DELHI RACE CLUB LTD.
v.
UNION OF INDIA AND ORS.
(Civil Appeal No.6461 of 2003)

JULY 13, 2012

[D.K. JAIN AND ANIL R. DAVE, JJ.]

Mysore Race Courses Licensing Act, 1952 (as extended to the Union Territory of Delhi in 1984) – s.11 – Horse racing – Licence fee leviable in terms of the 1985 Rules framed u/s.11 of the 1952 Act – Delegation of legislative power u/s.11 of the 1952 Act – Challenged as unconstitutional and ultra vires for allegedly conferring unguided, uncontrolled and unfettered power on the Administrator to fix the licence fee – Held: Delegation of non-essential legislative function of fixation of rate of imposts is a necessity to meet the multifarious demands of a welfare state – Such delegation is permissible as long as legislative policy is defined in clear terms, which provides guidance to the delegate – In the instant case, challenge to constitutionality of s.11(2) of the 1952 Act was based on the premise that no guidance, check, control or safeguard is specified in the 1952 Act – This principle, however, applies only to the cases of delegation of the function of fixation of rate of tax and not a fee – Since the levy involved in the present case is a fee and not tax, and the scheme of the 1952 Act clearly spells out the object, policy and the intention with which it has been enacted, therefore, the 1952 Act does not warrant any interference as being an instance of excessive delegation – Constitution of India, 1950 – Delegation of legislative power – Delegation of non-essential legislative function.

Delhi Race Course Licensing Rules, 1985 – r.6 – Horse racing – Licence fee leviable in terms of the 1985 Rules framed u/s.11 of the 1952 Act – Nature of the impost – Tax

or fee – Held: The true test to determine the character of a levy, is the primary object of the levy and the essential purpose intended to be achieved – In the instant case, the nature of the impost is not merely compulsory exaction of money to augment the revenue of the State but its true object is to regulate, control, manage and encourage the sport of horse racing as is distinctly spelled out in the 1952 Act and the 1985 Rules – Wide powers have been conferred on various authorities to enable them to supervise, regulate and monitor the activities relating to the race course with a view to secure proper enforcement of the provisions – Therefore, the levy involved in the present case is a 'fee' and not 'tax' – Mysore Race Courses Licensing Act, 1952 (as extended to the Union Territory of Delhi in 1984) – s.11 – Delhi Race Course Licensing (Amendment) Rules, 2001.

Delhi Race Course Licensing Rules, 1985 – r.6 – Delhi Race Course Licensing (Amendment) Rules, 2001 – Horse racing – Licence fee leviable in terms of the 1985 Rules (as amended in 2001) challenged on the ground that it lacked any element of 'quid pro quo' – Held: The licence fee imposed in the present case is a regulatory fee and is, thus, not conditioned by the fact that there must be a quid pro quo for the services rendered – The Government need not render some defined or specific services in return as long as the licence fee satisfies the limitation of being reasonable – If there is a broad correlation between the expenditure which the State incurs and the fees charged, the fees can be sustained as reasonable – 'Quid pro quo'.

Delhi Race Course Licensing Rules, 1985 – r.6 – Delhi Race Course Licensing (Amendment) Rules, 2001 – Licence fee prescribed in the 1985 Rules framed u/s.11 of the 1952 Act – Ten-fold enhancement of the licence fee in view of amendment in terms of the 2011 Rules – Propriety – Validity of the 2001 Rules and of the charging section i.e. s.11(2) of the 1952 Act – Challenge to – Held: The challenge to validity

of s.11(2) of the 1952 Act was raised after almost 15 years of the commencement of the 1952 Act – The appellant Race Course had been regularly paying the licence fee and the present challenge was made only when quantum of licence fee was increased by the Government on account of non-revision of the same since the commencement of the 1952 Act – Evidently, inflation during this period was taken as the criterion for increasing the quantum of the fee – The increase was reasonable keeping in view the fact that the expenditure incurred by the Government in carrying out the regulatory activities for attaining the object of the 1952 Act would have proportionately increased – Also, an institution of the size of the appellant Race Course should not cloak its objection to increase in the rate of licence fee and present them as a challenge to the constitutionality of the charging section – The licence fee has a broad co-relation with the object and purpose for which the 1952 Act and the 2001 Rules have been enacted – Both s.11(2) of the 1952 Act as well as the 2001 Rules do not suffer from any legal infirmity – Mysore Race Courses Licensing Act, 1952 (as extended to the Union Territory of Delhi in 1984) – s.11.

Constitution of India, 1950 – Delegation of legislative power – For fixation of rate of tax – Scope – Held: While delegating the power of fixation of rate of tax, there must be in existence, inter-alia, some guidance, control, safeguards and checks in the concerned Act – Taxation.

On 19th October, 1984, the Central Government had extended the Mysore Race Courses Licensing Act, 1952 to the Union Territory of Delhi, as it existed then, with certain amendments. In exercise of the powers conferred under Section 11 of the 1952 Act, vide notification dated 1st March 1985, the Administration of the Union Territory of Delhi, notified the Delhi Race Course Licensing Rules, 1985, rule 6 whereof prescribed licence fee rates. Subsequently, on 7th March 2001, in exercise of the

powers conferred under Section 11 of the 1952 Act, the Lt. Governor of the National Capital Territory of Delhi enacted the Delhi Race Course Licensing (Amendment) Rules, 2001 and enhanced the licence fee rates by ten times. The appellant filed writ petitions challenging the said two notifications dated 19th October, 1984 and 7th March, 2001 as illegal. The petitions were dismissed by the High Court.

In the instant appeal, the appellant *inter alia* raised the following contentions, viz. 1) that Section 11(2) of the 1952 Act was *ipso facto* bad in law, unconstitutional and *ultra-vires* as it conferred unguided, uncontrolled and unfettered power on the Administrator to fix licence fee; and 2) that the licence fee could not be demanded inasmuch as it lacked any element of *quid pro quo*.

