside. [para 49-50] [487-B-D]

2.7 Since the 2000 Regulations provide for a newly-established medical college/ institution to seek permission each year to continue with the MBBS course till the first batch of the students graduated, the position

is quite clear that the recognition referred to in ss.10B and 11 of the 1956 Act would have to relate to the grant of recognition to a medical institution u/s 11 for the purpose of recognition of its qualifications as a medical degree, which would entitle the holder thereof to practise medicine. [para 50] [487-D-E]

2.8 It is made clear that this will not prevent the medical colleges/institutions from applying for increase in the number of students, provided such application fulfils the conditions and criteria of s.10A and the Regulations framed thereunder by the Medical Council of India. [para 51] [487-F-G]

Govt. of A.P. & Anr. Vs. Medwin Educational Society & Ors. **2003 (5) Suppl. SCR 408 = (2004) 1 SCC 86;** *Shiv Kumar Chadha Vs. Municipal Corporation of Delhi* **1993 (3) SCR 522 = (1993) 3 SCC 161; and** *Mridhul Dhar Vs. Union of India* **2005 (1) SCR 380 =(2005) 2 SCC 65 - cited.**

Case Law Reference:

1998 (3) SCR740	relied on	para 19
1982 (1) SCR 759	overrurled	para 20
1999 (1) Suppl. SCR 249	relied on	para 21
1968 SCR 786	distinguished	para 21
1970 (1) SCR 413	distinguished	para 21
(1971) 1 SCC 607	distinguished	para 21
1987 SCR 661	distinguished	para 21
2001(5) Suppl. SCR 593	referred to	para 23
2003 (5) Suppl. SCR 408	referred to	para 24
1993 (3) SCR 522	referred to	para 34

2005 (1) SCR 380 referred to para 37

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4911 of 2012 etc.

From the Judgment & Order dated 13.10.2011 of the High Court of Delhi in Letters Patent Appeal No. 820 of 2011.

WITH

SLP (C) Nos. 30332, 30338 of 2011 & 3732 of 2012.

W.P. (C) Nos. 457, 458 & 489 of 2011.

Nideshe Gupta, P.S. Narasimha, V. Giri, Dushyant Dave, Dr. Abhishek Manu Singhvi, Pradip Ghosh, T.S. Doabia, Amit Kumar, Ashish Kumar, Atul Kumar, Rekha Bakshi, Shilandra K. Panday, Rajiv Agrawal, Kunal Cheema, Dhruv Kapur, Yash Pal Dhingra, Ranjan Kr. Pandey, Kaushal P. Gautam, M.P. Vinod, Ashok K. Jain, Dillip Pillai, Neeraj Shekar, Ashutosh Thakur, Priya Ranjan Roi, Arun Monga, Gaurav Sharma, Ranjan Kumar Pandey, Rekha Pandey, Rashmi Malhotra, D.S. Mahra, Shalinder Saini for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The Indian Medical Council Act, 1956, hereinafter referred to as the "1956 Act", was enacted, inter alia, to provide for the reconstitution of the Medical Council of India and the maintenance of a Medical Register for India and for matters connected therewith. Section 3 of the Act empowered the Central Government to constitute a Council, which as per Section 4(1) means the Medical Council of India, hereinafter referred to as the "Medical Council", constituted under the 1956 Act.

3. In these matters, we are mainly concerned with the interpretation of Sections 10A and 11 of the 1956 Act. Section

10A of the 1956 Act, which provides for permission for establishment of new medical colleges and new courses of study, is extracted hereinbelow :

> "*10A. Permission for establishment of new medical college, new course of study.-* (1) Notwithstanding anything contained in this Act or any other law for the time being in force:-
>
> a) no person shall establish a medical college; or
>
> b) no medical college shall -
>
> (i) open a new or higher course of study or training (including a post-graduate course of study or training) which would enable a student of such course or training to qualify himself for the award of any recognised medical qualification; or
>
> (ii) increase its admission capacity in any course of study or training (including a post-graduate course of study or training), except with the previous permission of the Central Government obtained in accordance with the provisions of this Section.
>
> Explanation 1.-For the purposes of this Section, "person" includes any University or a trust but does not include the Central Government.
>
> Explanation 2.- For the purposes of this Section "admission capacity" in relation to any course of study or training (including post-graduate course of study or training) in a medical college, means the maximum number of students that may be fixed by the Council from time to time for being admitted to such course or training.
>
> (2) (a) Every person or medical college shall, for the

purpose of obtaining permission under sub-Section (1), submit to the Central Government a scheme in accordance with the provisions of clause (b) and the Central Government shall refer the scheme to the Council for its recommendations.

(b) The scheme referred to in clause (a) shall be in such form and contain such particulars and be preferred in such manner and be accompanied with such fee as may be prescribed.

(3) On receipt of a scheme by the Council under sub-Section (2) the Council may obtain such other particulars as may be considered necessary by it from the person or the medical college concerned, and thereafter, it may, -

a) if the scheme is defective and does not contain any necessary particulars, give a reasonable opportunity to the person or college concerned for making a written representation and it shall be open to such person or medical college to rectify the defects, if any, specified by the Council;

b) consider the scheme, having regard to the factors referred to in sub-Section (7), and submit the scheme together with its recommendations thereon to the Central Government.

(4) The Central Government may, after considering the scheme and the recommendations of the Council under sub-Section (3) and after obtaining, where necessary, such other particulars as may be considered necessary by it from the person or college concerned, and having regard to the factors referred to in sub-Section (7), either approve (with such conditions, if any, as it may consider necessary) or disapprove the scheme and any such approval shall be a permission under sub-Section (1):

Provided that no scheme shall be disapproved by the

Central Government except after giving the person or college concerned a reasonable opportunity of being heard:

Provided further that nothing in this sub Section shall prevent any person or medical college whose scheme has not been approved by the Central Government to submit a fresh scheme and the provisions of this Section shall apply to such scheme, as if such scheme has been submitted for the first time under sub-Section (2).

(5) Where, within a period of one year from the date of submission of the scheme to the Central Government under sub-Section (2), no order passed by the Central Government has been communicated to the person or college submitting the scheme, such scheme shall be deemed to have been approved by the Central Government in the form in which it had been submitted, and accordingly, the permission of the Central Government required under sub-Section (1) shall also be deemed to have been granted.

(6) In computing the time-limit specified in sub-Section (5), the time taken by the person or college concerned submitting the scheme, in furnishing any particulars called for by the Council, or by the Central Government, shall be excluded.

(7) The Council, while making its recommendations under clause (b) of sub-Section (3) and the Central Government, while passing an order, either approving or disapproving the scheme under sub-Section (4), shall have due regard to the following factors, namely:-

a) whether the proposed medical college or the existing medical college seeking to open a new or higher course of study or training, would be in a position to offer the minimum standards of medical

education as prescribed by the Council under Section 19A or, as the case may be, under Section 20 in the case of post-graduate medical education;

b) whether the person seeking to establish a medical college or the existing medical college seeking to open a new or higher course of study or training or to increase its admission capacity has adequate financial resources;

c) whether necessary facilities in respect of staff, equipment, accommodation, training and other facilities to ensure proper functioning of the medical college or conducting the new course or study or training or accommodating the increased admission capacity, have been provided or would be provided within the time-limit specified in the scheme;

d) whether adequate hospital facilities, having regard to the number or students likely to attend such medical college or course of study or training or as a result of the increased admission capacity, have been provided or would be provided within the time-limit specified in the scheme;

e) whether any arrangement has been made or programme drawn to impart proper training to students likely to attend such medical college or course of study or training by persons having the recognised medical qualifications;

f) the requirement of manpower in the field of practice of medicine; and

g) any other factors as may be prescribed.

(8) Where the Central Government passes an order either approving or disapproving a scheme under this

Section, a copy of the order shall be communicated to the person or college concerned."

4. It would be seen from the above that after the promulgation of the 1956 Act, no person would be entitled to establish a Medical College except in the manner provided in Section 10A, which, in addition provides that no medical college shall open a new or higher course of study or training, including a post-graduate course of training, which would enable a student of such course or training to qualify himself for the award of recognised medical qualification, except with the previous permission of the Central Government. The said prohibition also extends to the increase in admission capacity in any course of study or training, including post-graduate study or training, except with such previous permission of the Central Government. Sub-Section (2) categorically provides that every person or medical college shall, for the purpose of obtaining permission under Sub-Section (1), submit to the Central Government a scheme in accordance with the provisions of Clause (b) and the Central Government shall refer the scheme to the Medical Council for its recommendations. The said Council has been authorized to scrutinize the scheme and make such suggestions, as may be necessary, to rectify any defect and, thereafter, to forward the same, together with its recommendations, to the Central Government. Sub-Section (7) provides that the Council while making its recommendations shall take into consideration the factors mentioned therein.

5. In other words, although, the Central Government is the authority to grant sanction to the establishment of a medical college, it is the Medical Council of India which plays a major role in deciding whether such sanction could be given by the Central Government.

6. Section 11 of the 1956 Act deals with recognition of medical qualifications granted by universities or medical institutions in India. The same also being relevant to the facts of this case, is reproduced hereinbelow :

"11. Recognition of medical qualifications granted by Universities or medical institutions in India.- (1) The medical qualifications granted by any University or medical institution in India which are included in the First Schedule shall be recognised medical qualifications for the purposes of this Act.

(2) Any University or medical institution in India which grants a medical qualification not included in the First Schedule may apply to the Central Government to have such qualification recognised, and the Central Government, after consulting the Council, may, by notification in the Official Gazette, amend the First Schedule so as to include such qualification therein, and any such notification may also direct that an entry shall be made in the last column of the First Schedule against such medical qualification declaring that it shall be a recognised medical qualification only when granted after a specified date."

7. In addition to the aforesaid provisions, Section 10-B of the 1956 Act is also of significance as it deals with non-recognition of medical qualifications in certain cases. For the sake of reference, the same is also extracted hereinbelow :-

"10-B. Non-recognition of medical qualifications in certain cases.- (1) Where any medical college is established except with the previous permission of the Central Government in accordance with the provision of Section 10A, no medical qualification granted to any student of such medical college shall be a recognised medical qualification for the purposes of this Act.

(2) Where any medical college opens a new or higher course of study or training (including a post-graduate course of study or training) except with the previous permission of the Central Government in accordance with the provisions of Section 10A, no medical qualification granted to any student of such medical college on the basis of such study or training shall be a recognised medical qualification for the purposes of this Act.

(3) Where any medical college increases its admission capacity in any course of study or training except with the previous permission of the Central Government in accordance with the provision of Section 10A, no medical qualification granted to any student of such medical college on the basis of the increase in its admission capacity shall be a recognised medical qualification for the purposes of this Act.

Explanation - For the purposes of this Section, the criteria for identifying a student who has been granted a medical qualification on the basis of such increase in the admission capacity shall be such as may be prescribed."

8. It is amply clear from Section 10B that if a Medical College is established, except with the previous permission of the Central Government, as provided under Section 10A, no medical qualification granted to any student of such medical college shall be recognized as a medical qualification for the purposes of the Act.

9. At this juncture, reference may be made to the "Establishment of Medical College Regulations, 1999", framed by the Medical Council of India in exercise of powers conferred under Section 10A read with Section 33 of the 1956 Act, and notified on 30th July, 1999. The same came into force on their publication in the Official Gazette on 28th August, 1999, and is hereinafter referred to as the "1999 Regulations".

10. Regulation 4 of the 1999 Regulations, inter alia, provides that applications for permission to set up Medical Colleges are to be submitted to the Secretary (Health), Ministry of Health and Family Welfare, Government of India, along with a non-refundable application fee of Rs.3.5 lakhs in the form of a demand draft/pay order in favour of the Medical Council of

India for Central and State Government Colleges and Rs.7 lakhs for private sector medical colleges and institutions. Regulation 5 provides that applications received by the Ministry of Health and Family Welfare are to be referred to the Medical Council for registration and evaluation and recommendations. Regulations 6 and 7 provide that after evaluation, the Council shall send a factual report to the Central Government with its recommendations to issue or not to issue Letters of Intent. Regulation 8 of the 1999 Regulations is the provision for grant of permission and since it is of considerable significance to the issue involved in these proceedings, the same is reproduced hereinbelow :

"*8. GRANT OF PERMISSION:*

(1) The Central Government on the recommendation of the Council may issue a Letter of Intent to set up a new medical college with such conditions or modifications in the original proposal as may be considered necessary. This letter of Intent will also include a clear cut statement of preliminary requirements to be met in respect of buildings, infrastructural facilities, medical and allied equipments, faculty and staff before admitting the first batch of students. The formal permission may be granted after the above conditions and modifications are accepted and the performance bank guarantees for the required sums are furnished by the person and after consulting the Medical Council of India.

(2) The formal permission may include a time bound programme for the establishment of the medical college and expansion of the hospital facilities. The permission may also define annual targets as may be fixed by the Council to be achieved by the person to commensurate with the intake of students during the following years.

(3) The permission to establish a medical college and admit students may be granted initially for a period of one year and may be renewed on yearly basis subject to verification of the achievements of annual targets. It shall be the responsibility of the person to apply to the Medical Council of India for purpose of renewal six months prior to the expiry of the initial permission. This process of renewal of permission will continue till such time the establishment of the medical college and expansion of the hospital facilities are completed and a formal recognition of the medical college is granted. Further admissions shall not be made at any stage unless the requirements of the Council are fulfilled. The Central Government may at any stage convey the deficiencies to the applicant and provide him an opportunity and time to rectify the deficiencies.

(4) The council may obtain any other information from the proposed medical college as it deems fit and necessary."

11. The above Regulation makes it clear that irrespective of whether the applicant is the Central Government or a State Government or a private person, the Central Government may, on the recommendation of the Medical Council, issue a Letter of Intent to set up a new medical college and formal permission may be granted initially for a period of one year and may be renewed on yearly basis subject to verification of the achievements of annual targets, once the conditions and modifications indicated in the Letter of Intent are accepted and after consulting the Medical Council of India. Sub-regulation (3) is important for our purpose as it also related to certain other Regulations published by the Medical Council in 2000. It provides, without any ambiguity that the provision to establish a medical college and to admit students may be granted initially for a period of one year and may be renewed on yearly basis

subject to verification of the achievement of annual targets. It may be noted that Section 10A speaks of permission and not recognition on a year to year basis. Recognition follows once the newly-established medical colleges/institutions satisfactorily complete five years with the graduation of the first batch of students admitted to the institution when initial permission is granted. It also provides with complete clarity that it shall be the responsibility of the applicant to apply to the Medical Council for renewal of permission six months before the expiry of the initial permission and that the process of renewal of permission will continue till all the required formalities are completed and a formal recognition of the medical college is granted.

12. From the aforesaid provisions it is very clear that recognition to a degree awarded by a newly-established medical college can be given only after all the requirements for the establishment of the medical college and expansion of the hospital facilities are completed. It has also been stipulated that further admissions shall not be made at any stage unless the requirements of the Council are fulfilled.

13. Reference may also be made to the Regulations framed by the Medical Council of India relating to opening of higher courses of study and increase of admission capacity in medical colleges and published by the Medical Council of India under notification dated 14th August, 2000. The same are known as "The Opening of a New or Higher Course of Study or Training (including Post-Graduate Course of Study or Training) and Increase of Admission Capacity in any Course of Study or Training (including a Post-Graduate Course of Study Or Training) Regulations, 2000", hereinafter referred to as "the 2000 Regulations", which came into force on 7th October, 2000. Thereafter, Regulation 3, which provides for permission for establishment of a new or higher course of study, etc., reads as follows :-

"(3) The permission for establishment of a new or higher course of study, etc. -

No medical college, shall -

(a) open a new or higher course of study or training (including a post-graduate course of study or training) which would enable a student of such course or training to qualify himself for the award of any recognized medical qualification; or

(b) increase admission capacity in any course of study or training (including a post-graduate course of study or training); except after obtaining the previous permission of the Central Government by submitting Scheme annexed to these regulations."

14. Regulation 3 of Part I of the said Regulations sets out the "Qualifying Criteria" which provides as follows :

"QUALIFYING CRITERIA :

The medical college/institution shall qualify for opening a New or Higher Course of Study or Training (including a Post-graduate Course of Study or Training) in the medical colleges/institutions if the following conditions are fulfilled :

1. (1) The medical college/institution must be recognised by the Medical Council of India for running Bachelor of Medicine and Bachelor of Surgery/Post-graduate Course; however, the medical college/Institute which is not yet recognised by the Medical Council of India for the award of MBBS Degree may apply for starting of a Post-Graduate Course in pre-clinical and para-clinical subjects of Anatomy, Physiology, Biochemistry, Pharmacology, Pathology, Microbiology, Forensic Medicine and Community Medicine at the time of third renewal - i.e. along with the admission of fourth batch for the MBBS Course";

[Emphasis Supplied]

15. Regulation 3 of Part II of the Regulations, dealing with Qualification Criteria initially provided that a medical college/ institution would qualify to apply for increasing the number of admissions in MBBS/PG Diploma/Degree/Higher Speciality Course in the existing medical college/institution, if it fulfilled certain conditions, one of which was that the medical college/ Institution had been recognized by the Medical Council of India as being capable of running such courses. The aforesaid paragraph was, subsequently substituted by the following :

> "The medical college/institution must be recognized by the Medical Council of India for running Bachelor of Medicine and Bachelor of Surgery/Post-Graduate Course; however, the Medial College/Institute which is not yet recognized by the Medical Council of India for the award of MBBS Degree may apply for starting of a Post-Graduate Course in pre-clinical and para-clinical subjects of Anatomy, Physiology, Biochemistry, Pharmacology, Pathology, Microbiology, Forensic Medicine and Community Medicine *at the time of fourth renewal - i.e. along with the admission of fifth batch for the MBBS Course."*
>
> [Emphasis Supplied]

16. It is in the aforesaid background that the Medical Council of India filed Special Leave Petition (Civil) No.28996 of 2011, and two other Special Leave Petitions, which are being heard along with three Writ Petitions filed by private institutions claiming the right to increase their admission capacity.

17. Appearing on behalf of the Medical Council of India, Mr. Nidhesh Gupta, learned Senior Advocate, referred to the relevant provisions of the 1956 Act, which have been referred to and reproduced hereinabove. Mr. Gupta relied heavily on the requirements to be fulfilled by the Applicant colleges for obtaining Letter of Intent and Letter of Permission for establishment of new medical colleges and yearly renewals

under Section 10A of the Indian Medical Council Act, 1956, published by the Medical Council of India and approved by the Central Government in its Ministry of Health & Family Welfare vide letter dated 13th October, 2009. Laying stress on the requirements to be fulfilled for yearly renewals under Section 10A of the 1956 Act, Mr. Gupta also referred to the 2000 Regulations, with particular reference to Regulation 3 of Part I of the Regulations dealing with Qualification Criteria as set out hereinabove. Mr. Gupta submitted that it would be clear from the substituted Sub-Regulation (1) of Regulation 3 that it was always the intention of the Central Government and the Medical Council of India that for the purpose of increase in the number of admissions in the different courses, the medical college/ institution had to be recognized by the Medical Council of India of being capable of running Bachelor of Medicine and Bachelor of Surgery/Post-Graduate Courses. Mr. Gupta urged that the said clause also provides that even in cases of medical colleges and institutes, which were not yet recognized by the Medical Council of India for the award of MBBS degree, they could also apply for increase of intake in the Post-Graduate Courses at the time of fourth renewal i.e. along with the admission of the fifth batch for the MBBS Course. Mr. Gupta submitted that the said provision makes it very clear that degrees awarded by medical colleges and institutions could not be recognized prior to the completion of the five year course and that only at the time of the fourth renewal, namely, for the final year course, could an application be made for such purpose along with the admission of the fifth batch for the MBBS Course, or in other words, with the admission of the final year students of the MBBS Course. Mr. Gupta submitted that the said provisions unambiguously indicate that without completion of the five-year course and the graduation of the first batch of MBBS students, a medical college or institution could not be recognized for the purposes of Section 10A or 11 of the 1956 Act.

18. In addition to what has been mentioned hereinabove,

Mr. Gupta laid special stress on Regulation 8 of the 1999 Regulations relating to grant of permission for setting up of a new medical college. He laid special stress on Sub-Regulation 3, extracted hereinbefore, which provides that the permission to establish a medical college and admit students may be granted initially for a period of one year and may be renewed on yearly basis, subject to verification of the achievements of annual targets. The said Regulation further provides that, for the purpose of renewal, an application would have to be made to the Medical Council of India at least six months prior to the expiry of the initial permission and that the process of renewal of permission would continue till such time as the establishment of the medical college and expansion of the hospital facilities are not completed and a formal recognition of the medical college is not granted. Mr. Gupta also laid stress on the further provision contained in the said Regulation to the effect that further admissions would not be made at any stage, unless the requirements of the Council are fulfilled. The said submissions were made in the light of Regulation 3 of Part II dealing with the question of "qualification criteria", whereunder it has been provided that the medical college/institution must be recognised by the Medical Council of India for running Bachelor of Medicine and Bachelor of Surgery/Post-Graduate Courses. The said Regulation further provides for fourth renewal, along with the admission of the fifth batch for the MBBS Course. Mr. Gupta submitted that the aforesaid provisions were sufficient to prove his case that recognition of the degree awarded by the newly-established medical college could only be given by the Central Government after the first batch of students of the MBBS Course had completed the said Course and recommendations had been made by the Medical Council to grant such recognition.

19. In support of his submissions, Mr. Gupta referred to and relied upon several decisions of this Court. Referring to the three-Judge Bench decision of this Court in the case of *Medical Council of India Vs. State of Karnataka & Ors.* [(1998)

6 SCC 131], Mr. Gupta submitted that one of the questions which fell for decision in the said case was the extent of the powers of the Medical Council of India to fix the admission capacity in the medical colleges/institutions and its role in regard to the increase in number of admissions in such institutions. One other question which also fell for consideration was with regard to the status of the regulations framed by the Medical Council under the 1956 Act.

20. On the first issue, one question which was raised was whether the directions given by the Medical Council under the Regulations framed by it were mandatory or directory in character. In this connection, this Court had occasion to consider its decision in *State of M.P. Vs. Nivedita Jain* [(1981) 4 SCC 296], in which it had, inter alia, been held that all the Regulations framed by the Medical Council of India under the 1956 Act, were directory in nature. While considering the matter, this Court held that the Indian Medical Council Act is relatable to Entry 66 of List I and prevails over any State enactment to the extent the State enactment is repugnant to the provisions of the said Act, even though the State Act may be relatable to Entry 25 or 26 of the Concurrent List. This Court further held that Regulations framed under Section 33 of the 1956 Act, with the previous sanction of the Central Government, are statutory and had been framed to carry out the purposes of the Act and for various other purposes mentioned in Section 33. This Court further held that if a Regulation falls within the purposes referred to under Section 33 of the Act, it would have statutory force. It was ultimately held that the State Acts, and in the said case, the Karnataka Universities Act and the Karnataka Capitation Fee Act, would have to give way to the Indian Medical Council of India Act, 1956, which was a Central Act.

21. The next case referred to by Mr. Gupta is a decision of the Constitution Bench in several writ petitions in which the lead writ petition, being No.290 of 1997, was filed by *Dr. Preeti Srivastava & Anr. against the State of M.P. & Ors.* [(1999) 7

SCC 120]. Some of the questions which fell for the determination of the Constitution Bench were similar to those which had been taken up and decided in *Nivedita Jain's* case (supra). While 4 out of 5 Judges were unanimous on the issue that by virtue of Entry 66 of List I and Entry 25 of List III, the State's competence to control or regulate higher education is subject to the standards so laid down by the Union of India, the dissenting view taken by one of the Hon'ble Judges was that while the Parliament was competent to authorize the Medical Council of India to prescribe basic standards of eligibility and qualification for admission to the Post-Graduate Courses under the Medical Council Act, the States were fully competent to control admission to Post-Graduate Medical Courses in the absence of any central legislation on these aspects. The majority view was similar to the view expressed in the decision in the Medical Council of *India* case (supra). It was further held that in view of Entry 66 of List I, a State has the right to control education, including medical education, so long as the field is not occupied by any Union List entry. Secondly, the State, cannot, by controlling education in the State, encroach upon the standards in institutions for higher education, because the same was exclusively within the purview of the Union Government. Distinguishing various earlier decisions of this Court in the cases of *Minor P. Rajendran Vs. State of Madras* [AIR 1968 SC 1012]; *Chitra Ghosh Vs. Union of India* [(1969) 2 SCC 228]; *State of A.P. Vs. Lavu Narendranath* [(1971) 1 SCC 607]; and *Ambesh Kumar (Dr.) Vs. Principal, L.L.R.M. Medical College* [(1986) Supp. SCC 543], the Constitution Bench criticized the decision rendered in *Nivedita Jain's* case (supra). Apart from the above, the majority view was that the power vested in the Medical Council under Section 20 of the 1956 Act, to prescribe the minimum standards for Post-Graduate education, was not merely advisory in nature, but that the universities were bound to abide by the standards prescribed. It was also the majority view that the norms had to be laid down by the Medical Council for determining

reservation of seats for SCs/STs/OBCs and minimum qualifying marks for the candidates had also to be prescribed.

22. In his dissenting judgment, Justice S.B. Majmudar held that the provisions of Section 20 read with Section 33 empowers the Medical Council to lay down basic requirements of quantifications and eligibility conditions and once the same was done, it was for the States under Entry 25 of List III to control admission and to lay down the criteria for shortlisting the eligible candidates, since Parliament had not legislated on this aspect. The Hon'ble Judges representing the majority view made it clear that under the 1956 Act, the Medical Council had been set up as an expert body to control the minimum standards of medical education, including Post-Graduate medical education, and to regulate their observance. Their Lordships also held that the Council had implicit power to supervise the qualifications or eligibility standards for admission into medical institutions and that the Act provided for an overall vigilance by the Medical Council to prevent sub-standard entrance qualifications for medical courses. It was further held that the scheme of the 1956 Act did not give an option to the universities to follow or not to follow the standards laid down by the Medical Council.

23. Reference was also made to the decision rendered by a Bench of two Judges in *K.S. Bhoir Vs. State of Maharashtra & Ors.* [(2001) 10 SCC 264], which was heard along with some other Civil Appeals, where the issues were common. The first issue raised and deliberated upon was the proposed one-time increase in admission capacity in medical colleges. Striking out the State provision, this Court held that the non-obstante clause contained in Section 10A(1) means that an increase in admission capacity in a medical college is prohibited, unless previous permission is obtained from the Central Government in accordance with the recommendation of the Medical Council of India. Their Lordships also observed that the entire scheme of Section 10A of the Act had to be read

in consonance with the other Sub-Sections to further the object behind the amending Act which was to achieve the highest standard of medical education. Their Lordships observed that the objective could be achieved only by ensuring that a medical college had the requisite infrastructure to impart medical education. In the facts of the said case and in view of Section 10A(1), Their Lordships ultimately held that the one-time increase proposed by the State Government in the admission capacity in the various medical colleges, should have been accompanied by a scheme prepared in accordance with the Act and the Regulations and submitted to the Central Government. Their Lordships also held that in the absence of any scheme submitted to the Central Government in regard to the one-time increase in the admission capacity in the medical colleges, the Central Government was justified in refusing permission for the same.