Dismissing the appeal with costs, the Court

HELD:1. From the conspectus of the views on the question of nature and extent of delegation of legislative functions by the Legislature, two broad principles emerge, viz. (i) that delegation of non-essential legislative function of fixation of rate of imposts is a necessity to meet the multifarious demands of a welfare state, but while delegating such a function, laying down of a clear legislative policy is pre-requisite and (ii) while delegating the power of fixation of rate of tax, there must be in existence, *inter-alia,* some guidance, control, safeguards and checks in the concerned Act. As long as the legislative policy is defined in clear terms, which provides guidance to the delegate, delegation of non-essential legislative function is permissible. The question of application of the second principle will not arise unless the impost is a tax. [Para 16] [22-B-E]

Corporation of Calcutta & Anr. v. Liberty Cinema **AIR (1965) SC 1107: 1965 SCR 477;** *Devi Das Gopal Krishnan*

& Ors. v. State of Punjab & Ors. **1967 (3) SCR 557;** *The Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi & Anr.* **AIR (1968) SC 1232: 1968 SCR 251 and** *In re. Delhi Laws Act, **1912*** **AIR 1951 SC 332: 1951 SCR 747 – referred to.**

Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. The Assistant Commissioner of Sales Tax & Ors. **(1974) 4 SCC 98: 1974 (2) SCR 879 – cited.**

2. The pivotal question to be determined in the present case is the nature of the impost. The true test to determine the character of a levy, delineating 'tax' from 'fee' is the primary object of the levy and the essential purpose intended to be achieved. In the instant case, it is plain from the scheme of the 1952 Act that its sole aim is regulation, control and management of horse-racing. Such a regulation is necessary in public interest to control the act of betting and wagering as well as to promote the sport in the Indian context. To achieve this purpose, licences are issued subject to compliance with the conditions laid down therein, which *inter alia* include maintenance of accounts and furnishing of periodical returns; amount of stakes which may be allotted for different kinds of horses; the measures to be taken for the training of the persons to become jockeys, to encourage Indian bred horses and Indian jockeys; the inclusion and association of such persons as the government may nominate as stewards or members in the conduct and management of the horse-racing. The violation of the conditions of the licence or the 1952 Act is penalised under the 1952 Act besides a provision for cognizance by a court not inferior to a Metropolitan Magistrate. To ensure compliance with these conditions, the Delhi Race Course Licensing Rules, 1985 empower the District Officer or an Entertainment Tax Officer to conduct inspection of the race club at reasonable times.

Thus, the nature of the impost is not merely compulsory exaction of money to augment the revenue of the State but its true object is to regulate, control, manage and encourage the sport of horse racing as is distinctly spelled out in the 1952 Act and the 1985 Rules. For the purpose of enforcement, wide powers are conferred on various authorities to enable them to supervise, regulate and monitor the activities relating to the race course with a view to secure proper enforcement of the provisions. Therefore, the levy involved in the present case is a 'fee' and not 'tax'. [Paras 17, 19] [22-F; 25-A-G]

Hingir Rampur Coal Co. Ltd. v. State of Orissa **1961 (2) SCR 537 and** *State of W.B. v. Kesoram Industries Ltd. & Ors.* **(2004) 10 SCC 201: 2004 (1) SCR 564 – relied on.**

The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt **AIR 1954 SC 282: 1954 SCR 1005 – referred to.**

3. The challenge to the constitutionality of Section 11(2) of the 1952 Act was based on the premise that no guidance, check, control or safeguard is specified in the Act. This principle, however, applies only to the cases of delegation of the function of fixation of rate of tax and not a fee. Since the levy involved in the present case is a fee and not tax, and the scheme of the 1952 Act clearly spells out the object, policy and the intention with which it has been enacted, therefore, the 1952 Act does not warrant any interference as being an instance of excessive delegation. [Para 28] [33-F-G]

4.1. While it is true that '*quid pro quo*' **is one of the determining factors that sets apart 'tax' from a 'fee' but the concept of** *quid pro quo* **requires to be understood in its proper perspective. A licence fee imposed for regulatory purposes is not conditioned by the fact that there must be a** *quid pro quo* **for the services rendered,**

but that, such licence fee must be reasonable and not excessive. It would again not be possible to work out with arithmetical equivalence the amount of fee which could be said to be reasonable or otherwise. If there is a broad correlation between the expenditure which the State incurs and the fees charged, the fees could be sustained as reasonable. [Paras 20, 25] [26-A-B; 31-B-D]

4.2. In the present case, the object of the 1952 Act, as synthesized from its provisions, is to regulate, monitor, control and encourage the sport of horse-racing. For this purpose, licences are issued subject to certain conditions. The compliance with the licence conditions is inevitable for renewal of the licences as well as significant to avoid any penalty under the 1952 Act. To ensure such compliance, district officers/ entertainment tax officers are entrusted with the duty of inspection. The nature of inspection enjoined by the 1952 Act is not of a general nature but requires expertise and training and also constant vigil on the activities of the race course. The expenses incurred in carrying out such regular inspections have to be considerable. Hence, the licence fee imposed in the present case is a regulatory fee and need not necessarily entail rendition of specific services in return but at the same time should not be excessive. In any case, the appellant has not challenged the amount of the levy as unreasonable and expropriatory or excessive. [Para 26] [31-D-G]

4.3. The argument on behalf of the appellant that inspection does not constitute a service rendered in lieu of the fee charged, is equally fallacious. The scheme of the 1952 Act; its object as elucidated in its provisions and Rules made therein; nature of conditions imposed in the licences; inspection to ensure its compliance and non-renewal of the licence as well as penalty in case of contravention of the licence conditions, make the Act fall

in the category of imposts where contributions are required to be made for the purpose of maintaining an Authority and the staff for supervising and controlling a public activity viz. the horse racing. Besides, the presence of a large institution like the race course enjoins additional burden on the civic authorities to maintain and develop the surrounding area for the convenience of the public at large. The licence fee levied in the present case, being regulatory in nature, the Government need not render some defined or specific services in return as long as the fee satisfies the limitation of being reasonable. The licence fee charged has a broad co-relation with the object and purpose for which the 1952 Act and the Delhi Race Course Licensing (Amendment) Rules, 2001 have been enacted. [Paras 26, 27] [31-H, 32-A, E-G]

A.P. Paper Mills Limited v. Government of A.P. & Anr **(2000) 8 SCC 167;** *Delhi Cloth & General Mills Co. Ltd. v. The Chief Commissioner, Delhi* **(1969) 3 SCC 925 and** *Secunderabad Hyderabad Hotel Owners' Association & Ors. v. Hyderabad Municipal Corporation, Hyderabad & Anr.* **(1999) 2 SCC 274: 1999 (1) SCR 143 – relied on.**

Sreenivasa General Traders and Ors. v. State of Andhra Pradesh and Ors. **(1983) 4 SCC 353: 1983 (3) SCR 843;** *Kewal Krishan Puri v. State of Punjab* **(1980) 1 SCC 416: 1979 (3) SCR 1217;** *Corporation of Calcutta & Anr. v. Liberty Cinema* **AIR (1965) SC 1107: 1965 SCR 477;** *Vam Organic Chemicals Ltd. & Anr. v. State of U.P. & Ors.* **(1997) 2 SCC 715: 1997 (1) SCR 403;** *P. Kannadasan v. State of T.N.* **(1996) 5 SCC 670: 1996 (4) Suppl. SCR 92;** *State of Tripura v. Sudhir Ranjan Nath* **(1997) 3 SCC 665: 1997 (2) SCR 29;** *B.S.E. Brokers' Forum, Bombay & Ors. v. Securities and Exchange Board of India & Ors.* **(2001) 3 SCC 482 – referred to.**

Shannon v. Lower Mainland Dairy Products Board **AIR 1939 PC 36 — referred to.**

The Delhi Cloth & General Mills Co. Ltd. v. The Chief Commissioner, Delhi & Ors. **(1970) 2 SCC 172: 1970 (2) SCR 348 – cited.**

5. Further, the challenge to the validity of Section 11(2) of the 1952 Act was raised after almost 15 years of its coming into force. The appellant, since the commencement of the 1952 Act, had been regularly paying the licence fee and the present challenge was made only when quantum of the licence fee was increased by the Government on account of non-revision of the same since the commencement of the 1952 Act. Evidently, the inflation during this period was taken as the criterion for increasing the quantum of the fee. It is a reasonable increase keeping in view the fact that the expenditure incurred by the Government in carrying out the regulatory activities for attaining the object of the 1952 Act would have proportionately increased. Also, an institution of the size of the Race Course should not cloak their objection to an increase in the rate of licence fee and present them as a challenge to the constitutionality of the charging section. [Para 29] [34-A-D]

6. In conclusion, it is held that Section 11(2) of the 1952 Act as well as 2001 Rules do not suffer from any legal infirmity. [Para 30] [34-E]

Case Law Reference:

1965 SCR 477	**referred to**	**Para 8**
1967 (3) SCR 557	**referred to**	**Para 8**
1968 SCR 251	**referred to**	**Para 8**
1974 (2) SCR 879	**cited**	**Para 8**
1970 (2) SCR 348	**cited**	**Para 9**
1979 (3) SCR 1217	**referred to**	**Para 9**

1999 (1) SCR 143	**relied on**	**Para 9**
(2000) 8 SCC 167	**relied on**	**Para 9**
2001 (3) SCC 482	**referred to**	**Para 9**
1951 SCR 747	**referred to**	**Para 15**
1954 SCR 1005	**referred to**	**Para 17**
1961 (2) SCR 537	**relied on**	**Para 17**
2004 (1) SCR 564	**relied on**	**Para 18**
1983 (3) SCR 843	**referred to**	**Para 20**
AIR 1939 PC 36	**referred to**	**Para 21**
1997 (1) SCR 403	**referred to**	**Para 23**
1996 (4) Suppl. SCR 92	**referred to**	**Para 23**
1997 (2) SCR 29	**referred to**	**Para 23**
(1969) 3 SCC 925	**relied on**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6461 of 2003.

From the Judgment & Order dated 5.2.2003 of the High Court of Delhi at New Delhi in Civil Writ Petition No. 2278 of 2002.

S.K. Gupta, Shagun Bhargava, B. Vijayalakshmi Menon for the Appellant.

T.S. Doabia, Rekha Pandey, Rashmi Malhotra, Anil Katiyar, D.S. Mahra for the Respondents.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. This is an appeal from a judgment, dated 5th February, 2003, rendered by the High Court of Delhi at New Delhi in CWP No.2278/2002. By the impugned judgment, the

High Court has upheld the validity of the Delhi Race Course Licensing (Amendment) Rules, 2001.

2. On 19th October, 1984, the Central Government in exercise of its powers under Section 2 of the Union Territories (Laws) Act, 1950, extended the Mysore Race Courses Licensing Act, 1952 (for short "the Act") to the Union Territory of Delhi, as it existed then, with certain amendments. The Preamble to the said Act reads thus:

> "Whereas it is expedient to make provision for the licensing regulation, control and management of horse-racing on race-course and all matters connected therewith in the Union Territory of Delhi"

Further, Section 3 of the Act reads as follows:

> "**3. Prohibition of horse-racing on unlicensed race-courses**- No horse-race shall be held save on a race course for which a licence for horse racing granted in accordance with the provisions of this Act, is in force."

Section 4 which lays down the procedure for issuing the licences for horse racing reads as follows:

> "**4. Licences for horse-racing**- (1) The owner, lessee or occupier of any race course may apply to the Government for horse-racing on such race-course or for arranging for wagering or betting in such race-course on a horse, race run or some other race-course either within the Union territory of Delhi or Outside the Union territory of Delhi.
>
> (2) The Government may (if in its opinion public interest so requires) withhold such licence or grant it subject to such conditions and for such period as they may think fit.
>
> (3) In particular and without prejudice to the generality of the foregoing power, such conditions may provide for-

> (a) the payment of a licence fee;
>
> (b) the maintenance of such accounts and furnishing of such returns as are required by the United Provinces Entertainment and Betting Tax Act, 1937 as extended to the Union territory of Delhi;
>
> (c) the amount of stakes which may be allotted for different kinds of horses;
>
> (d) the measures to be taken for the training of persons to become Jockeys;
>
> (e) the measures to be taken to encourage Indian bred horses and Indian Jockeys;
>
> (f) the inclusion or association of such persons as the Government may nominate as Stewards or members in the conduct and management of horse-racing;
>
> (g) the utilisation of the amount collected by the licensee in the conduct and management of horse-racing;
>
> (h) such other matters connected with horse-racing and the maintenance of the race-course for which in the opinion of Government it is necessary or expedient to make provision in the licence……"

Sections 5, 6 and 7 respectively enumerate penalties for taking part in horse races on unlicensed race-course and for contravention of conditions of licence. Section 9 envisages that cognizance of the offences under the Act can be taken by a court not inferior to that of a Metropolitan Magistrate. Section 11, the pivotal provision, which empowers the Government to make rules, reads as follows:

> "**11. Power to make rules**-(1) The Government may, by notification in the Delhi Gazette, make rules for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers; such rules may provide for all or any of the following matters, namely:-

(i) the form and manner in which applications for licences are to be made;

(ii) the fees payable for such licences;

(iii) the period for which licences are to be granted;

(iv) the renewal, modification and cancellation of licences."