24. The next decision referred to by Mr. Gupta was that rendered in the case of *Govt. of A.P. & Anr. Vs. Medwin Educational Society & Ors.* [(2004) 1 SCC 86], wherein the same view, as was expressed in the decision in K.S. Bhoir's case, was reiterated. It was reiterated that the decision of the State Government in the matter was not final, as the final decision had to be taken by the Central Government on the basis of the recommendations of the Medical Council under the relevant provisions of the Indian Medical Council Act, 1956.

25. Mr. Gupta lastly submitted that it is settled law that an individual State is entitled to legislate on any of the Entries contained in the Concurrent List even if there was in existence a central law on the said subject, but in case of repugnancy, the law enacted by the State would have to give way to the central law. Mr. Gupta urged that the Division Bench of the High Court had erred in interpreting the use of the expression "formal recognition" in Sub-Regulation (3) of Regulation 8 of the 1999 Regulations, and had erroneously held that the same could be preceded by grant of adhoc recognition, which could

subsequently be converted into a formal recognition, as contemplated by Section 11 of the 1956 Act. Mr. Gupta also urged that the decision of the Division Bench of the High Court concurring with the reasoning of the learned Single Judge that the Regulation does not contemplate that a college must be recognised to award degrees, i.e., it does not contemplate recognition under Section 11 of the 1956 Act and that it is permissible in a college to effect increase in the admission capacity, even at the stage when it has permission/recognition under Section 10A of the 1956 Act, was wholly erroneous and was liable to be struck down.

26. Mr. Gupta pointed out from a number of decisions of this Court that in an extraordinary case the Court may itself pass an order to give directions which the Government or public authority should have passed or issued. Mr. Gupta submitted that having held as much, the learned Single Judge had quite wrongly issued a mandamus to increase the capacity pertaining to the MBBS course from 100 to 150 seats in each of the three colleges, thus wandering into the territory of the Medical Council of India which had the necessary expertise and the authority under the Regulations to evaluate as to whether the medical institution was capable of catering to more students than initially envisaged. Mr. Gupta submitted that while increasing the number of students from 100 to 150, the Court not only acted beyond its jurisdiction in giving such direction, but it failed to take into consideration the fact that under the relevant regulations it was only the Medical Council which could have allowed such increase, once it was satisfied that the concerned institution had proper facilities to support such an increase.

27. Mr. Gupta, therefore, urged that since the process adopted by the learned Single Judge, which was affirmed by the Division Bench of the High Court, being contrary to the Rules and Regulations in respect of the issues raised in the appeals, the same could not be sustained and were liable to be set aside.

28. Mr. T.S. Doabia, learned Senior Advocate, who appeared for the Union of India, adopted the submissions made by Mr. Nidhesh Gupta and added that the scheme for granting permission to establish new medical colleges/ institutions and also for granting permission to increase the number of seats in the institution, made it quite clear that it was only the Central Government, acting on the recommendation of the Medical Council of India, which could either grant permission for the establishment of a new medical institution or grant recognition to the institution itself, once the first batch of students admitted had completed their fifth year and had graduated. Mr. Doabia submitted that this was a scheme which had been framed both under the Act and the Rules and Regulations framed thereunder and the Medical Council of India and the Union of India had complete say in the matter. The inclusion of a third party was not contemplated under the provisions of Sections 10A or 10B of the 1956 Act. Accordingly, the mandamus issued by the learned Single Judge of the High Court, which was affirmed by the Division Bench, was liable to be set aside.

29. Mr. Dushyant Dave, learned Senior Advocate appearing for the School of Medical Sciences and Research, Sharda Education Trust, the Respondent No.1 in SLP(C)No.30338 of 2011, raised the question as to whether it could have been the intention of the legislature to grant year to year recognition when a medical college was newly-established, till the first batch of students graduated therefrom after five years. Questioning the reasonability of such a view, Mr. Dave submitted that once permission was granted to a medical college/institution to commence classes, it would be quite absurd to accept the reasoning that such permission would have to be renewed annually, since after being satisfied that the institution was capable of running a medical course, permission had been granted to commence the classes for the first year.

30. Referring to Sections 10A(1)(b) and (4), Mr. Dave pointed out that the said provisions contemplated a one-time recognition and a citizen's inherent right to establish medical colleges cannot be curtailed by the provisions for grant of year to year recognition. Mr. Dave also urged that under the garb of exercising its powers under Section 19 of the 1956 Act, the Council could not assert that it could also regulate the manner in which the recognition was to be granted.

31. Mr. Dave submitted that the provisions of Section 19A could not be read into the provisions of Section 10A for permission to establish a new medical college or new course of study, as otherwise the grant of recognition from year to year would deter students from taking admissions in the medical college on account of the uncertainty of being able to continue the MBBS course in the event recognition was not granted for the subsequent year.

32. Mr. Dave, however, confined his submissions only to the question of increase in the number of students, in respect whereof he submitted that there could not be any fetters. Mr. Dave contended that the curtailment of the right of an institution to increase its admission capacity in any course of study or training, including a Post-Graduate Course of study or training, except with the previous permission of the Central Government, was in violation of the provisions of Article 19(1)(g) of the Constitution, as such prohibition was not only illogical, but was unreasonable also. Mr. Dave submitted that if permission could be granted to admit 100 students, there could be no logical reason as to why, in order to increase the number of students/ seats, an institution would have to wait for five years before recognition was granted to the institution by the Central Government on the recommendation of the Medical Council.

33. Drawing an analogy with the provisions of Order XXXIX Rules 1, 2 and 3 of the Code of Civil Procedure, 1908, Mr. Dave submitted that it would always be prudent to look into the matter at length before granting ad-interim orders.

According to Mr. Dave, before imposing conditions regarding grant of recognition from year to year, it would be more pragmatic to think over the matter with greater intensity before uniformly contending that a newly-established medical college/ institution would have to seek fresh permission/recognition each year, before being finally granted recognition after the fifth year, when the first batch of students would graduate from the institution.

34. In support of his submission, Mr. Dave firstly referred to the decision of this Court in *Shiv Kumar Chadha Vs. Municipal Corporation of Delhi* [(1993) 3 SCC 161], in which a three-Judge Bench of this Court, while considering the provisions of Order XXXIX Rule 3 C.P.C. and the proviso thereto held that the proviso had been introduced in order to compel the Court to give reasons as to why the provisions relating to notice was being dispensed with. Mr. Dave contended that instead of prohibiting the creation of new seats in the medical college/institution, the concerned authorities should sit and ponder over the matter to come to a conclusion as to whether such a bar was necessary when the institution was already running a medical course with a sizable number of students.

35. Mr. Dave urged that the doctrine of proportionality has been introduced by the Courts to ensure that the action taken against any individual did not transgress the constitutional provisions relating to the right of an individual to establish medical colleges/institutions as a concomitant of the right contained in Article 19(1)(g) of the Constitution. Mr. Dave concluded his submissions by urging that the attempt to impose extra-constitutional obstructions to a person's right to establish a medical college/ institution, could not have been the intention of the framers of the Constitution, who all were in favour of the right to practise any profession or trade and included the same as a fundamental right under Part III of the Constitution.

36. While endorsing the submissions advanced by Mr.

Dave, Dr. Abhishek Manu Singhvi, learned Senior Advocate, who appeared for the Respondent No.1, Rama Medical College, in SLP(C)No.28996 of 2011, submitted that there was a waste of human resources by denying admission to deserving students who wanted to pursue a medical course, although, the required facilities were available, only on the ground that such increase had not been sanctioned by the concerned authorities. Referring to the provisions of Sections 10A and 11(2) of the 1956 Act, Dr. Singhvi submitted that an interpretation of Section 10 of the aforesaid Act, as was being sought to be given, was entirely illogical, particularly when there was no specific legislation to the contrary. Dr. Singhvi urged that when facilities had been found to be sufficient for 100 students, facilities providing for 150 students, would have to be presumed to be sufficient as well.

37. Dr. Singhvi submitted that it is Section 10A of the 1956 Act which deals with setting up of new medical colleges/ institutions or enhancement of numbers. According to learned counsel, Section 11 of the 1956 Act had been wrongly pressed into service, since it concerns the Centre's power to recognize degrees. Expressing himself idiomatically, Dr. Singhvi urged that trying to read Section 11 with Section 10A was like trying to mix chalk and cheese and an attempt to do so would lead to absurdity. In this connection, Dr. Singhvi referred to a three-Judge Bench decision in Mridhul Dhar Vs. Union of India [(2005) 2 SCC 65], in which among several issues, one issue which fell for consideration was about not taking into consideration, for determining All-India quota, those seats which were created under Section 10A of the Act. The Hon'ble Judge recorded that according to the Medical Council of India, only seats recognised under Section 11 are taken into consideration and not the seats which are permitted under Section 10A of the Act. The provisions of Regulation 8(3) of the 1999 Regulations were also noted.

38. Having considered the said Regulation and the effect of Section 10A and Section 11 of the 1956 Act, Their Lordships

gave various directions, including a direction that the States, through the Chief Secretaries/Health Secretaries, should file a report in regard to admissions with the Director General of Health Services, by 31st October, 2004, with the DGHS giving details about adhering to the time schedule and the number of admissions granted as per the prescribed quota. Dr. Singhvi urged that the non-utilization of available resources was not intended by the legislature and the same also amounted to violation of the provisions of Article 21 of the Constitution.

39. Mr. Pradip K. Ghosh, learned Senior Advocate, who appeared for the Respondent No.1 in SLP(C)No.30332 of 2011, briefly reiterated the submissions already made. Referring to the writ petition filed by the Teerthankar Mahaveer Institute of Management and Technology, Moradabad, which was the petitioner in Writ Petition (C) No. 5763 of 2011, Mr. Ghosh urged that the society was running a large number of educational institutions in which about 8,500 students were pursuing their respective courses. Mr. Ghosh submitted that in 2008, the said society was granted the status of a private university and since it had all the required facilities, it moved the said writ petition for a mandamus on the respondents to grant permission to the writ petitioner college to admit 150 MBBS students, instead of 100, for the academic year 2011-12.

40. Mr. Kunal Cheema, learned Advocate, who appeared for the petitioner in Writ Petition (C) No.489 of 2011, Dashmesh Educational Charitable Trust, introduced a new dimension in the submissions by indicating that the expression "recognition" had not been used by the legislature in Section 10A of the Act. It talks of permission to establish a medical college/institution but the said expression finds place in the Regulations framed by the Medical Council under Section 10A(7)(g) read with Sections 33(fa) and 66 of the Act. According to Mr. Cheema, the permission granted to establish a medical college must be held to be sufficient for allowing the medical college/institution

to deal with the problems relating to increase in the number of students in a given year for the medical course.

41. Mr. Mukesh Giri, learned Advocate, adopted the submissions made by the learned counsel before him and also questioned the stand taken on behalf of the appellants that the Regulations contemplated a situation where before the Section 11 stage is reached, an institution could not apply for increase in the number of students, even when the other conditions relating to infrastructure were fulfilled.

42. As indicated at the beginning of this judgment, in these matters we are mainly concerned with the interpretation of Sections 10A and 11, together with Sections 10 and 33 of the Indian Medical Council Act, 1956. The Division Bench of the High Court, while considering the decision of the learned Single Judge, has laid undue stress on the expression "recognition by the Medical Council of India", used in the 2000 Regulations, since such expression has been used in a completely different sense other than granting recognition to a medical college/ institution for the purposes of Sections 10B and 11 of the 1956 Act. The said expression has to be read and understood as meaning that the concerned medical college/institution was recognised by the Medical Council of India as having the capacity to run such an institution. It is amply clear from Section 10A that what is contemplated thereunder is permission for establishing a new medical college, which is to be granted by the Central Government upon the recommendation of the Council. The use of the expression "recognition" in the Regulation does not affect or alter the intention of the legislature expressed in unambiguous terms in Section 10A as well as in Sections 10B and 11 of the 1956 Act. Both the 1956 Act and the Regulations framed by the Medical Council make it very clear that while the Central Government has the authority to recognize the degree awarded by a newly-established medical college/institution, it does so on the evaluation made by the Medical Council and its subsequent recommendation.

43. By pursuing the line of reasoning adopted by the learned Single Judge, the Division Bench allowed itself to be led into the error of coming to a finding that once permission/ recognition was granted under Section 10A of the 1956 Act, it gave the grantee permission to run a complete course. The Division Bench led itself further into the quagmire created by it by dividing Regulation 3(1) into two parts in the following manner :

> a) The medical college/institution must be recognised by the Medical Council of India for running Bachelor of Medicine and Bachelor of Surgery/Post Graduate Course;
>
> however
>
> b) The medical college/institute which is not yet recognised by the Medical Council of India for the award of MBBS degree may apply for increase of intake in Post Graduate courses in pre-clinical and para-clinical subjects of Anatomy, Physiology, Biochemistry, Pharmacology, Pathology, Microbiology, Forensic Medicine & Community Medicine at the time of 4th renewal i.e. along with the admission of 5th Batch for the MBBS Course.

44. The interpretation sought to be given to Regulation 3(1) in the manner aforesaid portrays a totally wrong understanding of the scheme of the Act itself and the all-pervading presence of the Medical Council of India in the process of grant of recognition for running of medical colleges/ institutions. The said reasoning has also led the Division Bench to misconstrue the provisions of Sections 10B and 11 of the 1956 Act as to the right given to a medical college/institution, which has been established without the permission of the Central Government as provided in Section 10A of the Act, to increase its admission capacity. Following the reasoning of the Single Judge, the Division Bench failed to see that Regulation 3(1) of the 2000 Regulations made it amply clear that those institutions which were yet to be recognised could apply for a Post-Graduate

Course in subjects which were not part of the regular Post-Graduate Courses which were available to those who were in possession of a recognised MBBS degree. Both the Single Judge and the Division Bench of the High Court seem to have ignored the provisions of the 1999 and 2000 Regulations, framed by the Medical Council of India under the provisions of Sections 10A and 33, of the 1956 Act. It may be of interest to note that Section 33, which empowers the Medical Council to frame Regulations, provides in Sub-Sections (fa) and (fb), the right to the Medical Council to frame a scheme in terms of Sub-Section (2) of Section 10A and also in regard to any other factors under Clause (g) of Sub-Section (7) of Section 10A. It is quite clear that the legislature has given the Medical Council of India wide authority to take all steps which are necessary to ensure that a medical institution, either at the time of establishment, or later at the time of applying for increase in the number of seats, has the capacity and the necessary infrastructure, not only to run the college, but also to sustain the increase in the number of seats applied for. To that extent, since the Act is silent, the Regulations which have statutory force will be applicable to the scheme as contemplated under the Act. We repeat that by allowing itself to get confused with the use of the expression "recognition" in Regulation 3(1) of the 2000 Regulations, both the learned Single Judge and the Division Bench of the High Court came to the erroneous conclusion that once permission had been granted under Section 10A to establish a new medical college/institution, the question of having to take fresh permission each year for any subsequent steps to be taken after grant of such permission till the fifth year of the course was completed, did not arise.

45. The aforesaid position would be doubly clear from the provisions of Sub-Section (3) of Section 10B, which, in no uncertain terms, provide that where any medical college increases its admission capacity in any course of study or training, except with the previous permission of the Central Government in accordance with the provisions of Section 10A,

no medical qualification granted to any student of such medical college on the basis of the increase in its admission capacity, shall be a recognised medical qualification for the purposes of the Act. In other words, without the previous permission of the Central Government within the scheme, as prescribed under Section 10A, i.e., without the recommendation of the Medical Council, any degree granted would not be recognised as a medical degree which would entitle such degree holder to function as a medical practitioner.

46. There is no getting away from the fact that Section 10A lays down the criteria for grant of permission for establishment of a new medical college and that Section 10B supplements the same by making it clear that even while increasing the number of seats in a medical college/institution, the procedure indicated in Section 10A, and in particular Section 10A(2), would have to be followed. At every stage, it is the Council which plays a very important role in either the grant of permission to establish a new medical college or to increase the number of seats. Furthermore, on account of the Regulations of 1999 and 2000, the norms relating to eligibility criteria, as set out in the 1999 Regulations, as also in the 2000 Regulations, have to be complied with, either for the purpose of grant of permission for establishing a new medical college or for introducing a new course of study along with the intention of increasing the number of students in the medical institution.

47. In Part II of the 2000 Regulations, which deals with the scheme for obtaining the permission of the Central Government to increase the admission capacity in any course of study or training, including Post Graduate course of study or training, in the existing medical colleges/ institutions, another set of "qualification criteria" has been set out in Regulation 3(1) which has created some confusion in the minds of the learned Judges in the High Court by use of the expression "recognised by the Medical Council of India". As indicated hereinbefore, what it seeks to indicate is that for the purpose of applying for increase

in the number of seats, the medical college must be one which, in the opinion of the Medical Council, was capable of running the Bachelor of Medicine and Bachelor of Surgery/Post-graduate Course. It also provides that the medical college/ institute which is not yet recognised by the Medical Council for the award of MBBS degree, may also apply for increase of intake in Post Graduate Course in pre-clinical and para-clinical subjects such as Anatomy, Physiology, Biochemistry, Pharmacology, Pathology, Microbiology, Forensic Medicine and Community Medicine, at the time of fourth renewal, i.e, along with the admission of the fifth batch for the MBBS Course, which are courses not connected with the regular course of study. In fact, the controversy which surfaced in *Nivedita Jain's* case (supra) that the Regulations framed by the Medical Council of India under Section 10A read with Section 33 of the 1956 Act, were directory in nature, was subsequently set at rest by the Constitution Bench decision in *Dr. Preeti Srivastava's* case (supra), wherein the view expressed in Nivedita Jain's case was overruled.

48. In view of the decision of the Constitution Bench, it is not necessary for us to refer to the other decisions cited both on behalf of the Medical Council of India and the respondents, since, in our view, the position is quite clear that in terms of the scheme of the Act and the Regulations framed by the Medical Council of India, it is the Central Government which is empowered to grant recognition to a medical college or institution on the recommendation made by the Medical Council of India. The role of the Medical Council of India in the grant of recognition to a medical college/institution is recommendatory and the Council has no power to grant recognition to a medical institution. Such power lies with the Central government. As pointed out by Mr. Cheema, no provision is available under the Act relating to grant of recognition of a medical college/ institution, since Section 10A speaks only of permission and not recognition. The same has been supplemented by the

provisions of the 1999 and 2000 Regulations for the purpose of Section 10A(7)(g) of the Act.

49. For the reasons aforesaid, we are unable to agree with the reasoning of either the learned Single Judge or the Division Bench of the High Court in arriving at the finding that once permission had been granted under Section 10A of the Act, it would amount to grant of recognition and, thereafter, the medical college/institution, was free to enhance the number of seats without the permission either of the Council or the Central Government.

50. We, therefore, have no hesitation in setting aside the judgments, both of the learned Single Judge as also that of the Division Bench of the High Court, and the directions given to increase the number of seats from 100 to 150 in the MBBS course run by the writ petitioners. Since the 2000 Regulations provide for a newly-established medical college/institution to seek permission each year to continue with the MBBS course till the first batch of the students graduated, in our view, the position is quite clear that the recognition referred to in Sections 10B and 11 of the 1956 Act would have to relate to the grant of recognition to a medical institution under Section 11 for the purpose of recognition of its qualifications as a medical degree, which would entitle the holder thereof to practise medicine.

51. Consequently, upon setting aside the judgments of the learned Single Judge and the Division Bench and the directions contained therein, we also make it clear that this will not prevent the medical colleges/institutions from applying for increase in the number of students, provided such application fulfils the conditions and criteria of Section 10A and the Regulations framed thereunder by the Medical Council of India.

52. The appeals arising out of SLP(C)Nos.28996 and 30332 of 2011, preferred by the Medical Council of India and the appeal arising out of SLP(C)No.30338 of 2011, preferred

by the Board of Governors, against the judgment and order dated 13th October, 2011, passed by the Delhi High Court in Letters Patent Appeal Nos. 820, 819 and 816 of 2011 respectively, along with the appeal arising out of SLP(C)No.3732 of 2012, preferred by the Medical Council of India against the judgment and order dated 14th November, 2011, passed by the Punjab and Haryana High Court in Civil Writ Petition No.16235 of 2011, are allowed. The impugned judgments and orders passed by the Delhi High Court, as also the Punjab and Haryana High Court, are set aside.

53. Consequently, Writ Petition (C) No.457 of 2011, filed by the School of Medical Sciences & Research, Sharda University; Writ Petition (C) No.458 of 2011, filed by Teerthanker Mahaveer Institute of Management & Technology Society, Moradabad; and Writ Petition (C) No.489 of 2011, filed by Dashmesh Educational Charitable Trust, are dismissed, as the reliefs prayed for therein are in direct conflict with the provisions of Section 10A of the 1956 Act and Regulation 8(3) of the 1999 Regulations.

54. Having regard to the facts involved, all the parties in each of the matters will bear their own costs.

R.P. Matters disposed of.

RESEARCH FOUNDATION FOR SCIENCE, TECHNOLOGY AND NATURAL RESOURCE POLICY
v.
UNION OF INDIA & ORS.
(Writ Petition (C) No. 657 of 1995)

6 JULY, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

Environmental law: Hazardous waste - Import of toxic waste - Ban on such imports - Writ petition challenging the decision of the Ministry of Environment and Forests permitting import of toxic wastes in India under the cover of recycling; seeking direction to the Union of India to ban all imports of all hazardous/toxic wastes; seeking amendment of the Hazardous Wastes (Management & Handling) Rules, 1989 (H.W.M.H. Rules) in conformity with the BASEL Convention and Articles 21, 47 and 48A of the Constitution; and for declaration that without adequate protection to the workers and public and without any provision of sound environment management of disposal of hazardous/toxic wastes, H.W.M.H. Rules are violative of Fundamental Rights and, therefore, unconstitutional - Writ petition disposed of by reasserting the interim directions given with regard to the handling of hazardous wastes and ship breaking in the various orders passed in the writ petition from time to time and, in particular, the orders dated 13th October, 1997 and 14th October, 2003 - Central Government also directed to ban import of all hazardous/toxic wastes identified and declared to be so under the BASEL Convention and its different protocols - Central Government also directed to bring the H.W.M.H. Rules, in line with the BASEL Convention and Articles 21, 47 and 48A of the Constitution - Prayer for declaration that without adequate protection to the workers and public, the said Rules are violative of the Fundamental Rights of the citizens, however,

rejected - Hazardous Wastes (Management & Handling) Rules, 1989 - Constitution of India, 1950 - Articles 21, 47 and 48A - BASEL Convention.

International treaties: BASEL Convention and MARPOL convention - Objectives of - Discussed.

In the instant writ petition, the basic grievance of the writ petitioner was with regard to the import of toxic wastes from industrialized countries to India, despite such wastes being hazardous to the environment and life of the people of this country. The writ petitioner sought to challenge the decision of the Ministry of Environment and Forests permitting import of toxic wastes in India under the cover of recycling, which, according to the petitioner, made India a dumping ground for toxic wastes. In the writ petition, the petitioner was seeking direction to the Union of India to ban all imports of hazardous/toxic wastes; amendment of Hazardous Wastes (Management & Handling) Rules, 1989 (H.W.M.H. Rules) in conformity with the BASEL Convention and Article 21, 47 and 48A of the Constitution; and declaration that without adequate protection to the workers and public and without any provision of sound environment management of disposal of hazardous/toxic wastes, the H.W.M.H. Rules are violative of Fundamental Rights and, therefore, unconstitutional. It was the grievance of the writ petitioner that since India became a signatory to the BASEL Convention on 22nd September, 1992, it should have amended the definition of "hazardous wastes", as provided in Article 3 read with Articles 4.1 and 13 of the said Convention.

The Supreme Court by its interim order dated 13th October, 1997, appointed a High-Powered Committee comprising of experts from different fields. The said Committee submitted its report after making a thorough examination of all matters relating to hazardous wastes.

On 14th October, 2003, the writ petition was taken up to consider the report of the High Powered Committee on the Terms of Reference which had been made to it. Although, initially, the deliberations with regard to the contents of the writ petition were confined to different toxic materials imported into India, at different stages of the proceedings, a good deal of emphasis was laid on the issue relating to imported waste oil lying in the ports and docks, as well as on ship breaking. The Supreme Court observed that the ship breaking operations could not be allowed to continue, without strictly adhering to all precautionary principles, CPCB guidelines and upon taking the requisite safeguards, which have been dealt with extensively in the report of the High Powered Committee, which also included the working conditions of the workmen.

Regarding the presence of hazardous waste oil in 133 containers lying at Nhava Sheva Port as noticed by the High Powered Committee, the Supreme Court directed by way of interim order to dispose of the waste oil under the supervision of Monitoring Committee by incineration.

Disposing of the writ petition, the Court

HELD: 1. India is a signatory, both to the BASEL Convention as also the MARPOL Convention, and is, therefore, under an obligation to ensure that the same are duly implemented in relation to import of hazardous wastes into the country. The BASEL Convention prohibited the import of certain hazardous substances on which there was a total ban. However, some of the other pollutants, which have been identified, are yet to be notified and, on the other hand, in order to prevent pollution of the seas, under the MARPOL Convention, the signatory countries are under an obligation to accept the discharge of oil wastes from ships. It is, therefore, important for the concerned authorities to ensure that

such waste oil is not allowed to contaminate the surrounding areas and also, if suitable, for the purposes of recycling, to allow recycling of the same under strict supervision with entrusted units and, thereafter, to oversee its distribution for reuse. [Para 30] [513-A-D]

2. As far as the first two prayers in the writ petition were concerned, the same had already been taken care of by the orders dated 13th October, 1997 and 14th October, 2003. By the first of the two orders, this Court appointed the High-Powered Committee with Prof. M.G.K. Menon as its Chairman and 14 issues were referred to the said Committee. After the said Committee submitted its Report, another Committee under the Chairmanship of Mr. A.C. Wadhawan was appointed to enquire into the disappearance of hazardous wastes from various ports and container depots, and the question relating to the working conditions of the workmen who handle such wastes. After the Wadhawan Committee submitted its Report, various directions were given with regard to the handling of such hazardous wastes. Furthermore, the contamination risks involved in ship breaking also came into focus in the light of the provisions of the Hazardous Wastes Rules, 1989, and directions were given as to how ships, which were carrying wastes, were to be dealt with before entering into Indian waters, which included the prohibition on the exporting country to export such oil or substance without the concurrence and clearance from the importing country. Since the question of ship breaking and distribution of hazardous wastes were being considered separately in the contempt proceedings, the directions contained in the BASEL Convention have to be strictly followed by all the concerned players, before a vessel is allowed to enter Indian territorial waters and beach at any of the beaching facilities in any part of the Indian coast-line. In case of breach of the conditions, the authorities shall impose the

penalties contemplated under the municipal laws of India. [Para 31] [513-E-H; 514-A-D]

3. The directions contained in the second order is based on the polluter pays principle, which is duly recognized as one of the accepted principles for dealing with violation of the BASEL Convention and the H.W.M.H. Rules, 1989, and the same is applicable whenever such violations occur. However, till such time as a particular product is identified as being hazardous, no ban can be imposed on its import on the ground that it was hazardous. Such import will, however, be subject to all other statutory conditions and restrictions, as may be prevailing on the date of import. Accordingly, the general prayer made in the writ petition that the Government of India should put a total ban on all hazardous wastes, can be applied in respect of such hazardous wastes as have been identified by the BASEL Convention and its Protocols over the years and/or where import into the country have been restricted by the municipal laws of India. In respect of such banned items, directions were already given in the order dated 13th October, 1997, to issue a notification to ban the import of such identified hazardous substances. In the event, any other items have since been identified, the Central Government is directed to issue appropriate notifications for banning the import of such hazardous substances as well. [Para 32] [514-E-H; 515-A-B]

4. The third prayer, that in the event of non-compliance, the provisions of the Hazardous Wastes (Management & Handling) Rules, 1989, should be declared as unconstitutional, cannot be granted, since the same are in aid and not in derogation of the provisions of Articles 21, 39(e), 47 and 48A of the Constitution. In fact, even at the interim stage, directions were given for compliance with the said Rules, particularly in the matter

of destruction of the waste oil contained in 170 containers by incineration at the cost of the importer. [Para 33] [515-B-D]

5. The writ petition was entertained and also treated by all concerned not as any kind of adversarial litigation, but litigation to protect the environment from contamination on account of attempts made to dump hazardous wastes in the country, which would ultimately result in the destruction, not only of the environment, but also the ecology as well and, in particular, the fragile marine bio-diversity along the Indian Coast-line. The petitioner Foundation played a very significant role in bringing into focus some very serious questions involving the introduction of hazardous substances into the country, which needed the Courts' attention to be drawn having regard to the BASEL Convention, aimed at protecting marine biology and countries having coast-lines alongside seas and oceans. The writ petition is, therefore, disposed of by reasserting the interim directions given with regard to the handling of hazardous wastes and ship breaking in the various orders passed in the writ petition from time to time and, in particular, the orders dated 13th October, 1997 and 14th October, 2003. The Central Government is also directed to ban import of all hazardous/toxic wastes which had been identified and declared to be so under the BASEL Convention and its different protocols. The Central Government is also directed to bring the Hazardous Wastes (Management & Handling) Rules, 1989, in line with the BASEL Convention and Articles 21, 47 and 48A of the Constitution. The further declaration sought for that without adequate protection to the workers and public, the aforesaid Rules are violative of the Fundamental Rights of the citizens is however rejected. [Paras 34, 35] [515-D-H; 516-A-B]

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 657 of 1995 etc.