3. In furtherance of the power conferred under Section 11 of the Act, by a notification dated 1st March 1985, the Administration of the Union Territory of Delhi, notified the Delhi Race Course Licensing Rules, 1985 [for short "1985 Rules"]. Rules 4 and 5 of the 1985 Rules lay down the procedure for submission of application for grant of licence for horse racing and the validity period of such licence respectively. Rule 6 prescribes the rate of 'Licence fee'. It reads as follows :

"**6. Licence fee-**The fee for the grant or renewal of a licence for horse racing on the race course shall be a sum of rupees two thousand (Rs.2000/-) per day on which race is held. The fee for the grant or renewal of a licence for arranging for wagering or betting on a horse race run on any other race course, within or outside the Union Territory of Delhi, shall be rupees five hundred (Rs.500/-) per race day on which race is held."

Rule 12 of the 1985 Rules, material for our purpose, confers power of inspection and states as under:

"**12. Inspection**- The District Officer or any other officer not below the rank of Entertainment Tax Inspector shall have access to the licensed race course at all reasonable times with a view to satisfy himself that the provisions of the Act

and these Rules are being complied with and that the conditions of the licence are duly observed."

4. On 7th March 2001, in exercise of the powers conferred under Section 11 of the Act, the Lt. Governor of the National Capital Territory of Delhi enacted the Delhi Race Course Licensing (Amendment) Rules, 2001 (for short "2001 Rules") and enhanced the aforesaid licence fee rates to Rs.20,000/- and Rs.5,000/- respectively.

5. On 31st January, 2002, Commissioner of Excise, Entertainment & Luxury Tax (respondent no.3 in this appeal) issued a demand letter to Delhi Race Club, a body corporate, the appellant in this appeal, informing them that the licence fee deposited by them was short by Rs.17,80,000/- for the year 2001-02 and by Rs.18 Lacs for the year 2002-03. Validity of the demand notice was questioned by the appellant by way of a writ petition in the High Court of Delhi, on the grounds that both the notifications, dated 19th October, 1984 and 7th March, 2001 were illegal in as much as : (i) delegation of powers under Section 11 of the Act to the Lt. Governor, to fix the licence fee without any guidelines is excessive delegation of legislative power and is therefore, *ultra vires*, (ii) in the absence of an element of *quid pro quo,* the licence fee charged was not in the nature of a fee but a tax and (iii) the ten fold increase in licence fee was highly excessive. However, it appears that based on the arguments advanced by the learned counsel, the High Court framed two key questions *viz.* (i) Is the licence fee under Rule 6 of the 1985 Rules a "fee" or not ? and (ii) If it is a fee, is it excessive or not?

6. Answering both the questions against the appellant, the High Court concluded that the licence fee in question is not a compensatory fee and consequently there was no requirement of a *quid pro quo*; the licence fee is in the nature of a regulatory fee and therefore, would not require any *quid pro quo* in the form of any social service and when the impost of Rs.2,000/- and Rs.500/- in the year 1984 was not regarded by the

appellant as being excessive, keeping in mind the high rate of inflation between 1984 and 2001, the enhanced rates of Rs.20,000/- and Rs.5,000/- in the year 2001 could not be said to be excessive. Hence, the appellant's writ petition having been dismissed, they are before us in this appeal.

7. At the outset, Mr. S. K. Bagaria, learned senior counsel appearing for the appellant, submitted that he would confine his submissions only to the two issues relating to the excessive delegation of power in the matter of fixation of licence fee and that the fee levied is in fact a tax and therefore, *ultra-vires* entry 66 of List II in the Seventh Schedule of the Constitution of India and would not press the issue that the fee levied is excessive.

8. Learned counsel strenuously urged that Section 11(2) of the Act confers unguided, uncontrolled and unfettered power on the Administrator to fix licence fee and thus, *ipso facto* bad in law, unconstitutional and *ultra-vires.* Learned counsel traced the evolution of law in this regard by referring to several decisions of this Court. The main thrust of his submissions was based on the decision of this Court in *Corporation of Calcutta & Anr. Vs. Liberty Cinema*[1], wherein it was held that the function of fixing the rate of tax is not an essential function and can be delegated, but such delegation has to be under some guidance. He invited our attention to the case of *Devi Das Gopal Krishnan & Ors. Vs. State of Punjab & Ors.*[2], wherein while explaining the ratio of the decision in *Liberty Cinema* (supra) and emphasising the necessity of some guidance while delegating the power to fix the rate of tax, it was observed that the doctrine of constitutional and statutory needs would not afford reasonable guidelines in the fixation of such rates of tax. Reliance was also placed on *The Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi & Anr.*[3], wherein, the Constitution Bench of this Court, while

1. AIR (1965) SC 1107.
2. 1967 (3) SCR 557.
3. AIR (1968) SC 1232.

observing that guidance and control must necessarily be present while delegating a legislative function, discussed various forms of such guidance depending upon the facts of each delegation, and held that the form of guidance to be given in a particular case, depends on a consideration of the provisions of the particular Act in question including the nature of the body to which the function has been delegated. Lastly, reference was made to the case of *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. Vs. The Assistant Commissioner of Sales Tax & Ors.*[4], wherein the above mentioned principles were reiterated. According to the learned counsel, Section 4(3) of the Act merely provides for the conditions, subject to which a licence may be granted but does not contain any guidance or policy relating to fixation of the licence fee. Similarly, Rule 13(2) of the 2001 Rules confer power of inspection of the licensed race course and has nothing to do with the licence fee or its rates. Thus, the learned senior counsel asserted that in the present case, Section 11(2) of the Act confers unguided, unfettered and arbitrary power on the Government to fix the licence fee without a minute shred of guidance of any manner and hence is beyond the limits of permissible delegation and therefore, deserves to be struck down as unconstitutional.

9. Mr. Bagaria also submitted that in the absence of any element of fee, as no services were being provided to the appellant against the fee charged, licence fee cannot be demanded, in as much as it lacked any element of *quid pro quo*. Referring to the decisions of this Court in *The Delhi Cloth & General Mills Co. Ltd. Vs. The Chief Commissioner, Delhi & Ors.*[5]*; Kewal Krishan Puri Vs. State of Punjab*[6]; *Secunderabad Hyderabad Hotel Owners' Association & Ors. Vs. Hyderabad Municipal Corporation, Hyderabad & Anr.*[7];

4. (1974) 4 SCC 98.
5. (1970) 2 SCC 172.
6. (1980) 2 SCC 274.
7. (1999) 2 SCC 274.

A.P. Paper Mills Limited Vs. Government of A.P. & Anr[8]; *B.S.E. Brokers' Forum, Bombay & Ors. Vs. Securities And Exchange Board of India & Ors.*[9] and *Liberty Cinema case* (supra) learned counsel argued that even though *quid pro quo* may not be required if the fee is classified as regulatory fee, nevertheless there must be a broad co-relation between the fee levied and the expenses incurred for rendition of services. It was contended that when a question arises whether the levy is in the nature of a fee, the duties and obligations imposed on the inspecting staff and the nature of the work done by them has to be examined for the purpose of determining the rendering of the services, which would make the levy a fee.

10. *Per contra,* Mr. T.S. Doabia, learned senior counsel appearing on behalf of respondent nos.2 and 3, submitted that the Act does not suffer from the vice of excessive delegation as the scheme of the Act provides enough guidelines to fix the rate of licence fee. To buttress his argument, he relied upon the Preamble and the text of Section 4 of the Act as also Rule 13(2) of the 1985 Rules. Drawing support from *Liberty Cinema* (supra) and *Municipal Corporation of Delhi* (supra) learned counsel contended that the nature and extent of guidance is to be ascertained from the broad features and objects sought to be achieved by a particular statute and not on the touchstone of a rigid uniform rule. According to the learned counsel, Section 4(3) of the Act, relating to the conditions of licence, itself provides the parameters to be kept in view while fixing the licence fee and are thus, sufficient guidelines in the matter of fixation of such licence fee. Rebutting the submissions of the appellant that the levy cannot be demanded as there was no *quid pro quo* involved, learned senior counsel submitted that there is an inherent distinction between the fee for services rendered; i.e. compensatory fee and a license fee which is in the nature of a regulatory fee, where no *quid pro quo was*

8. (2000) 8 SCC 167.

9. (2001) 3 SCC 482.

necessary. In support, reliance was placed on the decisions of this Court in *Liberty Cinema (supra); Secunderabad Hyderabad Hotel Owners' Association* (supra) and *A.P. Paper Mills Ltd.* (supra) wherein it was held that a licence fee is regulatory when the activities for which a licence is granted, require to be regulated or controlled. The fee which is charged for regulation of such activity would be classifiable as a fee and not a tax, although no services are rendered. He thus, submitted that the present fee being a regulatory fee, charged for the purpose of monitoring the activities to ensure that the licencees comply with the terms and conditions of licence, does not necessarily have to satisfy the test of *quid pro quo* and hence is valid. Although it was never the case of the respondents before the High Court, yet Mr. Doabia endeavoured to submit, in the alternative, that the impugned impost could be justified as a tax.

11. Learned counsel also urged that the fact that the levy had been challenged after a long delay was by itself sufficient for the High Court to dismiss the writ petition.

12. Before addressing and evaluating the rival submissions on the first issue, it would be useful to first survey the decisions heavily relied upon by the learned counsel, wherein the question as to the limits of permissible delegation of legislative power by a legislature to an executive/another body has been examined *in extenso*.

13. *Liberty Cinema* (supra), on which heavy reliance was placed by Mr. Bagaria, related to a levy imposed on cinema houses under the Calcutta Municipal Act, 1951. The levy was quashed by a learned Single Judge on the grounds that : (i) the levy being in the nature of a licence fee and not a tax, did not pass the test of legality on account of there being no correlation between the amount charged from the theatre owners and the services rendered to them or the expenses incurred by the Municipality in regard to the issue of licences

and (ii) Section 548(2) of the said Act, which authorised the Corporation to levy a tax, is unconstitutional as suffering from the vice of excessive delegation as it laid down no principle; indicated no policy and afforded no guidance for determining the basis or the rate on which the tax was to be levied and is, therefore, void. Corporation's appeal before the Division Bench being unsuccessful, the matter reached this Court. By majority, Corporation's appeal was allowed and impost was upheld as a tax. However, while upholding the validity of levy, speaking for the majority, *Sarkar, J.* observed that when the power to fix rates of tax is left to another body, the legislature must provide guidance for such fixation. Nevertheless, the validity of the guidance cannot be tested by a rigid uniform rule and must depend on the object of the Act which delegated the power to fix the rate. Thus, it was held that the power to fix the rate of tax can be delegated but some guidance has to be specified in the Act.

14. A similar question arose in *Devi Das* (supra) where the Constitution Bench, while endorsing the opinion rendered in *Liberty Cinema* (supra), held that there can be no general principle that the doctrine of constitutional and statutory needs would always afford reasonable guidelines in the fixation of rates of taxation. Each statute has to be examined to find out whether there are guidelines therein which prevent delegation from being excessive. The Constitution Bench summarised the law on the subject of excessive delegation as follows:

> "The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any

> other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. *It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature.*"
>
> (Emphasis supplied by us)

15. Our attention was also invited to a seven Judge Bench decision in *Municipal Corporation of Delhi* (supra) where the majority again took the view that the legislature can delegate non essential legislative functions, but while delegating such functions, there must be a clear legislative policy which serves as guidance for the authority on which the function is delegated. As long as a legislative policy can be culled out with sufficient clarity or a standard is laid down, Courts should not interfere with the discretion that undoubtedly rests with the legislature in determining the extent of delegation necessary in a particular case. On a review of a number of decisions on the point, including *In re. Delhi Laws Act, 1912*[10]*, Liberty Cinema* (supra)

10. AIR 1951 SC 332.

and *Devi Das* (supra), Wanchoo C.J. (speaking for himself and Shelat, J.) observed that what guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal with including its preamble. It was also observed that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation. However, what form the guidance should take is again a matter which cannot be stated in general terms. It will depend upon the circumstances of each statute under consideration; in some cases guidance in broad general terms may be enough; in other cases more detailed guidance may be necessary. In the same decision, Shah J. (speaking for himself and Vaidialingam J.) after analyzing the cases on the point of delegation of legislative function by the Legislature, culled out the following principles:

> "(i) Under the Constitution the Legislature has plenary powers within its allotted field; (ii) Essential legislative function cannot be delegated by the Legislature, that is, there can be no abdication of legislative function or authority by complete effacement, or even partially in respect of a particular topic or matter entrusted by the Constitution to the Legislature; (iii) Power to make subsidiary or ancillary legislation may however be entrusted by the Legislature to another body of its choice, provided there is enunciation of policy, principles, or standards either expressly or by implication for the guidance of the delegate in that behalf. Entrustment of power without guidance amounts to excessive delegation of legislative authority; (iv) Mere authority to legislate on a particular topic does not confer authority to delegate its power to legislate on that topic to another body. The power conferred upon the Legislature on a topic is specifically entrusted to that body, and it is a necessary intendment

> of the constitutional provision which confers that power that it shall not be delegated without laying down principles, policy, standard or guidance to another body unless the Constitution expressly permits delegation; and (v) the taxing provisions are not exception to these rules."