Under Article 32 of the Constitution of India.

WITH

Conmt. Pet. (C) No. 155 of 2005, SLP No. 16175 of 1997, C.A. Nos. 7660 of 1997 & 8300-8301 of 2004.

P.P. Malhotra, Mohan Parasaran, ASG, Ashok Bhan, V. Shekhar, A.K. Panda, Colin Gonsalves, Dr. Manish Singhvi, AAG, A. Mariarputham, AG, Sanjay Parikh, Mamta Saxena, A.N. Singh, Pranav Raina, Shanmugo Patro, B. Vijayalakshmi Menon, P. Parmeswaran, E.C. Agrawala, Sadhana Sandhu, Ashwani Garg, Savitri Pandey, Krishna Kumar, Mukesh Verma, B. Krishna Prasad, Anil Kumar Jha, Manik Karanjawala, K.B. Rohtagi, Hemantika Wahi, Jesal, Satyabrat Panda, Ashok Mathur, Shakil Ahmed Syed, Pradeep Misra, Gopal Singh, Manish Kumar, Rituraj Biswas, Khwairakpam Nobin Singh, Sapan Biswajit Meitei, Anil Shrivastav, Amit Kumar, Rakesh K. Sharma, Radha Shyam Jena, Urmila Sirur, Sushma Suri, Anil Katiyar, Manoj K. Mishra, Rajeev K. Dubey, Kamlendra Mishra, Sinha & Das, Sanjay R. Hegde, Vartika Sahay, Deepika G., Corporate Law Group, Aruneshwar Gupta, Janaranjan Das, Ejaj Maqbool, Bina Gupta, S. Janani, Ajay Sharma, Dilip Kumar Sharma, Atiashi Dipankar, Nikhil Nayyar, P.S. Sudheer, D.N. Goburdhan, Shiv Kant Arora, A. Rastogi, Kartika Sharma, Mukesh Verma, Yash Pal Dhingra, J.S. Wad & Co. Gaurav Agrawal, Binu Tamta, Ashwani Bhardwaj, R. Satish, Jay Savla, A. Raghunath, Ravindra Kumar, A. Deb Kumar, Diran Bhardwaj, D.S. Mahra, Pragyan P. Sharma, Rupesh Gupta, Mandakini Sharma, P.V. Yogeswaran, Gautam Dhamija, V.N. Raghupathy, Sumita Hazarika, D.N. Mishra, Vibha Datta Makhija, V.G. Pragasam, S.J. Aristotle, Praburamasubramanian, Tarjit Singh, Manjit Singh, K.K. Gupta, Pramod Dayal, Sushil Kumar Jain, B.V. Balaram Das, Vijay Panjwani, Edward Belho, Sentikumla Jamir, Asha G. Nair, Abhinav Ramkrishna, Milind Kumar, Bhavanishankar V. Gadnis, B. Sunita Rao, M.J. Paul, Sudarsh Menon, T.A. Khan, B.K.S Prasad, S. Mukherjee, Satyabrata Panda, Nandini Gore,

Hemantika Wahi, Aparna Bhat, Anuj Casfleino, Jyoti Mendiratta, R.K. Gupta, S.K. Gupta, M.K. Singh, Shekhar Kumar, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh, Aruna Mathur, Y. Khan for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. This writ petition has been filed by the Research Foundation for Science Technology and Natural Resource Policy, through its Director, Ms. Vandna Shiva, for the following reliefs :

"1. direct the Union of India banning all imports of all hazardous/toxic wastes;

2. direct amendment of rules in conformity with the BASEL Convention and Article 21, 47 and 48A of the Constitution as interpreted by this Court;

3. declare that without adequate protection to the workers and public and without any provision of sound environment management of disposal of hazardous/toxic wastes, the Hazardous Wastes (Management & Handling) Rules, 1989 are violative of Fundamental Rights and, therefore, unconstitutional;"

On 29th October, 1995, this Court directed notice to issue on the writ petition and also on the application for stay.

2. The basic grievance of the Writ Petitioner was with regard to the import of toxic wastes from industrialized countries to India, despite such wastes being hazardous to the environment and life of the people of this country. The Writ Petitioner sought to challenge the decision of the Ministry of Environment and Forests permitting import of toxic wastes in India under the cover of recycling, which, according to the Petitioner, made India a dumping ground for toxic wastes. It was alleged that these decisions were contrary to the

provisions of Articles 14 and 21 of the Constitution and also Article 47, which enjoins a duty on the State to raise the standards of living and to improve public health. In the writ petition it was also contended that Article 48A provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

3. In the writ petition, Ms. Vandna Shiva, the Director of the Petitioner Foundation, who is a well-known environmentalist and journalist, while highlighting some of the tragedies which had occurred on account of either dumping or release of hazardous and toxic wastes into the atmosphere, such as the tragedy which took place in the Union Carbide factory at Bhopal in 1984, referred to the BASEL Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal. It was submitted that an international awareness had been created under the BASEL Convention against the movement of hazardous wastes and their disposal in respect whereof the United Nations Environment Programme (UNEP) had convened a Conference on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes pursuant to the decision adopted by the Governing Council of UNEP on 17th June, 1987. The said Conference met at the European World Trade and Convention Centre, Basel, from 20th to 22nd March, 1989. India also participated in the Conference. On the basis of the deliberations of the Committee, the BASEL Convention on the Control of Transboundary Movements on Hazardous Wastes and their Disposal was adopted on 22nd March, 1989. It was the grievance of the Writ Petitioner that since India became a signatory to the BASEL Convention on 22nd September, 1992, it should have amended the definition of "hazardous wastes", as provided in Article 3 read with Articles 4.1 and 13 of the said Convention. It was the further grievance of the Writ Petitioner that India should have enacted laws in regard to the Transboundary Movement procedures with regard to hazardous wastes. Some of the

relevant provisions of Article 4 of the aforesaid Convention have been quoted in the writ petition and are extracted hereinbelow :

> 1. (a) Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal shall inform the other parties of their decision pursuant to Article 13.
>
> (b) Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, when notified pursuant to sub-para (a) above.
>
> (c) Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes.
>
> 2. Each Party shall take the appropriate measures to :
>
> xxx xxx
>
> (c) Ensure that persons involved in the management of hazardous wastes or other wastes within it take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment;
>
> (d) Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement;

xxx xxx

(g) Prevent the import of hazardous wastes and other wastes if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner."

4. Even restrictions on transboundary movement between parties contained in Article 6 of the Convention, inter alia, provide that the State of export shall not allow the exporter to commence the transboundary movement until it has received written confirmation that the notifier has received from the State of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question.

5. On 25th March, 1994, 65 countries which participated in the Convention agreed by consensus to ban all exports of hazardous wastes from OECD to Non-OECD countries immediately. It is the grievance of the Writ Petitioner that inspite of such consensual decision to ban all exports of hazardous wastes from OECD to Non-OECD countries, consistent efforts were made by the industrialized countries to break down the Non-OECD solidarity and to weaken the resolutions adopted at the BASEL Convention, and, in the process, Asia was fast becoming a vast dumping ground for international waste traders.

6. In the Writ Petition various instances were provided of the type of toxic wastes imported into the country under the garb of recycling. The Writ Petitioner has also drawn the attention of the Court to the provisions of the Hazardous Wastes (Management & Handling) Rules, 1989, hereinafter referred as the H.W.M.H. Rules, 1989, and complained of the fact that the same had not been implemented both by the Central Government and the State Governments and Union Territories and their respective Pollution Control Boards.

7. Based on the said allegations, this Court initially asked

all the State Governments and Union Territories and their respective Pollution Control Boards to submit affidavits as to how far the provisions of the aforesaid Rules had been implemented. The Central Government was asked to file a comprehensive affidavit in respect thereof. From the affidavits filed, this Court appears to have come to the conclusion that the States and their respective authorities did not seem to appreciate the gravity of the matter and the need for taking prompt measures to prevent the adverse consequences of such neglect. In the said background, this Court by its order dated 13th October, 1997, appointed a High-Powered Committee, with Prof. M.G.K. Menon as its Chairman, and referred 14 issues to the Committee on which it was required to give its report and recommendations. Since the said 14 terms of reference are of great relevance in the matter of disposal of the writ petition, the same are reproduced hereinbelow :-

"(1) Whether and to what extent the hazardous wastes listed in the Basel Convention have been banned by the Government and to examine which other hazardous wastes, other than listed in the Basel Convention and the Hazardous Wastes (Management and Handling) Rules, 1989, require banning.

(2) To verify the present status of the units handling hazardous wastes imported for recycling or generating/ recycling indigenous hazardous wastes on the basis of information provided by the respective States/UTs and determine the status of implementation of the Hazardous Wastes (Management and Handling) Rules, 1989 by various States/UTs and in the light of directions issued by the Hon'ble Supreme Court.

(3) What safeguards have been put in place to ensure that banned toxic/hazardous wastes are not allowed to be imported?

(4) What are the changes required in the existing

laws to regulate the functioning of units handling hazardous wastes and for protecting the people (including workers in the factory) from environmental hazards?

(5) To assess the adequacy of the existing facilities for disposal of hazardous wastes in an environmentally sound manner and to make recommendations about the most suitable manner for disposal of hazardous wastes.

(6) What is further required to be done to effectively prohibit, monitor and regulate the functioning of units handling hazardous wastes keeping in view the existing body of laws?

(7) To make recommendations as to what should be the prerequisites for issuance of authorisation/permission under Rule 5 and Rule 11 of the Hazardous Wastes (Management and Handling) Rules, 1989.

(8) To identify the criteria for designation of areas for locating units handling hazardous wastes and waste disposal sites.

(9) To determine as to whether the authorisations/ permissions given by the State Boards for handling hazardous wastes are in accordance with Rule 5(4) and Rule 11 of the Hazardous Wastes Rules, 1989 and whether the decision of the State Pollution Control Boards is based on any prescribed procedure of checklist.

(10) To recommend a mechanism for publication of inventory at regular intervals giving areawise information about the level and nature of hazardous wastes.

(11) What should be the framework for reducing risks to environment and public health by stronger regulation and by promoting production methods and products which are ecologically friendly and thus reduce the production of toxics?

(12) To consider any other related area as the Committee may deem fit.

(13) To examine the quantum and nature of hazardous waste stock lying at the docks/ports/ICDs and recommend a mechanism for its safe disposal or re-export to the original exporters.

(14) Decontamination of ships before they are exported to India for breaking."

Each one of the said terms of reference are of special significance as far as the reliefs prayed for in the writ petition are concerned. The said High Powered Committee, comprised of experts from different fields, submitted its report after making a thorough examination of all matters relating to hazardous wastes.

8. On 14th October, 2003, the Writ Petition was taken up by this Court to consider the report of the High Powered Committee on the Terms of Reference which had been made to it. Although, initially, the deliberations with regard to the contents of the Writ Petition were confined to different toxic materials imported into India, at different stages of the proceedings, a good deal of emphasis came to be laid on the issue relating to imported waste oil lying in the ports and docks, as well as on ship breaking. This Court observed that the ship breaking operations could not be allowed to continue, without strictly adhering to all precautionary principles, CPCB guidelines and upon taking the requisite safeguards, which have been dealt with extensively in the report of the High Powered Committee, which also included the working conditions of the workmen.

9. One of the other issues which was required to be dealt with was the disappearance of hazardous waste from authorized ports/Indian Container Depots/Container Freight Stations and also as to how to deal with the containers lying

there. Since disappearance of hazardous waste was one of the Terms of Reference, by order dated 10th December, 1999, this Court directed that a list of importers who had made illegal imports be placed on record. Since the same was not done, this Court on 3rd December, 2001, directed the Government to inquire into the matter, which resulted in the appointment of an eight-member Committee by the Government, chaired by Mr. A.C. Wadhawan. The report dated 26th July, 2002, submitted by the said Committee suggested that action should be taken against the importer for illegal import under the Customs Act, 1962, and also under the Central Excise Act, 1944. This Court categorized the matter into two parts. The first part related to imports made and cleared, where the consignments had already found their way to the market. The second part related to the stocks of hazardous waste lying at various ports/ICDs/CFSs. The question which arose was as to how the said stock was to be cleared from where they were lying. This Court was of the view that the stock in question could be divided into two categories; one, relating to imports of goods which were banned under the H.W.M.H. Rules, 1989, as amended up to date or falling under the banned category as per the Basel Convention and the other relating to waste in respect whereof there was no ban and being regulated, it was permissible to recycle and reprocess the same within the permissible parameters by specified authorized persons having requisite facilities under the Rules, as amended up to date. The Court directed that the said consignments falling under the said category were to be released or disposed of or auctioned in terms of the Rules, to the registered recyclers and reprocessors. However, in case the importer of such goods remained untraceable, the authorities were directed to deal with the same at the risk, cost and consequences of the importer. It was specified that the consignment of such importer could not be allowed to remain at the ports etc. indefinitely, merely because the importer was not traceable.

10. For the purpose of dealing with such consignments

where the importer could not be traced, this Court was of the view that the same should be dealt with, disposed of/auctioned by a Monitoring Committee which was appointed by the Court by the said order itself. The Monitoring Committee was comprised of existing members of the Committee constituted by the Ministry of Environment and Forests, along with one Dr. Claude Alvares, NGO and Dr. D.B. Boralkar. The Committee was directed to oversee that the directions of this Court were implemented in a time-bound fashion.

11. One of the other issues which came up for consideration before this Court was the MARPOL Convention which made it compulsory for signatory nations to allow discharge of sludge oil for the purposes of recycling. In the wake of the other issues which were taken up by this Court while considering the report of the High Powered Committee and that of the Wadhawan Committee, the issue relating to the provisions of the MARPOL Convention was set apart for decision at a later stage.

12. The original MARPOL Convention was signed on 17th February, 1973, but did not come into force. Subsequently, in combination with the 1978 Protocol, the Convention was brought into force on 2nd October, 1983. As will be noticed from the acronym, the expression "MARPOL" is the short form of "Marine Pollution". The same was signed with the intention of minimizing pollution on the seas, which included dumping, oil and exhaust pollution. Its object was to preserve the marine environment through the complete elimination of pollution by oil and other harmful substances and the minimization of accidental discharge of such substances. As far as this aspect of the matter is concerned, the Central Government was directed to file an affidavit indicating in detail how the said oil was dealt with. The issue relating to the import of such sludge oil was left unresolved for decision at a subsequent stage.

13. However, during the course of hearing in regard to the import of waste oil purportedly in violation of the H.W.M.H.

Rules, 1989, the two dominating principles relating to pollution, namely, the polluter-pays principle and precautionary principle, were examined at length. The report of the Committee indicated that the hazardous waste oil was imported into the country in the garb of furnace oil and, in fact, the containers and the vessels in which they were being transported, were also highly polluted, causing a tremendous risk to the environment and to human existence. Ultimately, by the said order of 14th October, 2003, certain directions were given regarding the procedure to be adopted, with regard to ship breaking, to the Central Pollution Control Board, to prepare a national inventory for rehabilitation of hazardous waste dump sites. The State Pollution Control Boards were directed to ensure that all parties dealing in hazardous chemicals which generated hazardous wastes, displayed online data in that regard outside their respective factories, on the pattern of Andhra Pradesh. The Ministry of Environment and Forests were also directed to consider making provision for Bank Guarantees. Certain recommendations were also made with regard to legislation in order to destroy any trans-boundary movement of hazardous wastes or other wastes and to punish such illegal trafficking stringently.

14. The matter rested there and only interim directions were given from time to time till it surfaced again before the Court on 25th January, 2003. On this occasion, the focus of this Court was directed towards the presence of hazardous waste oil in 133 containers lying at Nhava Sheva Port, as noticed by the High Powered Committee. On the directions of the Court, the oil contained in the said 133 containers was sent for laboratory test to determine whether the same was hazardous waste oil or not. After such examination it was found to be hazardous waste. Considering the detailed report submitted by the Commissioner of Customs (Imports), Mumbai, and the Monitoring Committee, and after hearing learned counsel for the parties, this Court observed that the issue to be determined in the proceedings was limited to the

environment and in giving proper directions for dumping consignments in question, having regard to the precautionary principle and polluter-pays principle. The main question before the Court was whether only a direction was required to be issued for the destruction of the consignment in order to protect the environment and, if not, in what other manner could the consignments be dealt with. Having considered the provisions of the Basel Convention on the Control of Trans-Boundary Movement of Hazardous Wastes and their disposal, and the report of the Monitoring Committing recommending destruction of the consignments by incineration, but also keeping in mind the fact that import of waste oil was permitted for the purpose of recycling, this Court directed that where the consignment was found fit for recycling, the same should not be destroyed, but recycling should be permitted under the supervision of the Monitoring Committee. However, it was also recorded that if recycling was not considered advisable by the Government, the said consignment would also have to be destroyed by incineration along with other consignments. In such a case the cost of incineration was to be borne by the Government.

15. Taking further note of the precautionary principle forming part of the Vienna Declaration and also having regard to the polluter-pays principle, this Court directed that it would be feasible to dispose of the oil under the supervision of the Monitoring Committee by incineration which would have no impact on the environment. It was directed that the 133 containers in question be destroyed by incineration as per the recommendations of the Monitoring Committee and under its supervision, at the cost of the importer which was assessed by the Monitoring Committee at Rs.12/- per kilo, which would have to be paid by the importers in advance. In the order dated 9th May, 2005, this Court took up for consideration the Fifth Quarterly Report of March 2005, filed by the Monitoring Committee from which it was seen that the waste oil contained in the 133 containers had not been destroyed in terms of the direction given on 5th January, 2005, on account of non-

payment of the cost of incineration by the importers. None of the importers had made the payment for incineration, though, a direction had been given to deposit the cost of incineration within four weeks from the date of the order. However, while taking serious note of non-payment of the incineration cost, this Court also felt that the destruction of the waste oil could not be delayed any further and directed immediate destruction of the waste oil in terms of order dated 5th May, 2005, by the Monitoring Committee and for the said purpose the cost of incineration was to be initially borne by the Customs Department, to be recovered from the importers. Simultaneously, a further opportunity was given to the importers to deposit the cost of incineration with the Monitoring Committee within two weeks, failing which they were directed to remain present in the Court on 18th July, 2005, and to show-cause why proceedings for contempt should not be taken against them. The Monitoring Committee was directed to file a report in that regard on the next date.

16. One other aspect was also taken note of with regard to the directions given to the Jawaharlal Nehru Port Trust, Mumbai Port Trust and the Commissioner of Customs, to furnish requisite information with regard to the 170 containers, which were lying unclaimed, to the Monitoring Committee. Since the same had not been filed within four weeks, as directed, the Chairperson of the Jawaharlal Nehru Port Trust, the Mumbai Port Trust and the Chief Commissioner of Customs Department, were directed to file personal affidavits as to why the order of the Court had not been complied with. Subsequently, suo-motu contempt proceedings, being No.155 of 2005, in Writ Petition(C) No.657 of 1995, were initiated for non-compliance of the directions contained in the order of 9th May, 2005.

17. As far as the suo-motu contempt proceedings are concerned, the same are an off-shoot of the various orders passed in the writ proceedings and the same will have to be

considered separately from the reliefs prayed for in the writ petition itself.

18. At the very beginning of this judgment we have set out the reliefs prayed for in the writ petition, which, inter alia, include a prayer for a direction upon the Union of India to ban imports of all hazardous/toxic wastes and for a further direction to amend the rules in conformity with the BASEL Convention and Articles 21, 47 and 48A of the Constitution. Apart from the above, a declaration has also been sought that without adequate protection of the workers and the public and without any provision of sound environment management of disposal of hazardous/toxic wastes, the Hazardous Wastes (Management & Handling) Rules, 1989, are violative of the Fundamental Rights guaranteed under the Constitution and, therefore, unconstitutional.

19. Since the proceedings became a continuing mandamus, this Court from time to time took up several issues emanating from the first prayer in the writ petition to ban imports of all hazardous/toxic wastes. However, in the process, one of the Conventions, namely, the impact of the MARPOL Convention, though referred to, was not decided and left for decision at the final hearing.

Accordingly, that aspect of the matter has to be decided also in these proceedings.

20. In one of the earlier orders passed on 5th May, 1997, two Hon'ble Judges had occasion to deal with the enormous generation of hazardous wastes in the country each day and Their Lordships were of the opinion that the said fact alone indicated sufficiently the magnitude of the problem and the promptitude with which it was needed to be tackled before the damage became irreversible. Their Lordships observed that prompt action was required to be taken, not only by the Central Government, but also by the State Governments and the Central and the State Pollution Control Boards. Accordingly, notice was

given to all the State Governments and the State Control Boards to file their replies, and directions were also given that with effect from that date no authorization/ permission would be given by any authority for the import of wastes which had already been banned by the Central Government or by any order made by any Court or any other authority. In addition, it was also directed that with effect from the date of the order, no import would be made or permitted by any authority or any person of any hazardous waste, which was already banned under the Basel Convention or was to be banned subsequently, with effect from the date specified therein. Notice was also issued to the State Governments to show cause as to why an order should not be made directing closure of the units utilizing the hazardous wastes where provision had already been made for requisite safe disposal sites. In addition, the State Governments were also directed to show cause as to why immediate orders should not be made for the closure of all unauthorized hazardous waste handling units.

21. Thereafter, during the pendency of the matter, a fresh Special Leave Petition was filed, being SLP(C)No.16175 of 1997, by Dr. Surendra Dhelia against the Union of India and others regarding import of contaminated waste oil and their disposal, since despite directions given to the State Governments and the Union of India, no affidavits were forthcoming and, as a result, on 4th February, 2002, a direction was given to the Secretary in the Ministry of Environment and Forests to file affidavits in compliance with the orders passed on 14th September, 2001 and 3rd December, 2001. A sum of Rs.10,000/- was also imposed as costs against the Ministry of Environment and Forests.

22. The matter came up again before the Court on 24th September, 2003, in which the H.W.M.H. Rules, 1989, fell for consideration having regard to Section 11 of the Customs Act, 1962, which empowers the Central Government to prohibit either absolutely or subject to such conditions as may be

specified in the notification, the import and export of the goods, if satisfied that it is necessary so to do for any of the purposes stated in Sub-Section (2). Since on behalf of the Central Government it was submitted that the import of 29 items had already been prohibited under Schedule 8 of the Hazardous Waste Rules, the Court directed the Central Government to issue a notification without further delay under Section 11 of the Customs Act, 1962, prohibiting the import of the said 29 items. Their Lordships also noted that the BASEL Convention had banned 76 items. Their Lordships were of the view that the remaining items were also required to be examined and, if necessary, to issue additional notifications to comply with any ban that may have been imposed in respect of remaining items.

23. What is more important is the fact that the Hon'ble Judges took note of the provisions of the Hazardous Waste Rules which allowed import of certain items subject to fulfillment of certain conditions. This Court directed that before the imported consignment was cleared, the requisite notification was to be issued making the compliance of the said conditions mandatory. In particular, in paragraph 7 of Their Lordships' order, a direction was given to the Competent Authority to the effect that while disposing of hazardous waste, in exercise of power under Sections 61 and 62 of the Major Port Trusts Act, 1963, they were required to ensure that the H.W.M.H. Rules, as amended up to date, and in particular, Rules 19 and 20 thereof, were complied with.

24. The said direction becomes relevant in relation to the third prayer made in the writ petition, as referred to hereinabove, relating to the constitutionality of the H.W.M.H. Rules, 1989. One thing is clear that even at the interim stage, there was no challenge as such to the constitutionality of the aforesaid Rules and that, on the other hand, directions were given by the Court to ensure compliance thereof.

25. Then came the orders relating to the import of 133 containers of hazardous waste oil, in the garb of lubricating oil,

which led to the appointment of a Monitoring Committee to oversee the destruction by incineration of the waste oil, as well as the containers thereof. Detailed orders having been passed in relation to the destruction of the waste and hazardous oil imported into the country in the garb of lubricating oil, and the directions given to the Monitoring Committee regarding re-export of the same, we will consider the impact of the MARPOL Convention against such background.

26. The MARPOL Convention, normally referred to as "MARPOL 73/78", may be traced to its beginnings in 1954, when the first conference was held and an International Convention was adopted for the Prevention of Pollution of Sea by Oil (OILPOL). The same came into force on 26th July, 1958 and attempted to tackle the problem of pollution of the seas by oil, such as,

(a) crude oil;
(b) fuel oil;
(c) heavy diesel oil; and
(d) lubricating oil.

27. The first Convention was amended subsequently in 1962, 1969 and 1971, limiting the quantities of oil discharge into the sea by Oil Tankers and also the oily wastes from use in the machinery of the vessel. Prohibited zones were established extending the setting up of earmarked areas in which oil could be discharged, extending at least 50 miles from the nearest land. In 1971, reminders were issued to protect the Great Barrier Reef of Australia. 1973 saw the adoption of the International Convention for the Prevention of Pollution from Ships. The said Convention, commonly referred to as MARPOL, was adopted on 2nd November, 1973, at the International Marine Organization and covered pollution by :

(i) oil;
(ii) chemicals;
(iii) harmful substances in packaged form;

(iv) sewage; and
(v) garbage

Subsequently, the 1978 MARPOL Protocol was adopted at a Conference on Tanker Safety and Pollution Prevention in February, 1978.

28. The overall objective of the MARPOL Convention was to completely eliminate pollution of the marine environment by discharge of oil and other hazardous substances from ships and to minimize such discharges in connection with accidents involving ships. The MARPOL 73/78 Convention has six Annexures containing detailed regulations regarding permissible discharges, equipment on board ships, etc. They are as follows :

Annex I : Regulations for the Prevention of Pollution by Oil, 2 October, 1983.