16. From the conspectus of the views on the question of nature and extent of delegation of legislative functions by the Legislature, two broad principles emerge, viz. (i) that delegation of non essential legislative function of fixation of rate of imposts is a necessity to meet the multifarious demands of a welfare state, but while delegating such a function laying down of a clear legislative policy is pre-requisite and (ii) while delegating the power of fixation of rate of tax, there must be in existence, *inter-alia,* some guidance, control, safeguards and checks in the concerned Act. It is manifest that the question of application of the second principle will not arise unless the impost is a tax. Therefore, as long as the legislative policy is defined in clear terms, which provides guidance to the delegate, such delegation of a non essential legislative function is permissible. Hence, besides the general principle that while delegating a legislative function, there should be a clear legislative policy, these judgments, which were vociferously relied upon before us, will have no bearing unless the levy involved is tax.

17. Therefore, the pivotal question to be determined is the nature of the impost in the present case. The characteristics of a fee, as distinct from tax, were explained by this Court, as early as in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[11] (commonly referred to as the 'Shirur Mutt's Case'). The ratio of this decision has been consistently followed as locus classicus in subsequent decisions dealing with the concept of 'fee' and 'tax'. A Constitution Bench of this Court in *Hingir Rampur Coal Co. Ltd. Vs. State of Orissa*[12] was faced with the

11. AIR 1954 SC 282.

12. 1961 (2) SCR 537.

challenge of deciding upon the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952, levying cess on the colliery of the petitioner therein. The Bench explained different features of a 'tax', a 'fee' and 'cess' in the following passage:

> "The neat and terse definition of Tax which has been given by Latham, C.J., in *Matthews v. Chicory Marketing Board* (1938) 60 C.L.R. 263 is often cited as a classic on this subject. "A tax", said Latham, C.J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of *quid pro quo* between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee.."

It was further held that,

> *"It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in general.* If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefitting the specified class or area the State as a whole may ultimately and indirectly be benefitted would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. *Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy…."*

(Emphasis supplied by us)

18. Recently in *State of W.B. Vs. Kesoram Industries Ltd. & Ors.*[13], a Constitution Bench of this Court, relying upon the decision in *Hingir Rampur Coal Co. Ltd* (supra), explained the distinction between the terms 'tax' and 'fee' in the following words: (SCC HN)

> "The term cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the persons from whom the fee has been collected. *Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged…."*

(Emphasis supplied by us)

13. (2004) 10 SCC 201.

19. In the light of the tests laid down in *Hingir Rampur* (supra) and followed in *Kesoram Industries* (supra), it is manifest that the true test to determine the character of a levy, delineating 'tax' from 'fee' is the primary object of the levy and the essential purpose intended to be achieved. In the instant case, it is plain from the scheme of the Act that its sole aim is regulation, control and management of horse-racing. Such a regulation is necessary in public interest to control the act of betting and wagering as well as to promote the sport in the Indian context. To achieve this purpose, licences are issued subject to compliance with the conditions laid down therein, which *inter alia* include maintenance of accounts and furnishing of periodical returns; amount of stakes which may be allotted for different kinds of horses; the measures to be taken for the training of the persons to become jockeys, to encourage Indian bred horses and Indian jockeys; the inclusion and association of such persons as the government may nominate as stewards or members in the conduct and management of the horse-racing. The violation of the conditions of the licence or the Act is penalised under the Act besides a provision for cognizance by a court not inferior to a Metropolitan Magistrate. To ensure compliance with these conditions, the 1985 Rules empower the District Officer or an Entertainment Tax Officer to conduct inspection of the race club at reasonable times. Thus, the nature of the impost is not merely compulsory exaction of money to augment the revenue of the State but its true object is to regulate, control, manage and encourage the sport of horse racing as is distinctly spelled out in the Act and the 1985 Rules. For the purpose of enforcement, wide powers are conferred on various authorities to enable them to supervise, regulate and monitor the activities relating to the race course with a view to secure proper enforcement of the provisions. Therefore, by applying the principles laid down in the aforesaid decisions, it is clear that the said levy is a 'fee' and not 'tax'.

20. The appellants have also challenged the nature of the impost, as according to them it is a tax imposed under the guise

of a fee, since there is no *quid pro quo* or any broad co-relation between the impost and the services rendered in return, rather, there is no service in return at all. While it is true that '*quid pro quo'* is one of the determining factors that sets apart 'tax' from a 'fee' but the concept of *quid pro quo* requires to be understood in its proper perspective. It can be traced back to the decision of this Court in *Sreenivasa General Traders and Ors. Vs. State of Andhra Pradesh and Ors.*[14], wherein a Bench of three learned Judges, analysed, in great detail, the principles culled out in *Kewal Krishan Puri* (supra). Opining that the observation made in the said decision, seeking to quantify the extent of correlation between the amount of fee collected and the cost of rendition of service, namely: 'At least a good and substantial portion of the amount collected on account of fees, may be in neighbourhood of two-thirds or three-fourths, must be shown with reasonable certainty as being spent for rendering services in the market to the payer of fee' appeared to be an obiter, the Court echoed the following views insofar as the actual *quid pro quo* between the services rendered and payer of the fee was concerned:

> "**31.** The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of the State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specified area of class; it may be of no consequence that the State may ultimately and

14. (1983) 4 SC 353.

indirectly be benefitted by it. *The power of any legislature to levy a fee is conditioned by the fact that it must be "by and large" a quid pro quo for the services rendered. However, correlationship between the levy and the services rendered (sic or) expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the Fee and the services rendered.*

32. There is no generic difference between a tax and a fee. Both are compulsory exactions of money by public authorities. Compulsion lies in the fact that payment is enforceable by law against a person inspite of his unwillingness or want of consent. A levy in the nature of fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. *It is now increasingly realized that merely because the collections for the services rendered or the grant of a privilege or licence are taken to the consolidated fund of the State and not separately appropriated towards the expenditure for rendering the service is not by itself decisive.* Presumably, the attention of the Court in *Shirur Mutt case* (AIR 1954 SC 282: 1954 SCR 1005) was not drawn to Article 226 of the Constitution. *The Constitution nowhere contemplates it to be an essential element of fee that it should be credited to a separate fund and not to the consolidated fund. It is also increasingly realised that the element of quid pro quo in the strict sense is not always a sine qua non for a fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax.*

* * *

7. *It is not always possible to work out with mathematical precision the amount of fee required for the services to be rendered each year and to collect only just that amount which is sufficient for meeting the expenditure in that year.* In some years, the income of a market committee by way of market fee and licence fee may exceed the expenditure and in another year when the development works are in progress for providing modern infrastructure facilities, the expenditure may be far in excess of the income. It is wrong to take only one particular year or a few years into consideration to decide whether the fee is commensurate with the services rendered. An overall picture has to be taken in dealing with the question whether there is quid pro quo i.e. there is correlation between the increase in the rate of fee from 50 paise to rupee one and the services rendered….."