Annex II : Regulations for the Control of Pollution by Noxious Liquid Substances (Chemicals) in Bulk, 6 April, 1987.

Annex III : Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form, 1 July 1992.

Annex IV : Regulations for the Prevention of Pollution by Sewage from ships, 27 September 2003.

Annex V : Regulations for the Prevention of Pollution by Garbage from Ships, 31 December 1988.

Annex VI : Regulations for the Prevention of Air Pollution from Ships and Nitrogen oxide. Will enter into force on 19 May 2005

29. Apart from the said Regulations, the MARPOL Convention also contains various Regulations with regard to

inspection of ships in order to ensure due compliance with the requirements of the Convention.

30. India is a signatory, both to the BASEL Convention as also the MARPOL Convention, and is, therefore, under an obligation to ensure that the same are duly implemented in relation to import of hazardous wastes into the country. As we have noticed earlier, the BASEL Convention prohibited the import of certain hazardous substances on which there was a total ban. However, some of the other pollutants, which have been identified, are yet to be notified and, on the other hand, in order to prevent pollution of the seas, under the MARPOL Convention the signatory countries are under an obligation to accept the discharge of oil wastes from ships. What is, therefore, important is for the concerned authorities to ensure that such waste oil is not allowed to contaminate the surrounding areas and also, if suitable, for the purposes of recycling, to allow recycling of the same under strict supervision with entrusted units and, thereafter, to oversee its distribution for reuse.

31. As far as the first two prayers in the writ petition are concerned, the same have already been taken care of by the orders dated 13th October, 1997 and 14th October, 2003. By the first of the two orders, this Court appointed the High-Powered Committee with Prof. M.G.K. Menon as its Chairman and 14 issues were referred to the said Committee. After the said Committee submitted its Report, another Committee under the Chairmanship of Mr. A.C. Wadhawan was appointed to enquire into the disappearance of hazardous wastes from various ports and container depots, and the question relating to the working conditions of the workmen who handle such wastes. After the Wadhawan Committee submitted its Report, various directions were given with regard to the handling of such hazardous wastes. Furthermore, the contamination risks involved in ship breaking also came into focus in the light of the provisions of the Hazardous Wastes Rules, 1989, and

directions were given as to how ships, which were carrying wastes, were to be dealt with before entering into Indian waters, which included the prohibition on the exporting country to export such oil or substance without the concurrence and clearance from the importing country. During the course of hearing, an issue was raised by Mr. Sanjay Parikh, learned counsel appearing for the petitioner, that some conditions may be laid down in relation to vessels containing hazardous wastes entering Indian waters without proper compliance with the provisions of the BASEL and the MARPOL Conventions. However, since the question of ship breaking and distribution of hazardous wastes are being considered separately in the contempt proceedings, in these proceedings we expect and reiterate that the directions contained in the BASEL Convention have to be strictly followed by all the concerned players, before a vessel is allowed to enter Indian territorial waters and beach at any of the beaching facilities in any part of the Indian coast-line. In case of breach of the conditions, the authorities shall impose the penalties contemplated under the municipal laws of India.

32. The directions contained in the second order is based on the polluter pays principle, which is duly recognized as one of the accepted principles for dealing with violation of the BASEL Convention and the H.W.M.H. Rules, 1989, and the same will be applicable whenever such violations occur. However, till such time as a particular product is identified as being hazardous, no ban can be imposed on its import on the ground that it was hazardous. Such import will, however, be subject to all other statutory conditions and restrictions, as may be prevailing on the date of import. Accordingly, the general prayer made in the writ petition that the Government of India should put a total ban on all hazardous wastes, can be applied in respect of such hazardous wastes as have been identified by the BASEL Convention and its Protocols over the years and/ or where import into the country have been restricted by the municipal laws of India. In respect of such banned items,

directions have already been given in the order dated 13th October, 1997, to issue a notification to ban the import of such identified hazardous substances. In the event, any other items have since been identified, the Central Government is directed to issue appropriate notifications for banning the import of such hazardous substances as well.

33. The third prayer, that in the event of non-compliance, the provisions of the Hazardous Wastes (Management & Handling) Rules, 1989, should be declared as unconstitutional, cannot be granted, since the same are in aid and not in derogation of the provisions of Articles 21, 39(e), 47 and 48A of the Constitution. In fact, as mentioned hereinabove, even at the interim stage, directions were given for compliance with the said Rules, particularly in the matter of destruction of the waste oil contained in 170 containers by incineration at the cost of the importer.

34. The writ petition has been entertained and has also been treated by all concerned not as any kind of adversarial litigation, but litigation to protect the environment from contamination on account of attempts made to dump hazardous wastes in the country, which would ultimately result in the destruction, not only of the environment, but also the ecology as well and, in particular, the fragile marine bio-diversity along the Indian Coast-line. The petitioner Foundation has played a very significant role in bringing into focus some very serious questions involving the introduction of hazardous substances into the country, which needed the Courts' attention to be drawn having regard to the BASEL Convention, aimed and protecting marine biology and countries having coast-lines alongside seas and oceans.

35. The writ petition is, therefore, disposed of by reasserting the interim directions given with regard to the handling of hazardous wastes and ship breaking in the various orders passed in the writ petition from time to time and, in particular, the orders dated 13th October, 1997 and 14th

October, 2003. The Central Government is also directed to ban import of all hazardous/toxic wastes which had been identified and declared to be so under the BASEL Convention and its different protocols. The Central Government is also directed to bring the Hazardous Wastes (Management & Handling) Rules, 1989, in line with the BASEL Convention and Articles 21, 47 and 48A of the Constitution. The further declaration sought for that without adequate protection to the workers and public, the aforesaid Rules are violative of the Fundamental Rights of the citizens and are, therefore, unconstitutional, is, however, rejected in view of what has been discussed hereinabove.

36. In the peculiar facts of the case, there will be no order as to costs.

D.G. Writ Petition disposed of.

BABLE @ GURDEEP SINGH
v.
STATE OF CHATTISGARH TR.P.S.O.P. KURSIPUR
(Criminal Appeal No. 106 of 2010)

JULY 10, 2012

[SWATANTER KUMAR AND RANJAN GOGOI, JJ.]

Penal Code, 1860 - s.302 r/w s.34 - Murder - Conviction of appellant and two others u/s.302 r/w s.34 by trial court - High Court while upholding the conviction of appellant acquitted the other two accused - Plea of appellant that the informant PW1 had turned hostile and the FIR not being a substantive piece of evidence, discredited the entire prosecution case; that the dying declaration made by the deceased was not reliable and that the injuries found on the person of appellant were not explained by the prosecution - Held: Merely because PW1 had turned hostile, it cannot be said that the FIR lost all its relevancy - PW11 and PW14 substantially supported the FIR which further stood corroborated by the medical evidence and the statements of other witnesses - Dying declaration made to PW14 was reliable and cogent - Appellant cannot derive any benefit from acquittal of the other two accused as the State did not prefer any appeal against the decision of High Court - Moreover, besides the dying declaration, there also existed other circumstances which supported the view in favour of guilt of the appellant - Prosecution did not render any explanation as to how the appellant suffered injuries but the onus was still on the appellant to prove that his explanation (that he suffered injuries due to armed assault by the deceased) was correct - There was apparent contradiction of serious nature as to the weapon used in committing the said assault against the appellant - One fact that completely stood established was that appellant was present at the place of occurrence and also that he had a fight with the deceased - These two circumstances provided full corroboration to the dying declaration, the statements of PW11 and PW14 as also the other material evidence led by the prosecution - Conviction of appellant accordingly upheld.

Code of Criminal Procedure, 1973 - s.313 - Object of - Held - The legislative scheme contained under the provisions of s.313, Cr.P.C. is to put to the accused all the incriminating material against him and it is equally important to provide an opportunity to the accused to state his case - It is the option of the accused whether to remain silent or to provide answer to the questions asked by the Court - Once the accused opts to give answers and, in fact, puts forward his own defence or the events as they occurred, then the accused is bound by such statement and the Court is at liberty to examine it in light of the evidence produced on record.

The trial court convicted the appellant (A-1) and two other accused (A-2 and 3) under Section 302 r/w Section 34 IPC for causing the death of one person in furtherance of their common intention and sentenced them to life imprisonment. On appeal by the accused persons, the High Court held that the oral dying declaration made by the deceased was not corroborated by the FIR as the names of A-2 and A-3 were not mentioned in the latter and that there was no legal and clinching evidence to implicate these two accused persons and acquitted both of them. In regard to the appellant, the High Court sustained the conviction and sentence passed by the trial court.

In the instant appeal, the appellant challenged his conviction contending that the injuries found on his person were not explained by the prosecution; that the informant PW1 had turned hostile and the FIR not being a substantive piece of evidence, discredited the entire

case of the prosecution; and that the dying declaration was not corroborated by other prosecution witnesses and as such the courts below could not have relied thereupon.

Dismissing the appeal, the Court

HELD: 1. Once registration of the FIR is proved by the Police and the same is accepted on record by the Court and the prosecution establishes its case beyond reasonable doubt by other admissible, cogent and relevant evidence, it will be impermissible for the Court to ignore the evidentiary value of the FIR. The FIR, Ext. P1, was duly proved by the statement of PW10, Sub-Inspector. According to him, he had registered the FIR upon the statement of PW1 and it was duly signed by him. The FIR was registered and duly formed part of the records of the police station which are maintained in normal course of its business and investigation. In any case, it is a settled proposition of law that the FIR by itself is not a substantive piece of evidence but it certainly is a relevant circumstance of the evidence produced by the Investigating Agency. Merely because PW1 had turned hostile, it cannot be said that the FIR would lose all its relevancy and cannot be looked into for any purpose. In this case, PW11 and PW14 were the two persons who had reached the place of incident immediately after the occurrence. They were instantaneously told by the deceased as to who the assailants were. They substantially supported what had been recorded in the FIR which further stood corroborated by the medical evidence and the statements of other witnesses. In these circumstances, the statements of PW11 and PW14 cannot be discredited merely because PW1 has turned hostile. Besides this, in furtherance to the statements of the accused persons, recovery of the weapons used in the crime was effected. [Para 10] [529-E-H; 530-A-C]

2. The dying declaration made by the deceased to PW14 cannot be lost sight of by the Court. To the rule of inadmissibility of hearsay evidence, oral dying declaration is an exception. The dying declaration in this case is reliable, cogent and explained the events that had happened in their normal course which was not only a mere possibility but would leave no doubt that such events actually happened as established by the prosecution. Once there exists reliable, cogent and credible evidence against one of the accused, the mere acquittal of other accused will not frustrate the case of the prosecution. Where the High Court, exercising its judicial discretion ultra-cautiously, acquitted the unnamed accused in the FIR, there the High Court for valid reasons held the appellant guilty of the offence. The High Court had recorded reasons in support of both these conclusions. Thus, the appellant cannot derive any benefit from the acquittal of the two other accused persons as the State has not preferred any appeal against the decision of the High Court. Moreover, the case of the prosecution is not merely based on the dying declaration made by the deceased to PW14 but there also existed other circumstances which supported the view in favour of guilt of the appellant, i.e., the disclosure made by the appellant and the consequent recovery of the weapons used in the crime, the statement of Investigating Officer, PW13, the statement of the doctor, PW5, and, in fact, the own version of the accused in relation to the incident. [Paras 11, 12] [530-C-H; 531-A]

Krishan Lal v. State of Haryana **(1980) 3 SCC 159 - relied on.**

3.1. The accused-appellant was examined by DW1 (doctor), who noticed six injuries on person of the accused and found that injury Nos.1 to 3 had been caused by some hard and sharp-edged weapon and

injury Nos.4 to 6 were caused by some hard and blunt weapon and all the injuries were caused within 24 hours. Further, injury Nos.2 to 6 were simple in nature and for injury No.1, X-ray of the skull, was advised but that also was not found to be grievous. In view of the nature of injuries suffered, the story advanced by the accused (that while he was going in a drunkard condition, deceased and another person launched an armed assault caused injuries to his hands and head) can hardly be believed. Where the deceased suffered fatal injuries, the accused despite having been assaulted by two people with lathi and weapon just suffered simple injuries. Thus, the possibility of the injuries being self-inflicted or having been suffered in some other way cannot be ruled out. [Para 13] [531-D-G]

3.2. The legislative scheme contained under the provisions of Section 313, Cr.P.C. is to put to the accused all the incriminating material against him and it is equally important to provide an opportunity to the accused to state his case. It is the option of the accused whether to remain silent or to provide answer to the questions asked by the Court. Once the accused opts to give answers and, in fact, puts forward his own defence or the events as they occurred, then the accused is bound by such statement and the Court is at liberty to examine it in light of the evidence produced on record. [Para 14] [531-G-H; 532-A-B]

3.3. In the instant case, the accused had opted to give an explanation. It was for the accused to satisfy the Court that his explanation was true and correct. Both the courts below concurrently rejected the explanation offered by the accused. On the contrary, they have found the said explanation to be factually incorrect. It was for the prosecution to explain the injuries on the person of the appellant as to when, how and by whom they were inflicted as also the fact whether they were inflicted during the occurrence in question or elsewhere. Of course, the prosecution did not render any explanation as to how the appellant had suffered these injuries but that by itself was not sufficient to believe that the appellant was innocent and the explanation rendered by him is established ipso facto. The onus is still on the appellant-accused to prove that his explanation is correct and in accordance with law. In the present case, the accused has stated that the deceased was carrying a sword and when he enquired from him as to why the other persons were quarrelling with and beating him, the deceased had assaulted him with the sword. Firstly, if a person is assaulted with a sword, there is hardly any likelihood of him to suffer injuries of the kind that the appellant had suffered; secondly, in the FIR, Ext.D-2, which he had got registered, it was specifically stated that the injuries were caused by lathi by the deceased. Thus, there was apparent contradiction of serious nature (as to the weapon used in committing the said assault against the appellant). Thirdly, the doctor (DW1) who had examined him, in his report had nowhere noticed as to how the accused had suffered those injuries. Even in his explanation under Section 313 Cr.P.C., the appellant did not state that he had consumed liquor whereas, according to the doctor, the appellant was smelling of liquor though he was not intoxicated. Lastly, the explanation offered by the appellant seemed to be very unnatural and opposed to normal behavior of a human being. The appellant claimed to be a friend of the deceased and that he had asked the deceased as to why others were quarrelling with him and had intended to help the deceased. If that be so, no person, in his senses, is likely to cause injuries to a well wisher, that too, with a sword. All these circumstances showed that the explanation offered by the accused was neither plausible nor true. [Para 15] [532-B-H; 533-A-C]

3.4. However, because of lodging of FIR, Ext D2, and his statement under Section 313 of the Cr.P.C., one fact that completely stood established and is undisputable is that the appellant was present at the place of occurrence and also that he had a fight with the deceased. Once these two circumstances are admitted, they fully provide corroboration to the dying declaration, the statements of PW11 and PW14 as also the other material evidence led by the prosecution. If the appellant was carrying a sword and others were carrying lathis, it is not understable as to how could the deceased suffer as many as 15 injuries including the incised wound, abrasions, amputation of middle finger from terminal phalages and other serious injuries and the appellant merely suffered six simple injuries. This itself belies the stand taken by the appellant. In any case, the deceased could not have caused injuries to any other person as in consequence of the assault upon himself, he would have had no strength left to cause any injury to others. Strangely, the accused denied all other questions as 'maloom nahin' (don't know) or 'incorrect' and gave explanation which was not worthy of any credence. [Para 16] [533-C-G]

Case Law Reference:

(1980) 3 SCC 159	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 106 of 2001

From the Judgment & Order dated 15.11.2006 of the High Court of Judicature Chhattisgarh at Bilaspur in Criminal Appeal No. 235 of 2001.

R.D. Upadhyay for the Appellant.

Atul Jha, Sandeep Jha, Dharmendra Kumar Sinha for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the High Court of Judicature at Chattisgarh at Bilaspur dated 15th November, 2006 wherein the High Court maintained the judgment of conviction and order of sentence passed by the learned Fourth Additional Sessions Judge, Durg, Chattisgarh, convicting the appellants for an offence under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC') and awarding life sentence to them. Though there were three accused before the trial court, the present appeal has been preferred only by appellant/ accused No.1, Bable @ Gurdeep Singh. While impugning the judgment under appeal, the learned counsel appearing for the appellant has, inter alia, but primarily raised the following arguments:

1. The injuries found on the person of the accused have not been explained by the prosecution. The deceased having suffered serious injuries that are stated to have been inflicted by the accused, could not have been in a condition to inflict any injuries upon the person of the accused. This leads to the conclusion that the accused had been assaulted by the deceased before the deceased himself suffered the injury. The injuries were admittedly found on the person of the accused. The prosecution has failed to explain such injuries. This failure on the part of the prosecution renders the story of the prosecution not only improbable but unbelievable as well.

2. Assuming, though not admitting, that the incident has been proved, the accused was entitled to the right to private defence as he was attacked and he caused the injuries in the process of protecting himself. Thus, the contention is that the accused/ appellant cannot be convicted under Section 302 IPC and his conviction under Section 302/34 IPC

A cannot stand the scrutiny of law.

3. Further the appellant states that the informant Tariq Shakil, PW1, had turned hostile. The FIR not being a substantive piece of evidence, would discredit the entire case of the prosecution. The Courts, in the B judgments under appeal, have failed to appreciate the evidence in its proper perspective and hence the judgments are liable to be set aside.

4. Lastly, the dying declaration is not corroborated by other prosecution witnesses and no details have C been furnished therein. As such the Courts could not have relied upon the said dying declaration.

2. Before we proceed to deliberate upon the legal and factual aspects of the case with reference to the arguments D advanced, it would be necessary to refer to the case of the prosecution in brief.

3. On 14th May, 1999 at about 10.15 p.m., when Tariq Shakil, PW1, was sitting in his S.T.D.-P.C.O. shop situated at New Kursipur, Gurunanak Chowk, one Guddu @ Jiten Soni, E PW12, came there and informed PW1 that the accused Sardar Bable is quarrelling with Ishwari Verma in front of his shop. Upon hearing this, PW1 closed his shop and went along with PW12 to the place of occurrence. The accused Bable was carrying a sword in his hand and was running towards them. Being F frightened, both of them went towards a street. After sometime, there was a noise that the accused Bable had caused injuries to Ishwari Verma and the said victim was lying in injured condition. He was removed to BSP Hospital, Sector 9, by his uncle Balwant Verma, PW14, where he was admitted. Dr. A.D. G Banerjee, PW2, had examined him and declared him brought dead. A written report in this regard was prepared being Ex.P5. The matter was reported to Bhilai City Police Station. Even a telephonic message was sent. Sub-Inspector, Suresh Bhagat, PW10, posted at that Police Station registered the case under H

A Section 174 Cr.P.C., Ex.P-22. On the same day at about 12.15 a.m. in the night, PW1 got the First Information Report (FIR), Ext.P-1, of the incident registered at Police Station Kursipur and a case under Section 302 IPC was registered. The Investigating Officer, Sub-Inspector P.N. Singh, PW13 took up the B investigation and went to the site. He prepared the site plan, Ex.P14, seized blood-stained earth, plain earth and a piece of chain of the watch and for that he prepared a seizure memo Ex.P-20. He also prepared the inquest report vide Ex.P4, in presence of the Panchas. The post mortem examination of the C body of the deceased was performed by Dr. S.R. Surendra, PW5 at 11.30 a.m. on 15th May, 1999. The post mortem report was submitted vide Ext.P-8 which noticed the following injuries on the body of the deceased: -

D "1. Incised wound 5 c.m. x ½ c.m. upto bone deep red colour longitudinal on anterior its and middle of scalp.

2. Incised wound 8 c.m. x 1 c.m. up to bone deep red colour. Margin everted oblique anterior and right E side of scalp.

3. Incised wound 3 c.m. x ¼ c.m. ¼ c.m. above left ear.

4. An abrasion 9 c.m. x ½ c.m. long below left ear.

F 5. An abrasion 6 c.m. x ½ c.m. neck colored below the first wound.

6. Incised wound 5 c.m. x ½ c.m. x ½ c.m. on left shoulder laterally.

G 7. Incised wound 1 c.m. x ½ c.m. x ½ c.m. on left shoulder anteriority.

8. Amputation middle finger from terminal phalages.

H

9. Ring finger also cut from terminal phalages from palmer aspect only.

10. Incised wound 8 c.m. x ½ c.m. x ½ c.m. red coloured on upper part and lateral surface of right arm.

11. Abrasion 2 c.m. x 2 c.m. red coloured on lower part and lateral surface of right upper arm.

12. Incised wound 7 c.m. x ½ c.m. x ½ c.m. lateral surface of elbow.

13. Incised wound 15 c.m. x 4 c.m. x 3 c.m. deed exposed tendon and blood vessel visible through wound. On lower part and medial surface of right fore arm.

14. Incised wound of 4 c.m. x 4 c.m. between right hand thumb and index finger. Bone of index finger visible through the wounds.

15. Perforated wound directed from behind, anteno laterally, 4 c.m. above the left knee joint. Wound entry cut of post medially size 4 c.m. x 3 c.m. oblique. On dissection popliteal artery is found cut."

4. The cause of death has been recorded as unconsciousness, which occurred prior to death and had arisen due to the injuries caused by some pointed sharp edged weapon.

5. The accused were arrested on the basis of their disclosure statements Exts.P-15, P-16 and P-26. Weapons used in the crime were seized and seizure memo was prepared vide Exts.P-17, P-18 and P-27. Blood stained clothes were recovered from the accused Bable and seizure memo Ext.P-19 was prepared. Sealed clothes of the deceased received from the Hospital were seized and seizure memo was

prepared vide Ext.P.29. The seized articles were sent for chemical examination.

6. It is further the case of the prosecution that the people around the place of the incident had seen the occurrence. Immediately thereafter, sister-in-law of the deceased, Janki, PW11 and uncle Balwant PW14 had reached the place of the incident. Balwant, PW14, had enquired from the deceased as to who were the assailants. After he gave the names, the accused persons were arrested and they made disclosure statements, as stated above.

7. It is noteworthy that the appellant Bable @ Gurdeep Singh had stated that on the date of incident, he was returning after collecting money for the milk supplied to the Thelawala at about 1-1.30 a.m. in the night. He saw Ishwari, Dalip, Dimple and Bage quarrelling at Gurunanak Chowk. He enquired from Ishwari (the deceased), who was his friend, as to what had happened. Ishwari, without any provocation, abused him and inflicted injury on his head with the sword that he was carrying. Thereupon, the accused ran away. Dalip and Prakash saw him running away. After some time of leaving the place, he lodged a police report of this incident giving details of the injuries that he had suffered and, in fact, he was medically treated and five stitches were put on his head. According to him, he had been falsely implicated in the present case.

8. The accused persons faced the trial and the learned Trial Court, vide its detailed judgment dated 27th February, 2001 held all the accused persons guilty of an offence under Section 302 read with Section 34 IPC for causing death of the deceased in furtherance of their common intention and sentenced them to undergo life imprisonment. Upon appeal by the accused persons, the High Court came to the conclusion that the oral dying declaration was not corroborated by the FIR as the names of two accused, namely, Pappi alias Arjun Singh and Vikky alias Vikram were not mentioned in the latter and

held that there was no legal and clinching evidence to implicate these two accused persons and hence the Court acquitted both of them. In relation to Bable alias Gurdeep Singh, the High Court sustained the findings, judgment of conviction and order of sentence passed by the Trial Court. Legality and correctness of this judgment of the High Court dated 15th November, 2006 has been assailed in the present appeal.

9. Reverting to the submissions made on behalf of the appellant, we may refer to the fact that the FIR had been lodged upon the statement of PW1. PW1 did not completely support the case of the prosecution and with the permission of the Court he was declared hostile. The contention is that the case of the present appellant would also stand equated to the case of the two acquitted accused persons and the High Court has fallen in error of law in not acquitting the accused-appellant as well. It cannot be denied that the FIR Ext.P-1 was registered upon the statement of PW1 and he himself has not supported the case of the prosecution, which creates a doubt in the case of the prosecution.

10. Once registration of the FIR is proved by the Police and the same is accepted on record by the Court and the prosecution establishes its case beyond reasonable doubt by other admissible, cogent and relevant evidence, it will be impermissible for the Court to ignore the evidentiary value of the FIR. The FIR, Ext. P1, has duly been proved by the statement of PW10, Sub-Inspector Suresh Bhagat. According to him, he had registered the FIR upon the statement of PW1 and it was duly signed by him. The FIR was registered and duly formed part of the records of the police station which were maintained in normal course of its business and investigation. Thus, in any case, it is a settled proposition of law that the FIR by itself is not a substantive piece of evidence but it certainly is a relevant circumstance of the evidence produced by the Investigating Agency. Merely because PW1 had turned hostile, it cannot be said that the FIR would lose all its relevancy and

cannot be looked into for any purpose. In the present case, PW11 and PW14 are the two persons who had reached the place of incident immediately after the occurrence. They were instantaneously told by the deceased as to who the assailants were. They have substantially supported what had been recorded in the FIR which further stands corroborated by the medical evidence and the statements of other witnesses. In these circumstances, we cannot discredit the statements of PW11 and PW14 merely because PW1 has turned hostile. Besides this, in furtherance to the statements of the accused persons, recovery of the weapons used in the crime was effected.

11. The dying declaration made by the deceased to PW14 cannot be lost sight of by the Court. To the rule of inadmissibility of hearsay evidence, oral dying declaration is an exception. The dying declaration in this case is reliable, cogent and explains the events that had happned in their normal course which was not only a mere possibility but leaves no doubt that such events actually happened as established by the prosecution. Once there exists reliable, cogent and credible evidence against one of the accused, the mere acquittal of other accused will not frustrate the case of the prosecution. Where the High Court, exercising its judicial discretion ultra-cautiously, acquitted the unnamed accused in the FIR, there the High Court for valid reasons held the present appellant guilty of the offence. The High Court had recorded reasons in support of both these conclusions. [Ref. *Krishan Lal v. State of Haryana* [(1980) 3 SCC 159].

12. Thus, we find that the present appellant cannot derive any benefit from the acquittal of the two other accused persons, with which this Court is not concerned as the State has not preferred any appeal against the decision of the High Court. Moreover, the case of the prosecution is not merely based on the dying declaration made by the deceased to PW14 but there also exist other circumstances which support the view in favour

of guilt of the appellant, i.e., the disclosure made by the appellant and the consequent recovery of the weapons used in the crime, the statement of Investigating Officer, PW13, the statement of the doctor, PW5, and, in fact, the own version of the accused in relation to the incident.

13. In the present case, the accused had led defence before the Trial Court and examined as many as four witnesses in support thereof. DW4, Head Constable Manharan Yadav stated that he was posted as a Constable at PS Kursipur outpost on 14th May, 1999. At about 22:45 hrs., the appellant Bable @ Gurdeep Singh appeared and reported orally that while he was going in a drunkard condition behind the Gurdwara, Ishwari met him on the way who posed to be a dada. He along with Manpreet, who was armed with lathi, caused injuries to both of his hands, head and then he had come to lodge a report. In furtherance to this report, the accused was examined by DW1, Dr. Praveen Chandra Agarwal, who noticed six injuries on the person of the accused and found that injury Nos.1 to 3 had been caused by some hard and sharp-edged weapon and injury Nos.4 to 6 were caused by some hard and blunt weapon and all the injuries were caused within 24 hours. The appellant is also stated to have been smelling of liquor at that time but was not intoxicated. Further, injury Nos.2 to 6 were simple in nature and for injury No.1, X-ray of the skull, was advised but that also was not found to be grievous. In view of the nature of injuries suffered, the story advanced by the accused can hardly be believed. Where the deceased suffered fatal injuries, the accused despite having been assaulted by two people with lathi and weapon just suffered simple injuries. Thus, the possibility of the injuries being self-inflicted or having been suffered in some other way cannot be ruled out.

14. The legislative scheme contained under the provisions of Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) is to put to the accused all the incriminating material against him and it is equally important to provide an opportunity

to the accused to state his case. It is the option of the accused whether to remain silent or to provide answer to the questions asked by the Court. Once the accused opts to give answers and, in fact, puts forward his own defence or the events as they occurred, then the accused is bound by such statement and the Court is at liberty to examine it in light of the evidence produced on record.

15. In the present case, the accused had opted to give an explanation, as aforenoticed. It was for the accused to satisfy the Court that his explanation was true and correct. Both the Courts below have concurrently rejected the explanation offered by the accused. On the contrary, they have found the said explanation to be factually incorrect. It was for the prosecution to explain the injuries on the person of the appellant as to when, how and by whom they were inflicted as also the fact whether they were inflicted during the occurrence in question or elsewhere? Of course, the prosecution has not rendered any explanation as to how the appellant had suffered these injuries but that by itself is not sufficient to believe that the appellant is innocent and the explanation rendered by him is established ipso facto. The onus is still on the appellant-accused to prove that his explanation is correct and in accordance with law. In the present case, the accused has stated that the deceased was carrying a sword and when he enquired from him as to why the other persons were quarrelling with and beating him, the deceased had assaulted him with the sword. Firstly, if a person is assaulted with a sword, there is hardly any likelihood of him to suffer injuries of the kind that the appellant had suffered; secondly, in the FIR, Ext.D-2, which he had got registered, it is specifically stated that the injuries were caused by lathi by the deceased. Thus, there is apparent contradiction of serious nature (as to the weapon used in committing the said assault against the appellant). Thirdly, the doctor (DW1) who had examined him, in his report had nowhere noticed as to how the accused had suffered those injuries. Even in his explanation under Section 313 Cr.P.C., the appellant has not stated that

he had consumed liquor whereas, according to the doctor, the appellant was smelling of liquor though he was not intoxicated. Lastly, the explanation offered by the appellant seems to be very unnatural and opposed to normal behavior of a human being. The appellant claims to be a friend of the deceased and that he had asked the deceased as to why others were quarrelling with him and had intended to help the deceased. If that be so, no person, in his senses, is likely to cause injuries to a well wisher, that too, with a sword. All these circumstances show that the explanation offered by the accused is neither plausible nor true.

16. But, because of lodging of FIR, Ext D2, and his statement under Section 313 of the Cr.P.C., one fact that completely stands established and is undisputable is that the appellant was present at the place of occurrence and also that he had a fight with the deceased. Once these two circumstances are admitted, they fully provide corroboration to the dying declaration, the statements of PW11 and PW14 as also the other material evidence led by the prosecution. If the appellant was carrying a sword and others were carrying lathis, it is not understable as to how could the deceased suffer as many as 15 injuries including the incised wound, abrasions, amputation of middle finger from terminal phalages and other serious injuries and the appellant merely suffered six simple injuries. This itself belies the stand taken by the appellant. In any case, the deceased could not have caused injuries to any other person as in consequence of the assault upon himself, he would have had no strength left to cause any injury to others. Strangely, the accused denied all other questions as 'maloom nahin' (don't know) or 'incorrect' and gave explanation which is not worthy of any credence.

17. For the reasons aforestated, we find no merit in the present appeal and the same is dismissed.

B.B.B. Appeal dismissed.

JAYRAJSINH DIGVIJAYSINH RANA
v.
STATE OF GUJARAT AND ANR.
(Criminal Appeal No.1040 of 2012)

JULY 20, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Constitution of India, 1950 - Article 142 - Code of Criminal Procedure, 1973 - ss.482 and 320 - Dispute over disposal of plot/property - Averments in FIR disclosing offences punishable u/ss. 467, 468, 471, 420 and 120B IPC against accused-appellant and two other accused - Prayer for quashing of criminal proceedings having regard to settlement between respondent no.2-complainant and appellant - Held: In the case on hand, irrespective of the earlier dispute between the parties; subsequently the appellant swore an affidavit with bona fide intention securing right, title and interest in favour of respondent no.2 - Further, in view of settlement arrived at between respondent no.2 and appellant, there is no chance of recording a conviction of appellant - Inasmuch as the matter has not reached the stage of trial, the High Court, by exercising the inherent power u/s.482 CrPC even in offences which are not compoundable under s.320 CrPC, may quash the prosecution - By applying the same analogy and in order to do complete justice u/Article 142 of the Constitution, the terms of settlement insofar as the appellant is concerned are accepted - Impugned FIR accordingly quashed qua the appellant - Penal Code, 1860 - ss.467, 468, 471, 420 and 120B.

Code of Criminal Procedure, 1973 - s.482 - Exercise of power under -Scope - Held: The power under s.482 CrPC has to be exercised sparingly and only in cases where the High Court is, for reasons to be recorded, of the clear view that

continuance of the prosecution would be nothing but an abuse of the process of law.

Respondent No. 2 was the President of Plot Owners' Association. Certain plots of the said Association were allegedly disposed of illegally by accused No.1 by creating false/forged documents in favour of accused No.2 who, in turn, sold the same to accused no.3 (the appellant). Respondent No.2 lodged FIR alleging collusion of the three accused persons in disposing of the plots. The averments in the FIR disclosed the offences punishable under Sections 467, 468, 471, 420 and 120-B of IPC. Aggrieved, the appellant filed application under Section 482, CrPC before the High Court to quash and set aside the said FIR. The High Court dismissed the application.

The instant appeal was filed challenging the order of the High Court. However subsequently, before the Supreme Court, respondent no. 2 filed a counter affidavit stating that subsequent to filing of the appeal, the appellant had approached respondent no.2 to show his bona fides that he himself was a victim in the said transactions and was cheated by accused no.1 and 2; that the appellant further informed respondent no.2 that he shall not claim any right, title, interest over the various plots belonging to the association; that the appellant has given an affidavit to respondent no.2 that he will withdraw the civil suit for specific performance and declaration, accepting that the appellant did not have any legal right, possession, title or claim over the various plots in issue as they were sold to him by accused Nos. 1 and 2 on the basis of forged documents and that considering the bonafide intention of the appellant he has no objection if the FIR is quashed qua the appellant.

The question for consideration before this Court was

that inasmuch as all the alleged offences are not compoundable offences under Section 320 CrPC (except Section 420 IPC that too with the permission of the Court before which any prosecution for such offence is pending), whether it would be possible to quash the FIR by the High Court under Section 482, CrPC or by this Court exercising jurisdiction under Article 136 of the Constitution.

Allowing the appeal, the Court

HELD: In the case on hand, irrespective of the earlier dispute between Respondent No. 2- the complainant and the appellant being Accused No. 3 as well as Accused Nos. 1 and 2 subsequently and after getting all the materials, relevant details etc., the appellant (Accused No. 3) sworn an affidavit with bona fide intention securing the right, title and interest in favour of Respondent No.2-complainant. In such bona fide circumstances, the power under Section 482 CrPC may be exercised. Further, in view of the settlement arrived at between Respondent No. 2-the complainant and the appellant (Accused No. 3), there is no chance of recording a conviction insofar as the present appellant is concerned and the entire exercise of trial is destined to be an exercise in futility. Inasmuch as the matter has not reached the stage of trial, the High Court, by exercising the inherent power under Section 482 CrPC even in offences which are not compoundable under Section 320, may quash the prosecution. However, the power under Section 482 has to be exercised sparingly and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. In other words, the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law. In the light of these

principles, inasmuch as Respondent No. 2-the Complainant has filed an affidavit highlighting the stand taken by the appellant (Accused No. 3) during the pendency of the appeal before this Court and the terms of settlement as stated in the said affidavit, by applying the same analogy and in order to do complete justice under Article 142 of the Constitution, the terms of settlement insofar as the appellant (Accused No. 3) is concerned are accepted. In view of the same, the impugned FIR for offences punishable under Sections 467, 468, 471, 420 and 120-B of IPC is quashed insofar as the appellant (Accused No. 3) is concerned. [Paras 9, 10, 11] [543-D-H; 544-A-E]

Shiji @ Pappu and Ors. v. Radhika and Anr. **(2011) 10 SCC 705 - relied on.**

Case Law Reference:

(2011) 10 SCC 705	**relied on**	**Para 8, 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1040 of 2012.

From the Judgment & Order dated 18.07.2011 of the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 3999 of 2011.

L. Nageshwar Rao, Pradhuman Gohil, Vikas Singh, Charu Mathur, S. Hari Haran for the Appellant.

S.B. Upadhyay, Sharmila Upadhyay, Pawan Kishor Singh, Sarvjit Pratap Singh, Hemantika Wahi, Jesal for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is filed against the impugned order dated

18.07.2011 passed by the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 3999 of 2011 whereby the High Court dismissed the application filed by the appellant herein (original Accused No. 3) under Section 482 of the Code of Criminal Procedure, 1973 (in short 'the Code') to quash and set aside the impugned FIR No. 45 of 2011 dated 12.03.2011 lodged by Vipulbhai Harshadbhai Raja, Respondent No. 2 herein with Sanand Police Station, Ahmedabad for the offences punishable under Sections 467, 468, 471, 420 and 120-B of the Indian Penal Code, 1860 (in short 'the IPC').

3. Brief facts:

(i) Respondent No. 2 herein is the President of Shri Supan Plot Owners' Association situated at Village Nidhrad, Sanand, Ahmedabad. Certain plots of the said Association were disposed of illegally by creating false/forged documents by one Pravinbhai Gangashankar Raval (original Accused No.1) in favour of one Janakben Pravinchandra Raval (original Accused No.2) who, in turn, sold the same to one Jayrajsinh Digvijaysinh Rana, the appellant herein (original Accused No. 3).

(ii) Pursuant to the same, Respondent No. 2 herein lodged FIR No. 45 of 2011 dated 12.03.2011 alleging about the sheer collusion of all the three above named accused persons in disposing of the plots.

(iii) Being aggrieved and dissatisfied with the same, the appellant herein (Accused No.3) preferred an application under Section 482 of the Code before the High Court to quash and set aside the said FIR. The High Court, by impugned order dated 18.07.2011, dismissed the same.

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

4. Heard Mr. L. Nageswara Rao, learned senior counsel for the appellant, Mrs. Hemantika Wahi, learned counsel for

respondent No.1-State of Gujarat and Mr. S.B. Upadhyay, learned senior counsel for Respondent No.2 – the Complainant.

5. In view of the subsequent development, as narrated in the counter affidavit filed by Respondent No.2 in this Court, there is no need to traverse all the factual details about the allegations and the ultimate order passed by the High Court dismissing the application filed by the appellant herein under Section 482 of the Code. The following averments in the counter affidavit are relevant for disposal of the above appeal which reads as under:

"5. That after the filing of the present special leave petition, the petitioner to show his bona fides and to prove that he himself is a victim has approached the answering respondent. The answering respondent was informed by the petitioner that the petitioner himself got cheated by Pravinbhai Gangashanker Raval and Janakben Pravinchandra Raval (accused Nos. 1 & 2 in the instant case FIR No. 45/2011). The petitioner further informed the answering respondent that he shall not claim any right, title, interest over the various plots belonging to the association and accordingly he has no right or title over the same.

6. The petitioner further submitted that he was also cheated by the other accused persons who sold the properties being subject the matter of dispute to whom on the basis of forged and fabricated documents, by which no rights can be transferred legally.

7. That the petitioner further informed the answering respondent that he has also filed a police complaint against the said accused Pravinbhai Gangashanker Raval and Janakben Pravinchandra Raval (accused Nos. 1 & 2 in the instant case FIR No. 45/2011) before the Special Investigation Team, Ahmedabad, Gujarat.

8. That the petitioner further assured and has given an affidavit to the answering respondent that he will withdraw the Civil Suit bearing No. 300/2011, titled as Jayarajsingh Digvijaysingh Rana vs. Supan Plot Owners Association & Ors. filed before the City Civil Court, Ahmedabad for specific performance and declaration, accepting that the petitioner did not have any legal right, possession, title or claim over the various plots in issue as they were sold to him by Pravinbhai Gangashanker Raval and Janakben Pravinchandra Raval (accused Nos. 1 & 2 in the instant case) on the basis of forged documents. He further accepted the answering respondent to be the genuine owner of the plots in existence and with them.

9. That after considering the bona fide intention of the petitioner the answering respondent hereby has no objection if the present FIR No. 45/2011 is quashed qua the petitioner. However, this requires to be clarified that the properties allegedly transferred in favour of the petitioner shall be considered as the property of the Association and this transaction which had taken place between the accused persons is a null and void transaction through which no title, right and interest has ever been transferred and the possession of the property was and is with the Association.

10. That in view of the above and since the right, title and interest of the association is now protected as the documents showing transfer of the property in favour of the petitioner stand declared as incompetent documents, therefore, the answering respondent has no objection if the present special leave petition is allowed and the FIR in question is quashed qua the petitioner."

The above information in the form of counter affidavit filed by Respondent No. 2 herein before this Court shows that by bona fide efforts, the appellant, who himself being the victim at the hands of Accused Nos. 1 and 2, assured Respondent No. 2

that he will not claim any right, title and interest over various plots belonging to the Association. It is further seen that the appellant has also executed an affidavit to Respondent No. 2 stating that he will withdraw the Civil Suit bearing No. 300/2011 filed before the City Civil Court, Ahmedabad for specific performance and declaration, accepting that he did not have any legal right, possession, title or claim over the various plots in issue as they were sold to him by Accused Nos. 1 and 2 on the basis of forged documents. Respondent No.2, after satisfying the bona fide intention of the appellant, informed this Court, by way of counter affidavit, that he has no objection if the present FIR No. 45/2011 is quashed qua the appellant. Respondent No.2, in categorical terms, informed this Court that in view of the stand taken by the appellant and since the right, title and interest of the said plots of the Association is now protected as the documents showing transfer of the property in favour of the appellant stand declared as invalid documents, he has no objection if the present appeal is allowed and the FIR in question is quashed insofar as the appellant is concerned. Apart from the above stand of Respondent No. 2 in the form of counter affidavit, learned senior counsel appearing for him also reiterated the same.

6. It is also relevant to point out that the averments in the FIR disclosed the offences punishable under Sections 467, 468, 471, 420 and 120-B of IPC.

7. The only question for consideration before this Court at this stage is that inasmuch as all those offences are not compoundable offences under Section 320 of the Code (except Section 420 of IPC that too with the permission of the Court before which any prosecution for such offence is pending), whether it would be possible to quash the FIR by the High Court under Section 482 of the Code or by this Court exercising jurisdiction under Article 136 of the Constitution of India?

8. The above question was recently considered by this Court in *Shiji @ Pappu & Ors. vs. Radhika & Anr.* (2011) 10 SCC 705. The question posed in that case was "Whether the criminal proceedings in question could be quashed in the facts and circumstances of the case having regard to the settlement that the parties had arrived at." After adverting to Section 482 of the Code and various decisions, this Court concluded as under:

> "17. It is manifest that simply because an offence is not compoundable under Section 320 CrPC is by itself no reason for the High Court to refuse exercise of its power under Section 482 CrPC. That power can in our opinion be exercised in cases where there is no chance of recording a conviction against the accused and the entire exercise of a trial is destined to be an exercise in futility. There is a subtle distinction between compounding of offences by the parties before the trial court or in appeal on the one hand and the exercise of power by the High Court to quash the prosecution under Section 482 CrPC on the other. While a court trying an accused or hearing an appeal against conviction, may not be competent to permit compounding of an offence based on a settlement arrived at between the parties in cases where the offences are not compoundable under Section 320, the High Court may quash the prosecution even in cases where the offences with which the accused stand charged are non-compoundable. The inherent powers of the High Court under Section 482 CrPC are not for that purpose controlled by Section 320 CrPC.
>
> 18. Having said so, we must hasten to add that the plenitude of the power under Section 482 CrPC by itself, makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be

recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. It is neither necessary nor proper for us to enumerate the situations in which the exercise of power under Section 482 may be justified. All that we need to say is that the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law. The High Court may be justified in declining interference if it is called upon to appreciate evidence for it cannot assume the role of an appellate court while dealing with a petition under Section 482 of the Criminal Procedure Code. Subject to the above, the High Court will have to consider the facts and circumstances of each case to determine whether it is a fit case in which the inherent powers may be invoked."

9. On going through the factual details, earlier decision, various offences under Section 320 of the Code and invocation of Section 482 of the Code, we fully concur with the said conclusion. In the case on hand, irrespective of the earlier dispute between Respondent No. 2- the complainant and the appellant being Accused No. 3 as well as Accused Nos. 1 and 2 subsequently and after getting all the materials, relevant details etc., the present appellant (Accused No. 3) sworn an affidavit with bona fide intention securing the right, title and interest in favour of Respondent No.2 herein-the Complainant. In such bona fide circumstances, the power under Section 482 may be exercised. Further, in view of the settlement arrived at between Respondent No. 2-the complainant and the appellant (Accused No. 3), there is no chance of recording a conviction insofar as the present appellant is concerned and the entire exercise of trial is destined to be an exercise in futility. Inasmuch as the matter has not reached the stage of trial, we are of the view that the High Court, by exercising the inherent power under Section 482 of the Code even in offences which are not compoundable under Section 320, may quash the prosecution.

However, as observed in *Shiji* (supra), the power under Section 482 has to be exercised sparingly and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. In other words, the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law.

10. In the light of the principles mentioned above, inasmuch as Respondent No. 2-the Complainant has filed an affidavit highlighting the stand taken by the appellant (Accused No. 3) during the pendency of the appeal before this Court and the terms of settlement as stated in the said affidavit, by applying the same analogy and in order to do complete justice under Article 142 of the Constitution, we accept the terms of settlement insofar as the appellant herein (Accused No. 3) is concerned.

11. In view of the same, we quash and set aside the impugned FIR No. 45/2011 registered with Sanand Police Station, Ahmedabad for offences punishable under Sections 467, 468, 471, 420 and 120-B of IPC insofar as the appellant (Accused No. 3) is concerned. The appeal is allowed to the extent mentioned above.

B.B.B. Appeal allowed.

ASHOK KUMAR RATILAL PATEL
v.
UNION OF INDIA AND ANR.
(Civil Appeal No. 5225 of 2012)

JULY 16, 2012

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

Service Law - Appointment on deputation - Post of Director, AICTE - Offer of appointment to appellant - Withdrawal of, on the ground that appellant was receiving higher pay scale in his parent department and deputation from higher post to lower post is not admissible - Challenged - Held: The High Court while affirming the order of cancellation of offer of appointment failed to appreciate the difference between "appointment on deputation" and "transfer on deputation" - The case of appellant is not a case of transfer on deputation - It is a case of appointment on deputation for which advertisement was issued and after due selection, offer of appointment was issued in favour of the appellant - A person, who applies for appointment on deputation has indefeasible right to be treated fairly and equally and once such person is selected and offered with the letter of appointment on deputation, the same cannot be cancelled except on the ground of non-suitability or unsatisfactory work - Further, in the instant case there was no stipulation in the advertisement that a person receiving higher pay of scale or higher qualification is ineligible for appointment on deputation - Once terms and conditions for deputation were intimated, it was for the appellant to decide whether to accept the scale of pay as offered or to continue to receive fixed pay on deputation - As appellant was selected after due selection and was offered appointment on deputation, and, in absence of any valid ground shown by the respondents, the appellant has a right

to join the post and the respondents were bound to accept his joining.

The appellant, a Director in the North Gujarat University in the scale of pay of Rs.12,000-420-18,300, applied for the appointment to the post of Director on deputation pursuant to an advertisement published by the 2nd respondent. By the said advertisement the candidates were informed that the pre-revised scale of pay of the post of Director is Rs.14,300-400-18,300 and that the said scale of pay will be revised to the pay band + Grade Pay of PB-4 Rs.37,000-67,000 + 8,700.

The case of the appellant was considered along with others and after due selection the 2nd respondent issued an offer of appointment and the letter was forwarded to the Registrar, North Gujarat University requesting the University to obtain acceptance of the above offer from the appellant and forward it to the Council (AICTE). The appellant informed the 2nd respondent his readiness and acceptance to join the post of Director, AICTE, New Delhi. He also requested his parent University to relieve him to join AICTE on deputation. The North Gujarat University in turn informed the 2nd respondent the approval of deputation given by the Executive Council of the North Gujarat University. The 2nd respondent was further informed that the present basic pay of the appellant is Rs.19,100 in the pay scale of Rs.16,400-450-20,900-500-22,400 and very shortly the same will be revised as per the 6th Pay Commission and will be fixed in Revised Pay Band + Academic Grade Pay of Rs.37,400 - 67,000 + Rs.10,000. The 2nd respondent on receipt of the said letter issued letter withdrawing the offer of appointment of the appellant on the ground that deputation from higher post to lower post is not admissible under rules. The cancellation of offer of appointment was followed by another advertisement which was challenged by the

appellant initially by filing a representation but having not received any information he preferred a writ petition before the High Court. The High Court dismissed the writ petition on the ground that the appellant has no right to claim entitlement to the post of Director and cannot compel the respondent to take him on deputation and thus affirmed the order of cancellation of offer of appointment as was issued to the appellant.

In the instant appeal, the appellant contended that his case was not a case of transfer on deputation but was a case of appointment on deputation after following all due procedures for appointment and selection; that in absence of any illegality in selection, it was not open to the Respondents to cancel the offer of appointment and that such action was arbitrary and violative of Article 14 of the Constitution of India.

Allowing the appeal, the Court

HELD: 1.1. Ordinarily transfers on deputations are made as against equivalent post from one cadre to another, one department to another, one organisation to another, or one Government to another; in such case a deputationist has no legal right in the post. Such deputationist has no right to be absorbed in the post to which he is deputed. In such case, deputation does not result into recruitment, as no recruitment in its true import and significance takes place as the person is continued to be a member of the parent service. [Para 11] [555-D-E]

1.2. However, the aforesaid principle cannot be made applicable in the matter of appointment (recruitment) on deputation. In such case, for appointment on deputation in the services of the State or organisation or State within the meaning of Article 12 of the Constitution of India, the provisions of Article 14 and Article 16 are to be followed. No person can be discriminated nor it is open to the

appointing authority to act arbitrarily or to pass any order in violation of Article 14 of the Constitution of India. A person, who applies for appointment on deputation has indefeasible right to be treated fairly and equally and once such person is selected and offered with the letter of appointment on deputation, the same cannot be cancelled except on the ground of non-suitability or unsatisfactory work. [Para 12] [555-F-H; 556-A]

2.1. The present case is not a case of transfer on deputation. It is a case of appointment on deputation for which advertisement was issued and after due selection, the offer of appointment was issued in favour of the appellant. In such circumstances, it was not open for the respondent to argue that the appellant has no right to claim deputation and the respondent cannot refuse to accept the joining of most eligible selected candidate except for ground of unsuitability or unsatisfactory performance. [Para 13] [556-B-C]

2.2. In the advertisement dated 13th September, 2009, the pre-revised scale of pay of the post of Director was shown at Rs.14,300-400-18,300. It was mentioned that the said pay scale will be revised to the pay band + grade pay of Rs.37,000-67,000 + 8700. No stipulation was made therein that a person receiving higher pay of scale or higher qualification is ineligible for appointment on deputation. On the contrary, in the offer of appointment, "the terms and conditions for deputation" it was specifically mentioned that the scale of pay of Director is PB-4 Rs.37,400-67,000 + 8700 (Grade Pay) with a stipulation at Clause 3.Once such terms and conditions for deputation was intimated by the 2nd respondent to the North Gujarat University, it was for the appellant to decide whether he will accept the scale of pay as was offered or will continue to receive his fixed pay on deputation as per Clause 3. The appellant by his letter

dated 20th February, 2010, accepted the offer and had shown his desire to join the post of Director, AICTE with the pay as mentioned in the said letter; such acceptance being in consonance with the terms and conditions of deputation and the offer of appointment dated 15th February, 2010, it was not open for the 2nd respondent to cancel and withdraw the offer of appointment. The High Court failed to appreciate the difference between "transfer on deputation" and "appointment on deputation" and erred in holding that the appellant has no right to claim entitlement to the post of Director. As the appellant was selected after due selection and was offered appointment on deputation, and, in absence of any valid ground shown by the respondents, the appellant has a right to join the post and the respondents were bound to accept his joining. [Para 14] [556-D-E, H; 557-A-D]

2.3. The impugned order of withdrawal of appointment dated 11th March, 2010 and the order of the High Court cannot be sustained and they are accordingly set aside. As the post of Director is vacant, in view of the interim order of this Court dated 9th May, 2011, the 2nd respondent is directed to accept the joining of the appellant for a period of one year on deputation which is to be counted from the date of his joining and other terms and conditions of deputation will remain same. The North Gujarat University is directed to relieve the appellant with further direction to 2nd respondent to accept the joining of the appellant within one week from the date of reporting by the appellant. [Para 15] [557-E-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5225 of 2012.

From the Judgment & Order dated 23.03.2011 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 3731 of 2011.

Nikhil Goel for the Appellant.

Amitesh Kumar, Navin Prakash for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted. This appeal has been preferred against the order dated 23rd March, 2011 passed by the Gujarat High Court whereby the High Court dismissed the writ petition and affirmed the order of cancellation of offer of appointment as was issued to the appellant.

2. The appellant who was initially appointed on 25th August, 2000 as Director, Computer Department in the Hemchandracharya North Gujarat University (hereinafter referred to as the 'North Gujarat University') in the scale of pay of Rs.12,000-420-18,300, applied for the appointment to the post of Director on deputation pursuant to an advertisement No.Estt.09-(01)2009 dated 13th September, 2009 published in the Newspaper (Times of India) by the 2nd respondent. By the said advertisement the candidates were informed that the pre-revised scale of pay of the post of Director is Rs.14,300-400-18,300 with further intimation that the said scale of pay will be revised to the pay band + Grade Pay of PB-4 Rs.37,000-67,000 + 8,700. Applications were called for from amongst suitable and eligible persons having Master Degree with 12 years' experience in Teaching or Research in Central or State Government or University.

3. The appellant in his application dated 24th September, 2009 shown details of his qualifications in the prescribed proforma, including the scale of pay as he was receiving, as shown below:

"11. Employment Record (details in reverse chronological order, starting with the last job)

Sl. No.	Name & address of the employer	Period of service in each post From to	Designation of Post held & Scale of pay	Nature of work and level of responsibilities
1.	H. North Gujarat University, PATAN Gujarat State (State University)	Since August 2000	Director computer Department Rs.12000-18300	Research, Teaching & Administration of department conducting UG, PG & Ph.D Prog.

In the Part-B of the said application, apart from the last pay scale he was receiving, the appellant also mentioned the pay he was expecting, as mentioned below:

" PART-B

1. (a) Present Pay Scale : Rs.12000-420-18300

(University/State Govt.) (Pay likely to revise as per 6th pay)

(i)	Basic Pay	Rs.15,780.00
(ii)	Dearness Pay+DA	Rs.19,015.00
(iii)	Others	Rs.03,559.00

	Total	Rs.38,354.00
		=========

(b) Basic Pay expected: as per AICTE norms."