21. It is pertinent to note that in *Liberty Cinema* (supra), the Court had identified the existence of two distinct kinds of fee and traced its presence to the Constitution itself. It was observed that in our Constitution, fee for licence and fee for services rendered are contemplated as different kinds of levy. The former is not intended to be a fee for services rendered. This is apparent from a bare reading of Articles 110(2) and 199(2) of the Constitution, where both the expressions are used, indicating thereby that they are not the same. Quoting *Shannon Vs. Lower Mainland Dairy Products Board*[15], with approval, it was observed thus :-

> "if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province or for both purposes…It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue."

15. AIR 1939 PC 36.

22. The same principle was reiterated in *Secunderabad Hyderabad Hotels Owners' Association case* (*supra*) where the existence of two types of fee and the distinction between them has been highlighted as follows:

> "9. It is, by now, well settled that a licence fee may be either regulatory or compensatory. When a fee is charged for rendering specific services, a certain element of quid pro quo must be there between the service rendered and the fee charged so that the licence fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. *Licence fee can also be regulatory when the activities for which a licence is given require to be regulated or controlled. The fee which is charged for regulation for such activity would be validly classifiable as a fee and not a tax although no service is rendered. An element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive."*
>
> (Emphasis supplied by us)

23. Dealing with such regulatory fees, this Court in *Vam Organic Chemicals Ltd. & Anr. Vs. State of U.P. & Ors*[16]*.*; observed that in case of a regulatory fee, like the licence fee, no *quid pro quo* is necessary, but such fee should not be excessive. The same distinction between regulatory and compensatory fees has been highlighted in *P. Kannadasan Vs. State of T.N.*[17]; *State of Tripura Vs. Sudhir Ranjan Nath*[18]; *B.S.E. Brokers' Forum case* (*supra*) and followed in several later decisions.

24. In *A.P. Paper Mills Ltd.* (supra), a bench of three

16. (1997) 2 SCC 715.

17. (1996) 5 SCC 670, para 36.

18. (1997) 3 SCC 665, 673.

learned Judges of this Court was called upon to examine the validity of the revision of licence fee under the Andhra Pradesh Factories Rules, 1950. The levy of licence fee was challenged *inter-alia* on the grounds that the fee imposed being in fact a tax, the State had no power to levy the same; the Rules or the Factories Act, 1948, did not provide any criteria or guidelines for fixation of licence fee and that the State had no power to impose or enhance the licence fee for any alleged services rendered or proposed to be rendered under other legislations other than the concerned Act, as the power is delegated under that particular Act only. On an analysis of the provisions of that Act and the Rules made thereunder, the Court came to the conclusion that the licence fee in this case was a regulatory fee and not a fee for any special services rendered; there was no mention of any special service to be rendered to the payer of the licence fee in the provisions and the purpose of the licence was to enable the authorities to supervise, regulate and monitor the activities relating to factories with a view to secure proper enforcement of the provisions. It was observed that the nature of the provisions made it clear that for proper enforcement of the statutory provisions, persons possessing considerable experience and expertise were required. On the question whether the element of *quid pro quo*, as it is understood in common legal parlance, was applicable to a regulatory fee, as in that case, speaking for the bench, *D.P. Mohapatra, J.,* concluded thus :

> "**32.** From the conspectus of the views taken in the decided cases noted above it is clear that the impugned licence fee is regulatory in character. Therefore, stricto sensu the element of quid pro quo does not apply in the case. The question to be considered is if there is a reasonable correlation between the levy of the licence fee and the purpose for which the provisions of the Act and the Rules have been enacted/framed. As noted earlier, the High Court has answered the question in the affirmative. We have carefully examined the provisions of the Act and the

Rules and also the pleadings of the parties. We find that the High Court has given cogent and valid reasons for the findings recorded by it and the said findings do not suffer from any serious illegality. It is our considered view that the licence fee has correlation with the purpose for which the statute and the rules have been enacted."

25. Thus, it is clear that a licence fee imposed for regulatory purposes is not conditioned by the fact that there must be a *quid pro quo* for the services rendered, but that, such licence fee must be reasonable and not excessive. It would again not be possible to work out with arithmetical equivalence the amount of fee which could be said to be reasonable or otherwise. If there is a broad correlation between the expenditure which the State incurs and the fees charged, the fees could be sustained as reasonable.

26. As noted above, in the present case, the object of the Act, as synthesized from its provisions, is to regulate, monitor, control and encourage the sport of horse-racing. For this purpose, licences are issued subject to certain conditions. The compliance with the licence conditions is inevitable for renewal of the licences as well as significant to avoid any penalty under the Act. To ensure such compliance, as aforesaid, district officers/ entertainment tax officers are entrusted with the duty of inspection. The nature of inspection enjoined by the Act is not of a general nature but requires expertise and training and also constant vigil on the activities of the race course. The expenses incurred in carrying out such regular inspections have to be considerable. Hence, in our opinion, the licence fee imposed in the present case is a regulatory fee and need not necessarily entail rendition of specific services in return but at the same time should not be excessive. In any case, the appellant has not challenged the amount of the levy as unreasonable and expropriatory or excessive. The argument on behalf of the appellant that inspection does not constitute a service rendered in lieu of the fee charged, based upon the

observations in the *Liberty Cinema case* (supra) is equally fallacious. In *Delhi Cloth & General Mills Co. Ltd. Vs. The Chief Commissioner, Delhi*[19] while holding that the levy involved in that case was a fee as opposed to tax, this Court held as follows:

"….In each case where the question arises whether the levy is in the nature of a fee the entire scheme of the statutory provisions, the duties and obligations imposed on the inspecting staff and the nature of work done by them will have to be examined for the purpose of determining the rendering of the services which would make the levy a fee. It is quite apparent that in the *Liberty Cinema case* it was found that no service of any kind was being or could be rendered and for that reason the levy was held to be a tax and not a fee…."