4. The case of the appellant was considered along with others and after due selection the 2nd respondent issued an offer of appointment on 15th February, 2010 and the letter was forwarded to the Registrar, North Gujarat University requesting the University to obtain acceptance of the above offer from the appellant and forward it to the Council (AICTE) by 26th February, 2010. In the said letter, it was further requested that

in the event of the acceptance of the above offer, the appellant may be relieved as early as possible so as to enable him to join the Council latest by 13th March, 2010. The relevant terms and conditions for deputation attached with the offer letter dated 15th February, 2010 are quoted hereunder:

"TERMS & CONDITIONS FOR DEPUTATION

1. Period of deputation: The deputation shall be for a period of one year and extendable for a total period of not exceeding three years on yearly basis w.e.f. the date, the offer assumes the charge of the post.

2. Post and scale of pay: Director PB-4 Rs.37,400-67,000 + Rs.8700 (Grade Pay).

3. Pay: During the period of deputation Dr. PATEL ASHOK RATILAL will have the either to get his/her pay fixed in the deputation post under the operation of normal rules or to draw pay of the post held by him in the parent Department plus a deputation (duty) allowance in accordance with and subject to the conditions, as modified from time to time and such other general or special orders issued by the Ministry of Finance."

5. The appellant by his letter dated 20th February, 2010 informed the 2nd respondent his readiness and acceptance to join the post of Director, AICTE, New Delhi. He also informed his parent University to relieve him to join AICTE on deputation within the joining date suggested by the Council, as evident from the letter dated 20th February, 2010 and is quoted hereunder:

"Hemchandracharya
North Gujarat University
P.B.No.21, University Road
Patan - 384265(N.G)

Dated 20th February, 2010

NAAC Accredited "B" (CGPA) State University

To
Chief Administrative Officer
All India Council for the Technical Education,
New Delhi.

Subject : An Application for the post of "DIRECTOR" on Deputation (Dr. A.R. Patel)

Ref. An advertisement letter from your office dated 15th February, 2010, with Ref. No.: FNo.2- 4/07/ AICTE/ Rectt./Estt/2009/815.

Sir,

With respect to above subject, I am thankful to Council for opportunity given to me for work as a Director on deputation basis at AICTE. I am a Director at Computer Department of H. North Gujarat University in Pay Scale of Rs.16400-450-20900-500-22400, with present basic pay Rs.19100/-. (To be revised, very shortly, as per the 6th Pay UGC Pay Scale of PB-1, Rs.37400-67000 + Rs.10,000 (Academic grade pay).

I hereby accept the offer of post of Director at AICTE, with my present pay as described above, I have requested my University to relieve me to join AICTE on deputation within joining date suggested by Council. Hence, I will join the Council as soon as HNG University relieve me.

Thanking you

Yours sincerely
(Dr. Ashok R. Patel)"

6. The North Gujarat University in turn by letter dated 5th March, 2010 informed the 2nd respondent the approval of deputation given by the Executive Council of the North Gujarat University with further information that the appellant will be relieved on 17th March, 2010. The 2nd respondent was further

informed that the present basic pay of the appellant is Rs.19,100 in the pay scale of Rs.16,400-450-20,900-500-22,400 and very shortly the same will be revised as per the 6th Pay Commission and will be fixed in Revised Pay Band + Academic Grade Pay of Rs.37,400 - 67,000 + Rs.10,000. The 2nd respondent on receipt of the said letter issued the impugned letter dated 11th March, 2010 and withdrew the offer of appointment of the appellant on the ground that deputation from higher post to lower post is not admissible under rules. The relevant portion of the ground given in the impugned letter dated 11th March, 2010 is extracted hereunder:

> "I am directed to inform you that your office vide their letter No.Estt/1572/2010 dated 5th March, 2010 has informed that your present basic pay is Rs.19,100 in the pay scale of Rs.16400-450-22400 and very shortly it will be revised as per the UGC 6th Pay Commission and will be fixed in the revised pay band+Academic Grade Pay ofRs.37400-67000+Rs.10,000/-. The post of Director, in AICTE, offered to you is in the revised bay band of Rs.37400-67000+Rs.8700/-, which is a lower grade. Deputation from higher post to lower post is not admissible under rules, the aforesaid offer letter dated 15-2-2010 issued to you, hereby stands withdrawn with immediate effect."

7. The cancellation of offer of appointment was followed by another advertisement which was challenged by the appellant initially by filing a representation dated 20th January, 2011 but having not received any information he preferred a writ petition before the Gujarat High Court.

8. The Division Bench of the Gujarat High Court by the impugned judgment dated 23rd March, 2011, dismissed the writ petition on the ground that the appellant has no right to claim entitlement to the post of Director and cannot compel the respondent to take him on deputation.

9. Learned Counsel appearing on behalf of the appellant

submitted that the case of the appellant was not a case of transfer on deputation but was a case of appointment on deputation after following all due procedures for appointment and selection. In absence of any illegality in selection, it was not open to the Respondents to cancel the offer of appointment. Such action is arbitrary and violative of Article 14 of the Constitution of India.

10. On the other hand, according to the respondents, they having realised that the pay of the parent department of the appellant could not be paid as he was getting higher pay as Director in the North Gujarat University, the offer of deputation was withdrawn. It was further contended that a person getting higher scale of pay cannot be deputed against a lower scale of pay and the appellant has no right to claim his entitlement to the post of Director, AICTE.

11. Ordinarily transfers on deputations are made as against equivalent post from one cadre to another, one department to another, one organisation to another, or one Government to another; in such case a deputationist has no legal right in the post. Such deputationist has no right to be absorbed in the post to which he is deputed. In such case, deputation does not result into recruitment, as no recruitment in its true import and significance takes place as the person is continued to be a member of the parent service.

12. However, the aforesaid principle cannot be made applicable in the matter of appointment(recruitment) on deputation. In such case, for appointment on deputation in the services of the State or organisation or State within the meaning of Article 12 of the Constitution of India, the provisions of Article 14 and Article 16 are to be followed. No person can be discriminated nor it is open to the appointing authority to act arbitrarily or to pass any order in violation of Article 14 of the Constitution of India. A person, who applies for appointment on deputation has indefeasible right to be treated fairly and equally and once such person is selected and offered with the

letter of appointment on deputation, the same cannot be cancelled except on the ground of non-suitability or unsatisfactory work.

13. The present case is not a case of transfer on deputation. It is a case of appointment on deputation for which advertisement was issued and after due selection, the offer of appointment was issued in favour of the appellant. In such circumstances, it was not open for the respondent to argue that the appellant has no right to claim deputation and the respondent cannot refuse to accept the joining of most eligible selected candidate except for ground of unsuitability or unsatisfactory performance.

14. In the advertisement dated 13th September, 2009, the pre-revised scale of pay of the post of Director was shown at Rs.14,300-400-18,300. It was mentioned that the said pay scale will be revised to the pay band + grade pay of Rs.37,000-67,000 + 8700. No stipulation was made therein that a person receiving higher pay of scale or higher qualification is ineligible for appointment on deputation. On the contrary, in the offer of appointment, "the terms and conditions for deputation" it was specifically mentioned that the scale of pay of Director is PB-4 Rs.37,400-67,000 + 8700 (Grade Pay) with following stipulation at Clause 3:

> "3. *Pay: During the period of deputation Dr. PATEL ASHOK RATILAL will have the either to get his/her pay fixed in the deputation post under the operation of normal rules or to draw pay of the post held by him in the parent Department plus a deputation (duty) allowance in accordance with and subject to the conditions, as modified from time to time and such other general or special orders issued by the Ministry of Finance."*

(emphasis added)

Once such terms and conditions for deputation was

intimated by the 2nd respondent to the North Gujarat University, it was for the appellant to decide whether he will accept the scale of pay as was offered or will continue to receive his fixed pay on deputation as per Clause 3. The appellant by his letter dated 20th February, 2010, accepted the offer and had shown his desire to join the post of Director, AICTE with the pay as mentioned in the said letter; such acceptance being in consonance with the terms and conditions of deputation and the offer of appointment dated 15th February, 2010, it was not open for the 2nd respondent to cancel and withdraw the offer of appointment. Going by the principles as referred above, we are constraint to state that the High Court failed to appreciate the difference between "transfer on deputation" and "appointment on deputation" and erred in holding that the appellant has no right to claim entitlement to the post of Director. As the appellant was selected after due selection and was offered appointment on deputation, and, in absence of any valid ground shown by the respondents, we hold that the appellant has a right to join the post and the respondents were bound to accept his joining.

15. For the reasons aforesaid, the impugned order of withdrawal of appointment dated 11th March, 2010 and the order of the Division Bench of Gujarat High Court cannot be sustained and they are accordingly set aside. As the post of Director is vacant, in view of the interim order of this Court dated 9th May, 2011, we direct the 2nd respondent to accept the joining of the appellant for a period of one year on deputation which is to be counted from the date of his joining and other terms and conditions of deputation will remain same. The North Gujarat University is directed to relieve the appellant with further direction to 2nd respondent to accept the joining of the appellant within one week from the date of reporting by the appellant. The appeal is allowed with the aforesaid observations and directions. There shall be no order as to costs.

B.B.B. Appeal allowed.

RAMESH CHILWAL @ BOMBAYYA

v.

STATE OF UTTARAKHAND

(Criminal Appeal Nos.1072-1073 of 2012)

JULY 20, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Sentence/Sentencing: Conviction of accused-appellants under i) s.302 IPC alongwith life imprisonment; ii) s.2/3 of the Gangsters Act alongwith 10 years rigorous imprisonment and iii) s.27 of the Arms Act alongwith 7 years rigorous imprisonment - Conviction affirmed by both High Court and Supreme Court - Clarification given by Supreme Court as regards the sentencing part - Held: Considering the fact that the trial court had awarded life sentence for offence u/s.302, IPC, in view of s.31, Cr.P.C., all the sentences imposed under the IPC, Gangsters Act and Arms Act would run concurrently - Code of Criminal Procedure, 1973 - s.31.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1072-1073 of 2012.

From the Judgment & Order dated 11.11.2011 of the High Court of Uttarakhand at Nainital in Criminal Appeal Nos. 15 & 16 of 2006.

Gaurav Agrawal for the Appellant.

Abhishek Atrey, Shivika Jain for the Respondent.

The order of the Court was delivered

O R D E R

1. Leave granted.

2. Heard learned counsel for the appellant as well as for the respondent-State.

3. On 9th April, 2012, this Court issued notice confining to the question of sentence only that too for clarifying that all the sentences to run concurrently.

4. Learned counsel appearing for the appellant has brought to our notice that the trial Judge has convicted and sentenced the appellant in the following order:

i) The accused Ramesh Chilwal @ Bambayya is convicted in Case Crime No.580/2004, Special Session Triable Case No.28/2005 under Section 302 I.P.C. and sentence for the rigorous imprisonment of life and a fine of Rs.1,00,000.00 (Rupees one lakh). In default for the payment of fine, he shall also serve a simple imprisonment for a period of six months. Out of this Rupees One Lac, Rs.50,000.00 (Rupees fifty thousand) is awarded as compensation to the family of the deceased.

ii) The accused Ramesh Chilwal @ Bambayya is convicted in Case Crime No. 580/2004, Special Session Triable Case No.28/2005 under Section 2/3 [3(1)] Gangsters Act and sentence for the rigorous imprisonment of 10 (ten) years and a fine of Rs.50,000.00 (Rupees fifty thousand). In default for the payment of fine, he shall also serve a simple imprisonment for a period of four months. Out of this Rs.50,000.00 (Rupees fifty thousand), rupees twenty five thousand is awarded as compensation to the family of the deceased.

iii) Accused Ramesh Chilwal @ Bambayya is convicted in Case Crime No. 737/2004, Sessions Triable Case No. 118/2005 under Section 27 of the Arms Act and sentence for the rigorous

imprisonment of 7 (seven) years and a fine of Rs.25,000.00 (Rupees twenty five thousand). In default for the payment of fine, he shall also serve a simple imprisonment for a period of four months. Out of this Rs.25,000.00, half of the amount is awarded as compensation to the family of the deceased."

5. By the impugned order, the said conviction and sentences were confirmed by the High Court.

6. Since this Court issued notice only to clarify the sentence awarded by the trial Judge, there is no need to go into all the factual details. We are not inclined to modify the sentence. However, considering the fact that the trial Judge has awarded life sentence for an offence under Section 302, in view of Section 31 of the Code of Criminal Procedure, 1973, we make it clear that all the sentences imposed under the IPC, the Gangsters Act and the Arms Act are to run concurrently.

7. While confirming the conviction, we clarify that all the sentences are to run concurrently. To this extent, the judgment of the trial Court as affirmed by the High Court is modified.

8. The appeals are disposed of accordingly.

B.B.B. Appeals disposed of.

SUSHILA TIWARY AND OTHERS
v.
ALLAHABAD BANK AND OTHERS
(Civil Appeal No.5224 of 2012)

JULY 16, 2012.

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

SERVICE LAW:

Termination from service - Bank employee - Served charge-sheets and also prosecuted in criminal case - Conviction by trial court - Employee terminated from service - Acquittal by appellate court on benefit of doubt - Employee placed under suspension, and on conclusion of the inquiry, his services terminated - Held: In the instant case, Clause 19.3(d) of Bi-Partite Settlement, 1966 is applicable - Clause 19.3(d) read along with Notice dated 2.7.2001, makes it clear that the employee stood reinstated w.e.f. 21.7.1999, i.e. the date on which he was originally dismissed from service, and deemed to be continuing under suspension since then and, as such, was entitled to subsistence allowance and not the full pay and allowances - Bi-partite Settlement, 1966 - Clause 19.3(c), 19.3(d), 19.5(d) and 19.5(j).

The husband of appellant no. 1, who was in the employment of the respondent Bank, was charge-sheeted by the Bank for certain acts of omission and commission and was also prosecuted before the criminal court. The trial court convicted him u/ss 468 and 477-A, IPC and sentenced him to RI for one year each under both the counts. Consequently, the employee was terminated from service by order dated 21.7.1999. He filed an appeal against his conviction, and the appellate court acquitted him giving him the benefit of doubt. The Bank ordered on

2.7.2001 that the employee would be deemed to have been placed under suspension w.e.f. 21.7.1999. The charges against the employee were found proved and, ultimately, by order dated 16.6.2003, his services were terminated. During the pendency of the writ petition filed by the employee, he died and his legal heirs were substituted. The single Judge dismissed the writ petition and the Division Bench dismissed the appeal filed by the legal heirs.

In the instant appeal, it was contended for the appellants that without reinstating the employee no departmental inquiry could be initiated and further, in view of Clause 19.3(c) of the Bi-partite Settlement, 1996, he was entitled to full pay and allowances minus the subsistence for the period of suspension.

Dismissing the appeal, the Court

HELD: 1.1 Clause 19.3(c) of the Bi-Partite Settlement, 1966 applies to the cases where the employee is acquitted during the trial. On the other hand, Clause 19.3(d) applies to the cases where the convicted employee prefers an appeal or revision application against his conviction and is acquitted. Under Clause 19.3(d) if an employee applies to the management for reconsideration of his case on acquittal, the management is required to review his case and may either reinstate him or proceed against him under the provisions set in Clauses 19.11 and 19.12 relating to discharge, the period up-to-date for which full pay and allowances have not been paid being treated as one of suspension. [para 13] [568-F-G]

1.2 In the instant case, the employee was convicted and sentenced by the trial court u/ss 468 and 477-A IPC. He was acquitted by giving benefit of doubt in the criminal appeal. In such case, he was liable to be

proceeded under Clause 19.3(d). The appellants cannot derive of the benefit of Clause 19.3(c) [para 14] [569-A-B]

1.3 If Clause 19.3(d) is read along with the notice dated 2.7.2001, it is clear that the employee stood reinstated w.e.f. 21.7.1999, i.e., the date on which he was originally dismissed from service and deemed to be continuing under suspension since then. This Court, therefore, holds that he was entitled for subsistence allowance and not the full pay and allowances. There is no illegality in the order of termination or the orders passed by the single Judge and the Division Bench of the High Court. [para 15-16] [569-E-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5224 of 2012.

From the Judgment & Order dated 03.05.2010 of the High Court of Patna in L.P.A. No. 762 of 2010.

Mohit Kumar Shah for the Appellants.

Dhruv Mehta, Yashraj Singh Deora, Rajesh Kumar, Shri Ram Krishna for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Delay condoned. Leave granted.

2. This appeal has been preferred by the Legal Heirs of the original writ petitioner, Shri Ravindra Nath Tiwary (hereinafter referred to as "Shri Tiwary") against the judgment dated 3rd May, 2010 passed by the Division Bench of the Patna High Court in L.P.A. No.762 of 2010, whereby the Division Bench dismissed the appeal and affirmed the order passed by the learned Single Judge wherein the order of termination passed against Shri Tiwary was affirmed.

3. Appellant No.1, Sushila Tiwary is the wife and appellant

Nos.2 to 5, Rajesh, Priyanjali, Sudhansu and Himanshu are the sons and daughter of Shri Tiwary.

4. Shri Tiwary was working as Special Assistant in the Allahabad Bank, Arah Branch(hereinafter referred to as "the Bank"). He was suspended on 11th June, 1990 for certain acts of omission and commission and proceeded departmentally under Clause 19.5(d) and 19.5.(j) of the first Bi-partite Settlement 1966. Two charge-sheets dated 30th June, 1990 and 13th October, 1990 were served on him. The Bank also decided simultaneously to prosecute Shri Tiwary in a criminal case for the criminal act and lodged an FIR with the Arah Police Station. After trial Shri Tiwary was convicted in the criminal case on 19th April, 1999 by the Sub-Divisional Judicial Magistrate(SDJM), Bhojpur. He was ordered to undergo RI for one year for the offence punishable under Section 468 IPC and RI for one year for the offence punishable under Section 477(A) IPC.

5. In view of the conviction in the criminal case, the Assistant General Manager, Regional Office, Patna, who was the disciplinary authority, by invoking provisions of Clause 19.6(a) of the Bi-partite Settlement, 1966 dismissed Shri Tiwary from the services of the Bank by order No.8/99 dated 21st July, 1999 after giving opportunity of personal hearing to Shri Tiwary.

Against the order of conviction Shri Tiwary preferred an appeal in the Court of the Additional District and Sessions Judge, Bhojpur, who by judgment dated 6th February, 2000, after giving benefit of doubt, had acquitted Shri Tiwary from the charges. After the acquittal Shri Tiwary approached the Bank and informed that he has been acquitted in criminal case by the Appellate Court. The Bank on receipt of such intimation, invoked Clause 19.3(c) of the Bi-partite Settlement and by order No.1/126 dated 2nd July, 2001 ordered that Shri Tiwary will be deemed to have been placed under suspension from the date of original order of dismissal, i.e., 21st July, 1999 and

shall continue to remain under suspension until further order. It was further ordered that during the period of suspension he will be entitled to subsistence allowance on the same scale as was getting just prior to his dismissal dated 21st July, 1999. The Assistant General Manager, Regional Office, Patna who was the disciplinary authority brought the aforesaid facts to the notice of Shri Tiwary and informed that his Headquarters has been fixed at Arah.

6. In the departmental enquiry, Shri Tiwary did not choose to participate. Once, he appeared before the Enquiry Officer but later on he again absented and refused to appear. Shri Tiwary moved before the Patna High Court against the order of suspension and revival of departmental proceedings by filing a writ petition, C.W.J.C. No.11479 of 2001. In the said writ petition, in view of the statement made on behalf of the Bank that the departmental enquiry has already been concluded and the Enquiry Officer has already submitted the report, Shri Tiwary withdrew the writ petition on 5th March, 2003 with liberty to raise all the pleas, in case, the order of disciplinary authority goes adverse to him.

7. The disciplinary authority noticed that Shri Tiwary refused to appear before the Enquiry Officer and remained absent. Therefore, the Enquiry Officer had to submit ex parte reports on 3rd September, 2002 and 9th September, 2002 separately for the two different chargesheets. In both the departmental proceedings all the charges against Shri Tiwary were found true. In this background, a second show-cause notice was issued to Shri Tiwary by the disciplinary authority by order dated 31st March, 2003 and it was proposed as to why his services be not terminated by paying three months' pay and allowances in terms of Clause 3(d) of the Memorandum of Settlement dated 10th April, 2002. Shri Tiwary was advised to appear in person with or without his Defence Representative before the disciplinary authority, the Assistant General Manager, Regional Office, Patna for personal hearing on 16th May, 2003. Pursuant to such notice, Shri Tiwary appeared before the

disciplinary authority on 16th May, 2003 with his Defence Representative. The objections as raised by him were recorded by the disciplinary authority and after going through the chargesheets, Enquiry Repots and the objections raised by Shri Tiwary the disciplinary authority terminated the services of Shri Tiwary by order dated 16th June, 2003.

8. Against the order of termination, Shri Tiwary filed the writ petition before the Patna High Court in C.W.J.C. No.12429 of 2005. During the pendency of the said writ petition before the learned Single Judge, Shri Tiwary died and was substituted by his Legal Heirs. After hearing the parties, learned Single Judge by judgment dated 3rd September, 2008 taking into consideration the gravity of charges and the fact that the amount which was alleged to be embezzled was deposited by Shri Tiwary with the Bank, pursuant to the order of this Court dated 8th July, 2008 in Criminal Appeal No. 1019 of 2008, refused to entertain the writ petition and dismissed the same. The Division Bench of the Patna High Court affirmed the said decision and dismissed the L.P.A. by the impugned judgment.

9. Learned counsel appearing on behalf of the appellants herein submitted that without reinstating the original writ petitioner, no departmental enquiry could be initiated. Further, in view of Clause 19.3(c), the original writ petitioner was entitled to full pay and allowances minus the subsistence allowance and all other privileges for the period of suspension which was denied to him.

It was further contended by the learned counsel for the appellants that the High Court ought to have considered that the departmental enquiry had been conducted and concluded ex parte, hence in all probability, it would have been fair enough to grant at least one more opportunity to the legal heirs of the delinquent to participate in the departmental enquiry and prove the innocence of the delinquent. It was also contended that the High Court ought to have considered that the impugned order of dismissal is void, having been passed without their being

any master and servant relationship existing at the time of passing of the order against the delinquent in absence of order of reinstatement.

10. Per contra, according to the learned counsel appearing for the respondents, in view of order dated 2nd July, 2001 Shri Tiwary was deemed to have been reinstated and in terms of Clause 19.3(d) Shri Tiwary was deemed to be on duty of the Bank from the date order of suspension was issued.

11. We have considered the respective submissions and also perused the relevant provisions of Bi-partite Settlement.

12. 'The disciplinary action and procedure' of the Bank are guided by Chapter 19 of Bi-partite Settlement, 1966. As per Clause 19.3(b), if an employee of the Bank is convicted in a criminal case, such employee may be dismissed from service from the date of his conviction or may be inflicted with lesser form of punishment depending on gravity of charges. Clauses 19.3(c) and 19.3(d) relate to action which is to be taken by the disciplinary authority, in case an employee is acquitted during the trial or pursuant to an order passed in an appeal or revision. Relevant Clause 19.3(c) and Clause 19.3(d) read as follows:

> "19.3(c) If he be acquitted, it shall be open to the management to proceed against him under the provisions set out below in Clauses 19.11 and 19.12 infra relating to discharges. However, in the event of the management deciding after enquiry not to continue him in service, he shall be liable only for termination of service with three months' pay and allowances in lieu of notice. And he shall be deemed to have been on duty during the period of suspension, if any, and shall be entitled to the full pay and allowances minus such subsistence allowances as he has drawn and to all other privileges for the period of suspension provided that he be acquitted by being given the benefit of doubt he may be paid such portion of such pay and allowances as the management may deem proper, and the period of his absence shall not be treated as a period spent on duty unless the management so direct.
>
> 19.3(d) If he prefers an appeal or revision application against his conviction and is acquitted, in case he had already been dealt with as above and he applies to the management for reconsideration of his case, the management shall review his case and may either reinstate him or proceed against him under the provisions set below in Clauses 19.11 and 19.12 infra relating to discharge, and the provision set out above as to pay, allowances and the period of suspension will apply, the period upto date for which full pay and allowances have not been drawn being treated as one of suspension. In the event of the management deciding, after enquiry not to continue him in service, the employee shall be liable only for termination with three months' pay and allowance in lieu of notice, as directed above."

13. The above reproduced provisions represent the intention of the Bank and the Union to determine as to what steps the disciplinary authority requires to take in case an employee who is accused in a criminal case is acquitted during the trial or such employee after conviction is subsequently acquitted in an appeal or revision. Clause 19.3(c) applies to the cases where the employee is acquitted during the trial. On the other hand, Clause 19.3(d) applies to the cases where the convicted employee prefers an appeal or revision application against his conviction and is acquitted. Under Clause 19.3(d) if an employee applies to the management for reconsideration of his case on acquittal, the management is required to review his case and may either reinstate him or proceed against him under the provisions set in Clauses 19.11 and 19.12 relating to discharge, the period up-to-date for which full pay and allowances have not been paid being treated as one of suspension. In the event of management deciding, after enquiry, not to continue in service, the employee shall be liable only for

termination with three months' pay and allowances in lieu of notice.

14. Reverting to the facts of this case, we find that Shri Tiwary was acquitted during the trial for the offence under Section 468 IPC and Section 477 (A) IPC and was ordered to undergo RI for one year each for both the Sections. He was acquitted by giving benefit of doubt in the criminal appeal. In such case, Shri Tiwary was liable to be proceeded under Clause 19.3(d) and, thereby, the appellants cannot derive of the benefit of Clause 19.3(c) of the Bi-partite Settlement.

The disciplinary authority by its notice dated 2nd July, 2001 passed the following order:

> "As such, it is ordered that Shri Tiwary will be deemed to have been placed under suspension from the date of original order of dismissal i.e. 21.07.1999 and shall continue to remain under suspension until further order. During the period of suspension, he will be entitled to subsistence allowance on the same scale as he was getting just before his dismissal on 21.07.1999."

15. If Clause 19.3(d) is read along with the notice dated 2nd July, 2001, it is clear that Shri Tiwary stood reinstated w.e.f. 21st July, 1999, i.e., the date on which he was originally dismissed from service and deemed to be continuing under suspension since then. For the said reasons, the stand taken by the appellants that Shri Tiwary was not reinstated before the departmental proceedings is fit to be rejected and we hold that he was entitled for subsistence allowance and not the full pay and allowances as called for.

16. We find no illegality in the order of termination or orders passed by the learned Single Judge and the Division Bench of the Patna High Court. They do not call for any interference. In absence of any merit, the appeal is dismissed but there shall be no order as to costs.

R.P. Appeal dismissed.

V.S. KANODIA ETC. ETC.
v.
A.L.MUTHU (D) THR. LRS. & ANR.
(Civil Appeal Nos. 5218-22 of 2012)

JULY 16, 2012

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

TAMIL NADU BUILDINGS LEASE AND RENT (CONTROL) ACT, 1960:

ss. 4(2) to 4(4) - Fixing of monthly rent - Non-residential premises - Held: In view of sub-ss.(2) to (4) of s.4, the market value of the site on which the building is constructed is an important factor to be taken into consideration for fixing the fair rent of the building - In the cases in hand, it was not open to the appellate authority to ignore the market value of the adjacent land already determined by the Rent Controller, on the ground of pendency of an appeal - The matter is remitted to the appellate authority for determination of limited issue relating to the market value of the land on which the building premises are situated, taking into consideration the evidence on record including Exh.A-4, Exh.A-9 and the market value of the adjacent land as was determined by the Rent Controller - The findings of the appellate authority with respect to 'classification of building', 'depreciation', 'plinth area', 'construction charges' and of basic amenities of the petition building as affirmed by the High Court are upheld.

The respondents-landlords owned three non-residential properties. In respect of the 1st property, for the purpose of fixing the monthly rent, the Rent Controller determined the valuation @ Rs.25 lakhs per ground. Appeals thereagainst remained pending. In respect of

2nd and 3rd properties, the Rent Controller fixed the rent after taking into consideration the market value of the land @ Rs.50 lakhs per ground. The appellate authority fixed the rent on the basis of valuation of the land @ Rs.65 lakhs per ground. The High Court dismissed the revision petitions of the tenants.

In the instant appeals, it was contended for the appellants-tenants that the valuation of land as was determined in respect of 1st property @ Rs.25/- lakhs per ground should have been taken into consideration for determination of the fair rent.

Allowing the appeals in part, the Court

HELD: 1.1 From the principles set out in sub-ss. (2) to (4) of s.4 of the Tamil Nadu Buildings Lease and Rent (Control) Act, 1960, it is apparent that market value of the site on which the building is constructed is an important factor to be taken into consideration for fixing the fair rent of the building. [para 14] [579-D]

1.2 The two rented premises, which are the subject matter of the instant appeals, are situated in the building adjacent to the 1st property, in respect of which the Rent Controller (small Causes Court) determined the market fair rent on accepting the market value of the land at Rs.25 lakhs per ground. Against the said judgment, appeals have been preferred by both the appellant-tenants and the respondents-landlords but no order of stay has been passed by the appellate authority and the matter is still pending. The mere fact that the appeals filed by the appellants and the respondents remain pending for disposal for more than 8 years and during the pendency the respondents-landlords filed two petitions u/s 4 of the Tamil Nadu Buildings Lease and Rent (Control) Act, 1960, before the Rent Controller, cannot be made a

ground to deprive the appellants-tenants of their legitimate right to rely on a market value of adjacent land already determined by the Rent Controller. Even if the appeals are dismissed by the appellate authority, the market value of the adjacent land as determined will remain Rs. 25 lakhs per ground. In the cases in hand, it was not open to the appellate authority to ignore the market value of the adjacent land already determined on the ground of pendency of an appeal. The High Court failed to appreciate this fact though it was a fit case for interference under Art. 227 of the Constitution of India. [para 15] [579-E-H; 580-A-C]

1.3 The impugned judgments of the appellate authority dated 14.10.2006 as affirmed by the High Court, to the extent they relate to "market value of the land", are set aside. The appeals are remitted to the appellate authority for determination of limited issue relating to the market value of the land on which the building premises are situated, taking into consideration the evidence on record including Ext.A-4, Ext.A-9 and the market value of the adjacent land as was determined by the Rent Controller in RCOP No. 1046 of 1994, etc. [para 16] [580-C-F]

2. The findings of the appellate authority with respect to 'classification of building', 'depreciation', 'plinth area', 'construction charges' and of basic amenities of the petition building as affirmed by the High Court are upheld. [para 17] [580-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5218-22 of 2012.

From the Judgment & Order dated 28.04.2008 of the High Court of Judicature at Madras in Civil Revision Petition Nos. 323, 324, 615, 616 & 3347 of 2007.

Siddharth Bhatnagar, Pratik Jalan, Pavan Kr. Bansal, T. Mahipal for the Appellant.

K. Ramamurthi, P.B. Balaji, A.T.M. Sampath for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted. These appeals have been preferred against a common order dated 28th April, 2008 passed by High Court of Judicature at Madras whereby Revision Petition Nos. 323, 324, 615, 616 and 3347 of 2007 preferred by appellant were dismissed.

2. The appellants are tenant whereas respondents are the landlord of tenanted building. Initially, the dispute related to non-residential premises situated in Chennai, namely, (i) 2nd and 3rd floors of the building at D.No.23, TTK Road, (Mowbray's Road), Chennai, (hereinafter referred to as 1st property) (ii) 2nd floor of the front and rear building at 22, TTK Road, (Mowbray's Road), Chennai-18 (hereinafter referred to as the 2nd property) and (iii) ground floor of the front and rear and 1st floor rear of the building at 22, TTK Road, (Mowbray's Road), Chennai-18 (hereinafter referred to as the 3rd property) but in these appeals, we are concerned with the rent fixed in respect to 2nd and 3rd property situated at 22, TTK Road, (Mowbray's Road), Chennai-18

3. In respect of 1st property at D.No.23, TTK Road, Chennai, the contractual rent was Rs. 6210/- per month, which was increased to Rs. 18,847/- by an order passed by Small Causes Court, Chennai on 28.6.1996 in RCOP NO.; 1046 of 1994 in a petition filed by respondent-landlord under Section 4 of the Tamil Nadu Buildings Lease and Rent (Control) Act, 1960 (hereinafter referred to as the Act). In the said case, for determination of fair rent, market value of the land was assessed @ Rs.25 lakhs per ground. The appellant-tenant has

preferred an appeal against the said order in RCA No. 557/2004 and another appeal has been preferred by respondent-landlord in RCA No. 1196/1996 before the Rent Control Appellate Authority (Small Causes Court) Chennai.

4. In respect of 2nd and 3rd property situated at 22, TTK Road, Chennai-18, the respondent-landlord filed two separate petitions under Section 4 of the Act for fixing the monthly rent of respective portions, registered as RCOP No. 1176 and 1177/1997. After hearing the parties, those petitions were determined by Rent Controller by a common judgment and decree dated 28.9.2004 whereby fair monthly rent of the properties were fixed at Rs. 46,422/- and Rs.95,220/- respectively, after taking into consideration the market value of land @ Rs.50 lakhs per ground.

5. Against the aforesaid common judgment, both the respondent-landlord and appellant-tenant preferred appeals in RCA No. 1393, 1394, 1404 and 1405 of 2004. After taking into consideration the relevant evidence and submission of parties, by a common order and judgment dated 14.10.2006 the appellate authority, (8th Judge) Small Causes Court, Chennai fixed the monthly rent at Rs. 58,329/- and Rs. 1,21,877/- respectively, allowing the appeal preferred by landlord and dismissing the appeals preferred by tenant. The rent was fixed on the basis of valuation of land @ Rs.65 lakhs per ground. Against the aforesaid order, the Revision petitions preferred by appellant-tenant were dismissed by the impugned common judgment dated 28.4. 2008.

6. Before the Courts below, the respondent-landlord took plea that the appellant-tenant had been on the front portion of the ground floor for 43 years and in the rear side portion of the ground floor and also at the rear side portion of the 1st floor and rear side portion of the 2nd floor for the past 17 years and in the front portion for the past 16 years. The petition building comes under Class I building with R.C.C. roofing and all the three basic amenities are available. The plinth area of the front

portion of the ground floor is 1719 sq. ft., and the rear portion is 1766 sq. ft. and the lumber portion is 341 sq. ft., latrine portion is 136 sq.ft., G.I. Sheet portion is 300 sq. ft. and on the 1st floor rear side portion is 1766 sq. ft., Latrine portion is 121 sq. ft. and on the 2nd floor the front portion is 1800 sq. ft. and the rear portion is 1766 sq. ft. and that the plinth area of the latrine portion is 121 sq. ft.. Furthermore, the petition building is situated at a very important and busy business area being Mylapore and, therefore, the value of the ground site per ground will be Rs.75 lakhs. Hence, prayer was made to fix the monthly fair rent of the petition building at Rs.77,706 and Rs.1,54,126 respectively.

7. The appellant-tenant on appearance, denied that the petition building is a Class I building and also denied the age of the building as mentioned by the respondent-landlord. According to them, age of the petition building as per their engineer was more than 55 years; and the measurement of basic amenities as shown in the petition were also incorrect. They alleged that basic amenities were not available in the petition building as was claimed by the landlord. The value of the ground site mentioned in the petition was also disputed as excessive. According to them, the petition building is situated in Bishop Wallers Avenue, therefore, the value of the ground site cannot exceed Rs.10 lakh per ground. Hence, it was submitted that the monthly fair calculated in the petition was very excessive and, therefore, the petition under Section 4 of the Act be dismissed.

8. The Rent Controller as well as Appellate Authority after hearing the parties decided the disputes relating to 'Classification of building', 'Plinth area', 'Construction charges', 'Value of the ground site' and 'Basic amenities'. There is a concurrent findings that the petition building is a Class-I building and the age of the petition building being 16,17 and 45 years respectively, therefore, the depreciation was calculated at 1 per cent for 16, 17 and 45 years. The plinth area was accepted as

mentioned by the engineers on behalf of the landlord for the purpose of determination of fair rent. Similarly, there is a concurrent findings with regard to construction charges and basic amenities. The engineers of both the parties had admitted that all three basic amenities were available in the petition building and accordingly the engineers for the landlord had fixed at 20 per cent and the engineers for the tenant had allotted 10 per cent but the trial court and the Appellate Authority accepted 15 per cent for determination of basic amenities.

9. So far as "value of the ground site" is concerned, parties exhibited their respective evidence which were noticed by Rent Controller and the Appellate Authority. The respondent-landlord produced the evidence to claim the value of the ground site at more than 1 crore per ground and in support of which a sale deed No. 99/88 dated 9.12.97 pertaining to door no. 241/1, T.T.K. Road Extention, Ambujammal Street, Alwarpet, Chennai-18 was filed as Exhibit A4. It was also brought to the notice of the Authority that an extent of 470 sq. ft. of land had been sold for Rs. 14,00,000/- and on that basis the value per ground is Rs.71,48,936/- and that the petition mentioned building is situated very near to Radhakrishnan Road but the property pertaining to Exhibit A4 is situated at a distance of 2 and ½ furlong from the petition mentioned building and, therefore, in the classification report Exhibit A9, the ground site per ground had been calculated at Rs.1 crore. The R.W.2, engineer on behalf of the tenant in his Examination in Chief had mentioned that the ground site where the petition mentioned building is situated is not owned by the Petitioner as conveyed by the tenant and, therefore, for the calculation of the monthly fair rent the value of the ground site had not been taken into account, no sale document had been filed on behalf of the tenant. The R.W.2, in his cross examination had mentioned that the petition mentioned building is situated on the TTK Road and near the junction of Cathedral Road and Radhakrishnan Road. There is a Church near the petition mentioned building and 'Woodland Hotel' is situated at a distance of 1 and ½ furlongs from the

petition mentioned building and opposite to it there is a hotel known as 'Mowbrays Inn'. Further, on the opposite site of the 'Woodland Hotel', St. Abbas School is situated. The Nilgiris Supermarket is situated at a little distance from it and a Music Academy is also there near the petition mentioned property. It was further mentioned that no document had been perused for the valuation of the ground site. Hence, the argument advanced that the petition mentioned building is situated on the T.T.K. main road but the entrance pertaining to the tenant is through the Biship lane was not accepted both by the Rent Controller and the Appellate Authority.

10. On behalf of the appellant-tenant, it was brought to the notice of both the Rent Controller and the Appellate Authority that another petition under Section 4 was filed by respondent-landlord against the appellant-tenant for fixation of monthly fair rent pertaining to 1st property situated adjacent to the disputed 2nd and 3rd property. In the said case, the rent has been fixed taking into consideration the valuation of rent @ Rs.25 lakhs per ground. Therefore, it was pleaded that same valuation should be taken for determination of the present cases. The Appellate Authority refused to notice the valuation as determined in respect of 1st property with following observation:

> "Since it had been admitted by both the parties that the appeal filed against the aforesaid order is still pending and in such a circumstance since it cannot be considered that the aforesaid order had reached the final stage and, therefore, the trial court having decided that it will not be justifiable to take into account the aforesaid valuation seems to be correct and decided accordingly."

11. In this case, the main grievance of the appellant-tenant is that the valuation of land as was determined in respect of 1st property @ Rs.25/- lakhs per ground but same has not been taken into consideration for determination of the fair rent of the petition building.

12. Per contra, according to learned counsel for the respondent-landlord, the Appellate Authority has determined the market value of the land @ Rs.65 lakhs per ground taking into consideration the classification report, Exhibit A-9, Exhibit A-4, etc., which are the recent market value and, therefore, the High Court rightly refused to sit in appeal over a finding of fact.

13. We have heard learned counsel for the parties and perused the record.

14. Section 4 of the Act reads as under:

> "4. Fixation of Fair Rent. -
>
> (1) The Controller shall on application made by the tenant or the landlord of a building and after holding such enquiry as he thinks fit, fix the fair rent for such building in accordance with the principles set out in the following sub-sections:
>
> (2) The fair rent for any residential building shall be nine per cent gross return per annum on the total cost of such building.
>
> (3) The fair rent for any non-residential building shall be twelve per cent gross return per annum on the total cost of such building.
>
> (4) The total cost referred to in sub-section (2) and sub-Section (3) shall consist of the market value of the site in which the building is constructed, the cost of construction of the building and the cost of provision of anyone or more of the amenities specified in schedule 1 as on the date of application for fixation of fair rent.
>
>> Provided that while calculating the market value of the site in which the building is constructed, the Controller shall take into account only that portion of the site on which the building is constructed and

of a portion upto fifty per cent, thereof of the vacant land, if any, appurtenant to such building the excess portion of the vacant land, being treated as amenity;

Provided further that the cost of provision of amenities specified in Schedule 1 shall not exceed-

(i) in the case of any residential building, fifteen per cent; and

(ii) in the case of any non-residential building, twenty-five per cent, of the cost of site in which the building is constructed and the cost of construction of the building as determined under this section."

From the principles set out in sub-Sections (2) to (4) of Section 4 it is apparent that market value of the site on which the building is constructed is an important factor to be taken into consideration for fixing the fair rent of the building.

15. Reverting to the facts of this case, we find that the appellants are tenant of three premises of which the respondents are the landlords. Out of the three premises, the first premises is a non-residential building constructed on land bearing D.No.23, T.T.K. Road, Chennai relating to which fair rent has already been determined by the Rent Controller in RCOP NO. 1046 of 1994. In the said case, the Rent Controller (Small Causes Court), Chennai by judgment dated 28.6.1996 determined the market fair rent on accepting the market value of the land at Rs.25 lakhs per ground. Against the said judgment, appeals have been preferred by both the appellant-tenants and the respondent-landlords but no order of stay has been passed by the appellate authority; matter is still pending. With regard to rest two rented premises, the building are situated on the adjacent land bearing D.No. 22, TTK Road, Chennai which are the subject matter of dispute. The mere fact that the appeal filed by appellants and respondents remain pending for disposal for more than 8 years and during the pendency the respondent-landlord filed two petitions under Section 4 of the Act before the Rent Controller, cannot be made a ground to deprive the appellants-tenants of their legitimate right to rely on a market value of adjacent land (D.No. 23, TTK Road, Chennai) already determined by the Rent Controller. Even if the appeals are dismissed by the appellate authority, the market value of the adjacent land as determined will remain Rs. 25 lakhs per ground. In the cases in hand, it was not open to the appellate authority to ignore the market value of the adjacent land already determined on the ground of pendency of an appeal. The High Court failed to appreciate the aforesaid fact though it was a fit case for the High Court to interfere under Article 227 of the Constitution of India.

16. In the result, the appeals are allowed in part; the impugned judgments of the Appellate Authority dated 14.10.2006 as affirmed by the High Court, so far as it relates to "market value of the land" is concerned, are set aside; Appeals, RCOP No. 1393, 1394, 1404 and 1405 of 2004 are remitted to the appellate authority (learned VIIIth Judge, Court of 'Small Causes Court', Chennai) for determination of limited issue relating to the market value of the land on which the building premises is situated (D.No. 22, TTK Road, Chennai-18) taking into consideration the evidence on record including Exh.A-4, Exh.A-9 and the market value of the adjacent land as was determined by the Rent Controller in RCOP No. 1046 of 1994, etc., preferably within six months.

17. So far as the findings of the appellate authority with respect to 'classification of building', 'depreciation', 'plinth area', 'construction charges' and of basic amenities of the petition building as affirmed by the High Court are not interfered with by this Court and they are upheld. There shall be no order as to costs.

R.P. Appeals partly allowed.

POLAMURI CHANDRA SEKHARARAO @ CHINNA@ BABJI
v.
STATE OF A.P.
(Criminal Appeal No. 2168 of 2009)

JULY 23, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

PENAL CODE, 1860:

s.302 - Accused committing murder of his elder sister's son - Circumstantial evidence - Conviction and sentence of life imprisonment by courts below - Held: Trial court has rightly held that though the two eye-witnesses turned hostile, their presence at the police station was admitted and correctness of the report given by one of them at the police station could not be questioned - The said report disclosed that the deceased went to the house of accused who got enraged by the conduct of the deceased in his attempt to develop close relationship with his daughter - He stabbed repeatedly the deceased and went to police station along with the said two eye-witnesses and handed over the knife to the police - The SFL report supported the prosecution case - The fact that the dead body was found in the compound of the accused is not in dispute - The overall consideration of the evidence available on record only substantiates the guilt of the accused in the killing of the deceased and consequently the conclusion reached by trial court and upheld by High Court does not call for any interference - Evidence - Testimony of hostile witnesses - Evidentiary value of related witnesses - Circumstantial evidence.

The appellant was prosecuted for committing the murder of the son of his elder sister (PW-3). The case of

the prosecution as stated in Ext. P-1, the statement of PW-1, the daughter of the accused, was that on the stated date and time, the deceased went to the house of the accused and on latter's asking, the deceased stated that he would marry both his daughters (PWs 1 and 2). Enraged by the statement of the deceased, the accused brought a knife from his bed room and stabbed several times the deceased. The accused along with PWs 1 and 2 went to the police station and handed over the knife there stating that he had killed the deceased. The statement of PW 1(Ext. P-1) was registered. Before the trial court, PWs 1 and 2 turned hostile. However, the trial court relying upon the other evidence convicted the accused u/s 302 IPC and sentenced him to life imprisonment. The High Court declined to interfere.

In the instant appeal, it was contended for the accused-appellant that the so-called eye-witnesses, namely, PW-1 and PW-2, having turned hostile, Ext. P-1 could not be acted upon; and that PWs 3, 4, 6 and 7 were closely related to the deceased and, as such, their version could also not be relied upon.

Dismissing the appeal, the Court

HELD: 1.1 The fact that the dead body of the deceased with a number of bleeding injuries was found in the compound of the appellant is not in dispute. It is also not in dispute that the said fact was reported to the Police Station by PWs-1 and 2 along with the accused. The knife (M.O.-10) was seized in the presence of PW-10 by PW-14 under Ext. P-5. The FSL report also confirmed that human blood was found on the weapon (M.O.-10) though the origin of the blood group was stated to be not traceable. The doctor (PW-13) also confirmed that the incised cut injuries could have been caused by a weapon like Ext. M.O.-10. Further, the appellant also admitted that

he was not in talking terms with his wife and that is why she was living with her parents; and that the deceased used to stay in the same house in which his wife and PWs-1 and 2 were also staying. Every circumstance noted by the trial court goes to show that it was the appellant who got enraged by the conduct of the deceased in his attempt to develop close relationship with his daughter (PW-2) which was not to his liking, inasmuch as he was not in good terms with the mother of the deceased (PW-3). [para 14, 16 and 18] [588-C-E; 590-F-H; 591-A-B]

1.2 The trial court held that though PWs-1 and 2 turned hostile, they deposed that they saw the dead body of the deceased in the house of the appellant; that they went to the police station along with the appellant; and that Ext. P-1 report was given by PW-1. The presence of PWs-1 and 2 in the police station was admitted and the correctness of Ext. P-1 cannot be questioned by them. [para 8] [585-D-F]

1.3 Merely because PWs-3, 4, 6 and 7 are related to the deceased, there is no reason why they should implicate the appellant who is also closely related to them. [para 18] [591-C]

1.4 The overall consideration of the evidence available on record only substantiates the guilt of the accused-appellant in the killing of the deceased and consequently the conclusion reached by the trial court and upheld by the High Court does not call for any interference. [para 18] [591-F-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2168 of 2009.

From the Judgment & Order dated 28.03.2008 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 646 of 2006.

Chanchal Kumar Ganguli for the Appellant.

Amit K. Nain, D. Mahesh Babu, Mayur R. Shah, Savita Devi for the Respondent.

The Judgment of the Court was delivered by

Fakkir Mohamed Ibrahim Kalifulla, J. 1. This appeal is directed against the conviction and sentence imposed upon the appellant for the offence punishable under Section 302, Indian Penal Code (for short 'IPC') imposing the sentence of imprisonment for life and a fine of Rs. 1,000/- with default sentence of simple imprisonment for a period of three months.

2. The case of the prosecution as projected in Exhibit P-1 was that on 06.04.2004, in the evening at 5.10 p.m. the deceased, Ravi Kishore, went to the house of the accused in his Hero Honda Motor Bike, when the accused and his two daughters Polamrui Divya and Polamrui Jaya Chandrika [PWs-1 and 2] were chatting outside the house. It is alleged that when the accused asked the deceased as to why he came there, the deceased declared that he wish to marry both his daughters and threw a challenge as to whom he would give them in marriage. It is further alleged that the accused, enraged by the statement of the deceased, brought a long knife from his bed room and inflicted several blows on the deceased due to which he fell down breathless on the floor.

3. According to the prosecution, the accused along with his two daughters PWs-1 and 2, thereafter, went to the Steel Plant Police Station in his two-wheeler and handed over the knife to the Station writer stating that he had killed the deceased with that knife.

4. According to the prosecution, statement of PW-1 (Exhibit P-1) was registered against the appellant for an offence under Section 302, IPC on 06.04.2004. As many as 15 witnesses were examined in support of the prosecution. Exhibits P-1 to P-29 were exhibited and M.O.-1 to M.O.-14

were marked. The appellant was questioned under Section 313, Cr.P.C. to which the appellant simply denied his involvement in the occurrence.

5. Though PWs-1 and 2 were examined as eye-witnesses, they turned hostile and none was examined on the defence side.

6. Dr. N.V.S.L. Narasimham [PW-13] in the post mortem report opined that the deceased appeared to have died of hemorrhage and shock due to incised cut injuries on the neck and multiple incised cut injuries on the other parts of the body.

7. The trial Court based on the evidence of doctor (PW-13), Dasari Yerrayya [PW-9] and Y. Suryanarayana, Deputy Superintendent of Police [PW-15] as well as Exhibits P-4 and P-8 held that the death of deceased was a homicidal one.

8. The trial Court held that though PWs-1 and 2 turned hostile, they deposed that they saw the dead body of the deceased in the house of the appellant, that they went to the police station along with the appellant and that Exhibit P-1 report was given by PW-1. The learned Sessions Judge rejected the case of the appellant that he along with PWs-1 and 2 went for shopping on that day and they were not present at the place of occurrence, inasmuch as, there was no independent witness to support the said version. The trial Judge noted that presence of PWs-1 and 2 in the police station was admitted and that the correctness of Exhibit P-1 cannot be questioned by them. It was also held that when the deceased was lying dead in front of the house of the accused, it was for the accused to explain as to how the dead body was found in that place and what steps he had taken to explain the same. In that view, the learned Sessions Judge, by relying upon the other evidence, namely, FSL Report (Exhibit P-29) which made specific reference to Item No. 10-the knife and Item Nos.4,5,6 and 7 which contained human blood, the cloths which were seized from the deceased and Exhibit P-5- the Seizure Memo of M.O.-10 prepared by PW-14 while effecting the seizure in the presence of PW-10, a

technician in the Steel Plant who had no axe to grind against the appellant, to support its conclusion.

9. The circumstances relied upon by the learned Sessions Judge are set out in detail in paragraph 49 of the judgment. Having found the appellant guilty of the offence of murder of the deceased on 06.04.2004 at about 5.10 p.m. with the aid of M.O.-10 within the compound of his house, the trial Court imposed the sentence of imprisonment for life apart from a fine of Rs. 1000/- with a default sentence of three months of simple imprisonment. The High Court declined to interfere with the conviction and sentence of the appellant in the judgment impugned in this appeal against which the appellant has come before us.

10. We heard Mr. Chanchal Kumar Ganguli, counsel for the appellant and Mr. Amit K. Nain, counsel for the State. Learned counsel for the appellant, in his submissions contended that when the so-called eye witnesses, namely, PWs-1 and 2 turned hostile, Exhibit P-1, alleged to have been given by PW-1 cannot be acted upon. He further submitted that if the evidence of the alleged eye witnesses are eschewed from consideration, what remains is the evidence of PW Nos.3, 4, 6 and 7, who were not eye witnesses but were closely related to the deceased and, therefore, their version also cannot be relied upon. Learned counsel would, therefore, contend that when there was no incriminating circumstance connecting the accused with the death of the deceased, the conviction and sentence imposed upon him by the Courts below cannot be sustained.

11. As against the above submissions, learned counsel appearing for the State contended that though PW-1 supported Exhibit P-1 in her Examination-in-Chief, she had to be treated as hostile in the course of her cross examination and the conclusion of the trial Court by relying upon various other circumstances narrated in the order, cannot be faulted. According to the learned counsel there was motive for the

appellant to kill the deceased, that the absence of proper explanation as to how the body of the deceased was found in the courtyard of the accused and failure to satisfy the Court about the plea of alibi was sufficient to prove the guilt of the appellant of the killing of the deceased. Learned counsel, therefore, submitted that the conviction and sentence imposed on the appellant by the trial Court and confirmed by the High Court does not call for interference.

12. Having heard learned counsel for the appellant and having perused the material papers placed on record, the judgment of the trial Court as well as the High Court, we are also convinced that the conviction and sentence imposed on the appellant does not call for interference. PW Nos.1 and 2 who are none other than the daughters of the appellant, though said to have initially preferred the complaint-Exhibit P-1 through PW-1 alleging murder of the deceased by the appellant on 06.04.2004, turned hostile.

13. To reiterate the facts, the deceased is none other than the nephew of the appellant i.e. son of his elder sister, Karem Veera Veni (PW-3). Since the appellant was not in talking terms with his wife, his daughters, namely, PW Nos.1 and 2 were living along with their mother in their grandparents' house at a different place. The above facts are not in dispute inasmuch as the appellant admitted the same in the 313 questioning. It has also come in evidence that the move of the appellant to secure divorce from his wife was not supported by PW-3 and, therefore, he was not in good terms with PW-3 also. His wife is none other than PW-3's elder sister's daughter. K. Hema Sekhar (PW-4) is the father of the deceased, K. Kiran Kumar (PW-6) is the brother of the deceased and K. Swarnalatha (PW-7) is the sister of the deceased. Though according to PW-3, the appellant and PW-3 were not in talking terms, the children of both were moving friendly with each other. According to the prosecution, the deceased developed a liking for PW-2, daughter of the appellant which was also known to the appellant's elder sister as well as K. Swarnalatha (PW-7), sister

of the deceased.

14. It is stated that it was in the above stated background when PWs-1 and 2 visited the house of the deceased to spend their holidays, the appellant having come to know about the move of the deceased to develop close relationship with PW-2, got enraged by his conduct which made him to call him to his house on 06.04.2004 and that after the deceased arrived, the appellant questioned his conduct towards his daughter PW-2 to which the deceased appeared to have retorted saying that he can even marry both his daughters, which provoke d the appellant to ultimately inflict the cut injuries with the knife (M.O.-10) and the deceased succumbed to his injuries on the spot. The fact that the dead body of the deceased was found in the compound of the appellant is not in dispute. It is also not in dispute that the said fact was reported to the Steel Plant Police Station by PWs-1 and 2 along with the accused. The knife (M.O.-10) was seized in the presence of PW-10 by PW-14 under Exhibit P-5. The Forensic Science Laboratory (FSL) report also confirmed that human blood was found on the weapon (M.O.-10) though the origin of the blood group was stated to be not traceable.

15. Inasmuch as PWs.1 and 2 turned hostile, the trial Court attempted to examine as to whether there were circumstances enough to link the appellant with the death of the deceased. In that attempt the trial Court has culled out the following 16 circumstances:

> "49. The following circumstances/chain of events make the Court to draw an inference that the accused dealt blows on the deceased with M.O.10 and murdered him:-
>
> a) The accused and his wife on account of their differences are living separately and the wife of the accused is residing with her parents at Kesanapalli of East Godavari District along with PWs 1 and 2 and her son;
>
> b) The deceased was also residing in the house of the

parents of the wife of the accused and he was having close intimacy with the daughters of the accused; especially PW-2;

c) On account of differences between him and his wife, the accused is not having talking terms with his sister i.e. PW-3;

d) On account of the grudge developed against the deceased, having been informed by PWs-1 and 2, the accused gave a telephonic call to PW-3 and requested her to send the deceased to his house;

e) The deceased went to the house of the accused on 06.04.2004 at 5 p.m. on his motor cycle (PW-2 deposed about the blue coloured Hero Honda Motor Cycle parking it in front of her house and having dents);

f) The dead body of the deceased was found lying in the premises of the house of the accused;

g) PWs-1 and 2 i.e. daughters of the accused going to the police station along with the accused and giving Ex.P.1 report to the police at 17.40 hours i.e. 5.40 p.m. on 06.04.2004;

h) The accused not admitting himself going to the police station along with his daughters i.e. PWs-1 and 2.

i) The denial of the accused about the presence of the dead body of the deceased in the premises of his house in his examination under Section 313, Cr.P.C.

j) The seizure of M.O.10 by PW-14 in the presence of PW-10 under Ex.P.5 (PW-10 is also a technician in the Steel Plant);

k) The presence of the accused in the police station on 06.04.2004 (PW-10 deposed about the presence of the accused in the police station apart from deposing about the seizure of MO-10)

l) The accused not attending to his duty on 06.04.2004;

m) The theory of alibi introduced by the accused through PWs-1 and 2 who are his daughters that they had been for shopping along with him from 3.30 p.m. and returning to the house at 7.30 p.m. not being proved;

n) The police informing PW-3 about the murder of her son by the accused at 7 p.m. on 06.04.2004;

o) PW-1 informing PW-8 on 06.04.2004 at about 7 p.m. about the death of the deceased from the police station;

p) The accused not giving any explanation for the presence of the dead body of the deceased in the premises of his house but he simply denying the offence and stating that the police have foisted the case against him."

16. Keeping the above reasoning of the trial Court in mind, when we examine the submissions, we also notice that there were as many as 17 injuries noted in the post-mortem certificate by the doctor (PW-13). Of the 17 injuries, 13 injuries were incised cut injuries and the cause of death was stated to be due to shock and hemorrhage pursuant to the incised cut injuries on the neck and multiple incised cut injuries on other parts of the body. The doctor (PW-13) also confirmed that the incised cut injuries could have been caused by a weapon like Exhibit M.O.-10. Exhibit P-29, the FSL report disclosed that though the origin of the blood stain could not be determined, human blood was detected on MO-10. The appellant admitted the following facts:-that the deceased was son of PW-3, that he died on 06.04.2004, that he was found dead in the garden which is situated in front of his house within his compound, that there were number of bleeding injuries on the body of the deceased, that he was not in talking terms with his wife and that is why she was living with her parents, and that the deceased used to stay in the same house in which his wife and PWs-1 and 2 were also staying.

17. To a specific question put to the accused as to whether he wish to examine any witnesses he said "no witness".

18. Having considered the above factors, we find that every circumstance noted by the trial Court goes to show that it was the appellant who got enraged by the conduct of the deceased in his attempt to develop close relationship with his daughter PW-2 which was not to his liking, inasmuch as he was not in good terms with PW-3, the mother of the deceased. The appellant was stated to have been aggrieved by the non-cooperation of PW-3 in his attempt to dissolve the marriage with his wife who is the daughter of the elder sister of the appellant as well as PW-3. Merely because PWs-3,4,6 and 7 are related to the deceased, there is no reason why they should implicate the appellant who is also closely related to them. If according to the appellant, he was not present when the murder of the deceased took place in his residence, as rightly pointed out by the trial Court, then it was for him to explain as to how the dead body was found in his house. Admitting the presence of the dead body of the deceased in the courtyard of the appellant's house, no step was taken by the appellant to explain the situation of the presence of the dead body in his house. The theory of the hostile witnesses PWs-1 and 2 that they went for shopping along with the appellant was rightly rejected by the trial Court in the absence of any other supporting material both oral as well as documentary. The evidence of the doctor (PW-13) and Exhibit P-8 disclose that the deceased was mercilessly wounded with the knife (M.O.-10) which resulted in his instantaneous death due to shock and hemorrhage. The overall consideration of the evidence available on record only substantiate the guilt of the accused-appellant in the killing of the deceased and consequently the conclusion reached by the trial Court and upheld by the High Court does not call for any interference. The appeal, therefore, fails and the same is dismissed.

R.P. Appeal dismissed.

M. SARVANA @ K.D. SARAVANA
v.
STATE OF KARNATAKA
(Criminal Appeal No. 79 of 2010)

JULY 24, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

PENAL CODE, 1860:

s.302 - Murder - Conviction and sentence of life imprisonment awarded by courts below - Held: The dying declaration made by the deceased, the evidence of the eye-witness, the recovery of the knife at the instance of the accused, the serological report, the evidence of the father of the deceased that there was previous animosity between the deceased and the accused, make a complete chain of events, pointing unexceptionally towards the guilt of the accused - Prosecution has proved its case beyond any reasonable doubt - There is no reason to interfere with the concurrent judgments of conviction and order of sentence passed by the courts below.

EVIDENCE ACT, 1872:

s. 32(1) - Dying declaration recorded by police - Evidentiary value of - Explained - Held: In the instant case, the dying declaration was made after due certification of fitness by the doctor and was recorded by a police officer in discharge of his normal functions - The statement was made by the deceased voluntarily and was a truthful description of the events - His version is fully supported by the witness who had accompanied him at all relevant times, right from inflicting of the injuries till the time of his death.

EVIDENCE:

Hostile witness - Evidentiary value of - Held: Court can even take into consideration the part of the statement of a hostile witness which supports the case of the prosecution.

FIR

Lodging of FIR - Held: It is not necessary that an eye witness alone can lode the FIR - It can be lodged by any person and even by telephonic information - In the instant case, there was no inordinate delay in lodging the FIR.

The appellant was prosecuted for committing the murder of one 'K'. The prosecution case, as disclosed in the statement of the deceased recorded by the Head Constable (PW-2) in the hospital, was that the appellant-accused had enmity with him; that at 7.45 P.M. on 14.2.2003, when PW-3 and he were proceeding to have meals, the appellant met them on the way and, stating that he would do away with the deceased, stabbed him with the knife on his stomach; that when he fell down, the accused further assaulted him with a glass bottle on his head and face; that PW-3 got him admitted in the hospital. The victim died the following morning at 7.00 A.M. The trial court convicted the accused u/s 302 IPC and sentenced him to life imprisonment. The High Court confirmed the conviction and the sentence.

Dismissing the appeal, the Court

HELD: 1.1 There was no inordinate delay in lodging the FIR. The incident occurred at 7.45 p.m. on 14.2.2003. People had gathered at the place of the incident and PW3, who was accompanying the deceased at the relevant time, had taken him to the hospital. The doctor on duty, after having seen the injured, reported the matter to the police and then the FIR was lodged at 11.30 p.m. on the same day. The conduct of both the doctor on duty and PW3 was very normal. They had cared first to take steps to give medical aid to the injured and make every effort to save the deceased. [para 8] [601-A-D]

1.2 It is a settled principle of law that an FIR can be lodged by any person, even by telephonic information. It is not necessary that an eye-witness alone can lodge the FIR. [para 8] [601-E-F]

2.1 The mere fact that one of the witnesses produced by the prosecution had been declared hostile and did not support its case would not be fatal to the case of the prosecution, particularly when the prosecution has been able to prove its case by other cogent and reliable evidence. In the instant case, the prosecution has not only proved its case by independent witnesses, eye-witnesses, medical evidence and the report of the FSL, but has also established its case beyond reasonable doubt on the strength of the dying declaration. [para 9] [601-G-H; 602-A-B]

Atmaram & Ors. v. State of Madhya Pradesh **(2012) 5 SCC 738;** *Jodhraj Singh v. State of Rajasthan* **2007 (5) SCR 850 = (2007) 15 SCC 294; and** *Sambhu Das @ Bijoy Das & Anr. v. State of Assam* **2010 (11) SCR 493 = (2010) 10 SCC 374 - referred to**

2.2 The court can even take into consideration the part of the statement of a hostile witness which supports the case of the prosecution. Therefore, it cannot be said that whenever prosecution witnesses are declared hostile, it must prove fatal to the case of the prosecution. [para 10] [602-D]

Bhajju @ Karan Singh v. State of M.P. **(2012) 4 SCC 327;** *Govindaraju @ Govinda v. State by Sriramapuram Police Station and Anr.* **(2012) 4 SCC 722 - referred to.**

3.1 As regards the admissibility and evidentiary value of the dying declaration, the factum of death of the deceased has been proved. PW3 has given the eye-version of the occurrence. He had taken injured to the hospital and has categorically stated that on his way to the hospital, the deceased was conscious, though in great pain. After reaching the hospital, the duty doctor, who could not be examined as a witness because she had left the service, had informed about admission of an injured person in the hospital to Head Constable, PW2, who came to the hospital and after getting the certification from the duty doctor in regard to fitness of the deceased to make a statement, had recorded the statement of the deceased u/s 161 of the CrPC. This statement became the dying declaration of the deceased because he expired on the very next day, i.e. 15.2.2003 in the morning. According to the said dying declaration, the appellant had clearly stated that he would murder the deceased; he thereafter he took out the knife and stabbed the deceased. Still not satisfied with this assault, the appellant went to the nearby shop and brought a bottle and spilled the liquid all over his head and then inflicted bleeding injury on his forehead. The deceased in his statement has categorically and with clarity stated that the accused had inflicted both injuries upon his body. These injuries proved fatal leading to the death of the deceased. [para 11] [602-E-H; 603-A-D]

3.2 Clause (1) of s. 32 of the Evidence Act, 1872 makes the statement of the deceased admissible, which has been generally described as dying declaration. Once such statement has been made voluntarily, and if it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given

by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration. [para 12 and 16] [603-E-F; 609-D]

Bhajju @ Karan Singh v. State of M.P. **(2012) 4 SCC 327; and** *Surinder Kumar v. State of Haryana* **2001 (12) SCR 12 05 = (2011) 10 SCC 173 - relied on**

Chirra Shivraj v. State of Andhra Pradesh **2010 (15) SCR 673 = (2010) 14 SCC 444; and** *Laxman v. State of Maharashtra* **(2002) 6 SCC 710 - referred to.**

3.3 In the instant case, the dying declaration was made after due certification of fitness by the doctor and was recorded by a police officer in discharge of his normal functions. The statement was made by the deceased voluntarily and was a truthful description of the events. This version is fully supported by PW3, the witness who had accompanied the deceased at all relevant times, right from inflicting of the injuries till the time of his death. The serological report, Ex.P16, duly established that the blood group on the knife used for the assault and that of the deceased was O+. This knife had been recovered as per Mahazar Ext. P-12 by the PSI (PW-11) in furtherance to the voluntary statement of the appellant in presence of PW14, the Panch. The father of the deceased (PW5) has also clearly stated that there was previous animosity between the deceased and the appellant. Thus, the complete chain of events, pointing unexceptionally towards the guilt of the appellant has been established by the prosecution thereby proving its case beyond any reasonable doubt. There is no reason to interfere with the concurrent judgments of conviction and order of sentence passed by the Courts below. [para 17-18] [609-E-H; 610-A-B]

Case Law Reference:

(2012) 5 SCC 738	**referred to**	**Para 9**
2007 (5) SCR 850	**referred to**	**Para 9**
2010 (11) SCR 493	**referred to**	**Para 9**
(2012) 4 SCC 327	**referred to**	**Para 10**
(2012) 4 SCC 722	**referred to**	**Para 10**
2001 (12) SCR 1205	**relied on**	**para 12**
2010 (15) SCR 673	**referred to**	**para 13**
(2002) 6 SCC 710	**referred to**	**para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 79 of 2010.

From the Judgment & Order dated 04.12.2007 of the High Court of Karnataka, Bangalore in Criminal Appeal No. 1656 of 2004.

Aishwarya Bhati, Karan Sharma for the Appellant.

Anitha Shenoy for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the High Court of Karnataka, Bangalore, dated 4th December, 2007 confirming the judgment of conviction and order of sentence passed by the Fast Track (Sessions) Judge-III, Bangalore City, dated 26th October and 28th October, 2004, respectively convicting the appellant under Section 302 of the Indian Penal Code, 1860 (for short, the 'IPC') and awarding him sentence of rigorous imprisonment for life and a fine of Rs.10,000/-, in default thereto to undergo further rigorous imprisonment for a period of three and a half years.

2. The facts leading to the demise of the deceased Kuppa can be stated as follows:

Head Constable Sadashivaiah, PW2, received an intimation at about 10.30 p.m. in the night of 14th February, 2003 from the doctor on duty at the Victoria Hospital stating that a badly injured person had been admitted to the Victoria Hospital. After receiving this information, PW2 proceeded to Victoria Hospital and approached the duty doctor, Dr. Girija. The said police officer found the deceased in a sound state of mind and the duty doctor duly endorsed regarding fitness of the deceased to make a statement. Accordingly, the Head Constable recorded the statement of the deceased Kuppa and the same was exhibited as Ex.P2. When PW2 was examined as a witness in the Court, he identified the MLC report, Ex.P3 and also identified the endorsement of the duty doctor on the said dying declaration regarding fitness of the injured as Ex.P2 (b). After recording the statement, the same was handed over to the PSI Shivanna for further investigation. According to the statement of the deceased, as recorded by PW2, there was previous animosity between him and the appellant and on 14th February, 2003 at 7.45 p.m. when he and PW3 were proceeding to have meals and go to their house after the day's work, they met the appellant who said that he would do away with the deceased and stabbed him with knife on his stomach due to which he fell down. Even thereafter, the accused did not spare him and repeatedly assaulted him with glass bottles on his head and face, causing grievous injuries. Anthoni, PW3, took him to the hospital and got him admitted.

3. PW3 has stated in his statement before the Court that on 14th February, 2003 at about 7.15 p.m., he and the deceased were proceeding towards hotel for tiffin, at Double Road, Lal Bagh when they were near the MP Stores, the appellant was standing there. Looking at Kuppa, the appellant had started abusing Kuppa and uttered that he would commit

murder of Kuppa. Immediately thereafter, the appellant started assaulting Kuppa on the right side of his stomach with a knife and caused grievous injuries. Kuppa fell down, meanwhile, the appellant assaulted him with a bottle on the forehead and ran away. The people had gathered there. Then, he had taken Kuppa to the hospital and got him admitted. This witness duly identified the knife, MO-1 used by the appellant as well as the broken glass pieces of the bottle marked as MO-2. He even identified the T-shirt that Kuppa was wearing on the day of the incident which was blood-stained marked as MO-3. Moreover, he identified the towel as MO-4 and the blood-stained pant of Kuppa as MO-5. This witness stated that he knew both the deceased and the accused for the last more than 12 years. According to this witness, the street light was there at the time of the incident.

4. Unfortunately, Kuppa succumbed to his injuries and died in the hospital on 15th February, 2003 at 7.00 a.m. Dr. Naveen (PW1) informed the police and prepared the death memo, Ex.P1. Dr. Udayashankar (PW8) performed the post-mortem on the body of the deceased and noticed the injuries of the deceased and the cause of death as follows: -

> "Injuries :-
>
> External examination :-Length of the body is 170 cms. Well built. Dark brown complexion. Rigor mortis is present all over the body and liver mortis faintly present on the back. Hospital bandage is present over lower chest and abdomen, intravenous injection mark present over left forearm. Face is smeared with dried blood stains and also both palms foot.
>
> External injuries: 1. Surgically sutured shaped wound present over the vertex. Long limb measures 6 cms. Short limb measures 5 cms. On removal of the sutures, they are cut wounds, skull deep.

> Scalp skull : External injuries described. Extra vasation of blood present around corresponding external injuries. Skull intact. Membranes pale.
>
> Brain - Pale."
>
> "Opinion as to cause of death :-
>
> Death was due to shock and haemorrage consequent to injuries sustained."

5. We may also notice here that Dr. K.M. Chennakeshava (PW13) was examined to identify the signature and writing of Dr. Girija who had endorsed the dying declaration as she had left the Victoria Hospital and had gone to America prior to the time when the matter came up for recording of evidence in the Court. PW9, Nanjunappa, the Officer from the Forensic Science Laboratory (FSL) had identified MOs1 to 5 and 7 and stated that they contained blood stains and MOs 3 to 5 and 7 were containing blood having 'O' positive group which was the blood group of the deceased.

6. Besides the above, the prosecution, in order to establish its case, had examined 15 witnesses and exhibited Exhibits P1 to P20. After completion of the prosecution evidence, the appellant was examined and in his statement under Section 313 of the Code of Criminal Procedure, 1973 (CrPC), he took the stand of complete denial and stated nothing more.

7. The learned counsel appearing for the appellant contended that there was inordinate delay in lodging the First Information Report (FIR) and in any case, the FIR having been lodged by a person who was not an eye-witness, would render the same inadmissible. Then it is contended that PW7 had been declared hostile as he did not support the case of the prosecution and further that the dying declaration recorded by the police is inadmissible and cannot be made the sole basis for conviction of the appellant. The contention, therefore, is that

the appellant is entitled to acquittal.

8. We find no merit in either of these contentions raised on behalf of the appellant. Firstly, there was no inordinate delay in lodging the FIR. The incident occurred at 7.45 p.m. on 14th February, 2003. People had gathered at the place of the incident and PW3, who was accompanying the deceased at the relevant time, had taken him to the hospital. The doctor on duty, after having seen the injured person, had reported the matter to the police and then the FIR was lodged. This FIR, Ex.P.10, was lodged at 11.30 p.m. on the same day. We do not think that there had been any inordinate delay in lodging the FIR. The conduct of both the doctor on duty and PW3 was very normal. The priority for PW3 was not to go to the police station and lodge the FIR but to take the deceased, who was seriously injured at that time, to the hospital at the earliest. He did the latter and correctly so. The doctor had cared first to take steps to give medical aid to the injured and make every effort to save the deceased rather than calling the police instantaneously. However, without any undue delay, the doctor informed the police. The police came to the hospital and it was only after the concerned police officer (PW2) had met the duty doctor and seen the injured and recorded his statement that the FIR was registered. It is a settled principle of law that an FIR can be lodged by any person, even by telephonic information. It is not necessary that an eye-witness alone can lodge the FIR. In view of these facts, no court can hold that there is inordinate delay in lodging the FIR by accepting the contention raised on behalf of the appellant.

9. Coming to the first leg of the second submission raised by the learned counsel for the appellant, the contention is that PW7, who was stated to be an eye-witness did not completely support the case of the prosecution, when he was examined before the court. The mere fact that one of the witnesses produced by the prosecution had been declared hostile and did not support the case of the prosecution would not be fatal to

the case of the prosecution, particularly when the prosecution has been able to prove its case by other cogent and reliable evidence. In the present case, the prosecution has not only proved its case by independent witnesses, eye-witnesses, medical evidence and the report of the FSL, but has also established its case beyond reasonable doubt on the strength of the dying declaration of the deceased himself. Reference in this regard can be made to the decisions of this Court in *Atmaram & Ors. v. State of Madhya Pradesh* [(2012) 5 SCC 738]; *Jodhraj Singh v. State of Rajasthan* [(2007) 15 SCC 294]; and *Sambhu Das @ Bijoy Das & Anr. v. State of Assam* [(2010) 10 SCC 374].

10. We may notice, at this stage that the court can even take into consideration the part of the statement of a hostile witness which supports the case of the prosecution. Therefore, it cannot be said that whenever prosecution witnesses are declared hostile, it must prove fatal to the case of the prosecution. Reference in this regard can be made to the judgment of this Court in the case of *Bhajju @ Karan Singh v. State of M.P.* (2012) 4 SCC 327; *Govindaraju @ Govinda v. State by Sriramapuram Police Station and Anr.* (2012) 4 SCC 722.

11. Coming to the admissibility and evidentiary value of the dying declaration made by the deceased, the factum of death of the deceased has been proved. PW3 has given the eye-version of the occurrence. He was a witness to the hurling of abuses as well as inflicting of both the fatal injuries by the appellant - one by knife and the other with a glass bottle on the forehead of the deceased. He had taken injured-Kuppa to the hospital and has categorically stated that on his way to the hospital, the deceased was conscious, though in great pain. After reaching the hospital, the duty doctor, Dr. Girija, who could not be examined as a witness because she had left the service, had informed about admission of an injured person in the

hospital to Head Constable, PW2, who came to the hospital and after getting the certification from the duty doctor in regard to fitness of the deceased to make a statement, had recorded the statement of the deceased under Section 161 of the CrPC. This statement became the dying declaration of the deceased because he expired on the very next day, i.e. 15th February, 2003 in the morning. According to the said dying declaration, the appellant had clearly stated that he would murder him whereafter he took out the knife and stabbed the deceased. Still not satisfied with this assault, the appellant went to the shop of one Kaka and brought a bottle and spilled the liquid all over his head and then inflicted bleeding injury on his forehead. The deceased in his statement has categorically and with clarity stated that the accused K.D. Saravana had inflicted both injuries upon his body. These injuries proved fatal leading to the death of the deceased.

12. We may refer to some of the judgments of this Court in regard to the admissibility and evidentiary value of a dying declaration. In the case of *Bhajju* (supra), this Court clearly stated that Section 32 of the Evidence Act, 1872 was an exception to the general rule against admissibility of hearsay evidence. Clause (1) of Section 32 makes statement of the deceased admissible, which has been generally described as dying declaration. The court, in no uncertain terms, held that it cannot be laid down as an absolute rule of law that dying declaration could not form the sole basis of conviction unless it was corroborated by other evidence. The dying declaration, if found reliable, could form the basis of conviction. Similar principle was stated by this Court in the case of *Surinder Kumar v. State of Haryana* (2011) 10 SCC 173 wherein the Court, though referred to the above principle, but on facts and because of the fact that the dying declaration in the said case was found to be shrouded by suspicious circumstances and no witness in support thereof had been examined, acquitted the accused. However, the Court observed that when a dying declaration is

true and voluntary, there is no impediment in basing the conviction on such a declaration, without corroboration.

13. In the case of *Chirra Shivraj v. State of Andhra Pradesh* (2010) 14 SCC 444, the Court added a caution that a mechanical approach in relying upon the dying declaration just because it is there, is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by other persons and where these ingredients are satisfied, the Court expressed the view that it cannot be said that on the sole basis of a dying declaration, the order of conviction could not be passed.

14. In the case of *Laxman v. State of Maharashtra* (2002)6 SCC 710, the Court while dealing with the argument that the dying declaration must be recorded by a magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:

> "3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration

should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate

that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

15. In *Govindaraju @ Govinda v. State of Sriramapuram P.S. & Anr.* [(2012) 4 SCC 722], the court inter alia discussed the law related to dying declaration with some elaboration: -

"23. Now, we come to the second submission raised on behalf of the appellant that the material witness has not been examined and the reliance cannot be placed upon the sole testimony of the police witness (eyewitness).

24. It is a settled proposition of law of evidence that it is not the number of witnesses that matters but it is the substance. It is also not necessary to examine a large number of witnesses if the prosecution can bring home the guilt of the accused even with a limited number of witnesses. In *Lallu Manjhi v. State of Jharkhand* (2003) 2 SCC 401, this Court had classified the oral testimony of the witnesses into three categories:

(a) wholly reliable;

(b) wholly unreliable; and

(c) neither wholly reliable nor wholly unreliable.

In the third category of witnesses, the court has to be cautious and see if the statement of such witness is corroborated, either by the other witnesses or by other documentary or expert evidence.

25. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the

touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eyewitness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty.

26. Reference in this regard can be made to *Joseph v. State of Kerala* (2003) 1 SCC 465 and *Tika Ram v. State of M.P.* (2007) 15 SCC 760. Even in *Jhapsa Kabari v. State of Bihar* (2001) 10 SCC 94, this Court took the view that if the presence of a witness is doubtful, it becomes a case of conviction based on the testimony of a solitary witness. There is, however, no bar in basing the conviction on the testimony of a solitary witness so long as the said witness is reliable and trustworthy.

27. In *Jhapsa Kabari* (supra), this Court noted the fact that simply because one of the witnesses (a fourteen-year-old boy) did not name the wife of the deceased in the fardbeyan, it would not in any way affect the testimony of the eyewitness i.e. the wife of the deceased, who had given a graphic account of the attack on her husband and her brother-in-law by the accused persons. Where the statement of an eyewitness is found to be reliable, trustworthy and consistent with the course of events, the conviction can be based on her sole testimony. There is no bar in basing the conviction of an accused on the testimony of a solitary witness as long as the said witness is reliable and trustworthy.

28. In the present case, the sole eyewitness is stated to be a police officer i.e. PW 1. The entire case hinges upon the trustworthiness, reliability or otherwise of the testimony of this witness. The contention raised on behalf of the appellant is that the police officer, being the sole eyewitness, would be an interested witness, and in that situation, the possibility of a police officer falsely implicating innocent persons cannot be ruled out.

29. Therefore, the first question that arises for consideration is whether a police officer can be a sole witness. If so, then with particular reference to the facts of the present case, where he alone had witnessed the occurrence as per the case of the prosecution.

30. It cannot be stated as a rule that a police officer can or cannot be a sole eyewitness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

31. This Court in *Girja Prasad* (2007) 7 SCC 625 while particularly referring to the evidence of a police officer said that it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such

evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of the police administration."

16. The dying declaration is the last statement made by a person at a stage when he in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration.

17. Reverting to the facts of the present case, the dying declaration was made after due certification of fitness by the doctor and was recorded by a police officer in discharge of his normal functions. The statement was made by the deceased voluntarily and was a truthful description of the events. This version is fully supported by PW3, the witness who had accompanied the deceased at all relevant times, right from inflicting of the injury till the time of his death. The serological report, Ex.P16, duly established that the blood group on the knife used for the assault and that of the deceased was O+. This knife had been recovered vide Mahazar Ex.P-12 by PW11 Srinivasa PSI in furtherance to the voluntary statement of the appellant in presence of PW14, the Panch. The father of the deceased, PW5, has also clearly stated that there was previous animosity between the deceased and the appellant. In other

words, the complete chain of events, pointing unexceptionally towards the guilt of the appellant has been established by the prosecution thereby proving the case of the prosecution beyond any reasonable doubt.

18. Thus, we see no reason to interfere with the concurrent judgments of conviction and order of sentence passed by the Courts below. The appeal, therefore, is dismissed.

R.P. Appeal dismissed.