The observations made in the *Delhi Cloth and General Mills* (supra) apply squarely to the instant case. The scheme of the Act; its object as elucidated in its provisions and Rules made therein; nature of conditions imposed in the licences; inspection to ensure its compliance and non-renewal of the licence as well as penalty in case of contravention of the licence conditions, make the Act fall in the category of imposts where contributions are required to be made for the purpose of maintaining an Authority and the staff for supervising and controlling a public activity viz. the horse racing. Besides, the presence of a large institution like the race course enjoins additional burden on the civic authorities to maintain and develop the surrounding area for the convenience of the public at large. This Court echoed a similar view in the *Secunderabad Hyderabad Hotels Owners' Association case* (supra) as follows:

"(8)….Undoubtedly, the Corporation has the general duty to provide scavenging and sanitation services including

19. (1969) 3 SCC 925.

removal of garbage and maintaining hygienic conditions in the city for the benefit of all persons living in the city. Nevertheless, hotels and eating houses by reason of the nature of their occupation, do impose an additional burden on the municipal corporation in discharging its duties of lifting of garbage, maintenance of hygiene and sanitation since a large number of persons use the premises either for lodging or for eating; the food is prepared in large quantity unlike individual households and the resulting garbage is also much more than what would otherwise be in the case of individual households….."

27. Thus, the licence fee levied in the present case, being regulatory in nature, the Government need not render some defined or specific services in return as long as the fee satisfies the limitation of being reasonable. We may reiterate here that the amount of licence fee charged from the appellant has not been challenged as being excessive. Thus, in light of the above observations relating to inspection and other provisions of the Act, we hold that the licence fee charged has a broad co-relation with the object and purpose for which the Act and the 2001 Rules have been enacted.

28. As noted above, challenge to the constitutionality of Section 11(2) of the Act was based on the premise that no guidance, check, control or safeguard is specified in the Act. This principle, as we have distinguished above, applies only to the cases of delegation of the function of fixation of rate of tax and not a fee. As we have held that the levy involved in the present case is a fee and not tax, the ratio of the above-mentioned cases, relied upon by the learned Senior Counsel, will have no application in determining the question before us. The scheme of the Act clearly spells out the object, policy and the intention with which it has been enacted and therefore, the Act does not warrant any interference as being an instance of excessive delegation.

29. Before we part with the judgment, it is pertinent to note

that the challenge to the validity of Section 11(2) of the Act was raised after almost 15 years of its coming into force. The appellant, since the commencement of the Act, had been regularly paying the licence fee and the present challenge was made only when quantum of the licence fee was increased by the Government on account of non revision of the same since the commencement of the Act. Evidently, the inflation during this period was taken as the criterion for increasing the quantum of the fee. It is a reasonable increase keeping in view the fact that the expenditure incurred by the Government in carrying out the regulatory activities for attaining the object of the Act would have proportionately increased. It is also relevant to note that an institution of the size of the Race Course should not cloak their objection to an increase in the rate of licence fee and present them as a challenge to the constitutionality of the charging section.

30. In view of the aforegoing discussion, we are in agreement with the High Court that Section 11(2) of the Act as well as 2001 Rules do not suffer from any legal infirmity. This appeal, being bereft of any merit, is dismissed accordingly, with costs, quantified at Rs.50,000/-.

B.B.B. Appeal dismissed.

UNION OF INDIA
v.
IBRAHIM UDDIN & ANR.
(Civil Appeal No. 1374 of 2008)

JULY 17, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Code of Civil Procedure, 1908:

Title suit – Burden of proof – Suit for declaration of title of ownership of property against Union of India – Suit dismissed by trial court – Order set aside by District Judge in first appeal on the finding that the defendant-Union of India failed to prove its title over the suit land – Second appeal dismissed by High Court – Held: The first appellate court as well as the High Court committed grave error in shifting the burden of proof on the defendant-Union of India, though it was exclusively on the plaintiff-respondent no.1 to prove his case, which the plaintiff-respondent no.1 failed to do – The documents produced by the Union of India were not properly appreciated by the first appellate court and the High Court – The appellate courts decided the appeals in unwarranted manner in complete derogation of the statutory requirements and in flagrant violation of the provisions of CPC and the Evidence Act – Decree of the trial court restored.

Order XII – Admission – Evidentiary value of – Held: Admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous – Even if the admission is not conclusive it may operate as an estoppel – Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff.

Order XLI, Rule 27 – Additional evidence at the appellate stage – Admissibility of – Recording of reasons, if required – Held: The matter is entirely within the discretion of the appellate court – The discretion is to be exercised by the court judicially taking into consideration the relevance of the documents/evidence in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court – In absence of satisfactory reasons for non-production of the evidence in the trial court, additional evidence should not be admitted in appeal – Whenever the appellate Court admits additional evidence it should record its reasons for doing so – The omission to record the reasons must be treated as a serious defect – But this provision is only directory and not mandatory, if reception of such evidence can be justified under the rule.

Order XLI, Rule 27 – Application for production of additional evidence in appellate court – Stage of consideration – Held: Application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved – Such an application, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal – In case, such application has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/ inexecutable and is liable to be ignored.

s.100 – Interference in second appeal – Scope – Substantial question of law – Held: Generally, a Second

Appeal does not lie on question of facts or of law – However, there may be exceptional circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of s.100 CPC – In second appeal, the court frames the substantial question of law at the time of admission of the appeal and is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the court comes to the conclusion that the question(s) framed could not be the substantial question(s) of law – There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal.

Specific Relief Act, 1963 – s.34 – Suit seeking relief of declaration of title without seeking consequential relief – Maintainability – Held: Not maintainable – Suit barred by the proviso to s.34 of the Act as the plaintiff was not in possession and yet he did not ask for restoration of possession or any other consequential relief.

Evidence Act, 1872 – s.114(g) – Presumption under – When Court may draw adverse inference u/s.114(g) – Relevant factors to be taken into consideration – Held: The issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side – The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. under Order XI CPC – In case one party has asked the court to direct the other side to produce the document and other side failed to comply with the court's order, the court may be justified in drawing the adverse inference – All the pros and cons must be examined before the adverse inference is drawn – Code of Civil Procedure, 1908 – Order XI.

Respondent no.1 filed Original Suit in the Court of Civil Judge, Agra on 25.7.1995, seeking a decree for declaration that he was the owner of the suit property/ land, making averments that the suit land originally had been with the Maratha Government (Scindia-Gwalior); that the ancestors of the plaintiff having close association with the Maratha Government, were made a grant in respect of the suit land in the year 1800 and later, the land was partitioned between the ancestors of the plaintiff in the year 1819; that subsequently, the plaintiff/ respondent no.1 being the only heir (descendant) became the absolute owner of the land; that the suit land was given on rent to the State authorities in Agra by executing a rent note for a sum of Rs.22/- per month and that since the Union of India claimed title over the suit land illegally and in an unauthorised manner on 22.2.1993 and afterwards, the cause of action arose to approach the court. The trial court dismissed the suit.

Aggrieved, respondent no.1 preferred first appeal before the District Judge, Agra. During pendency of the appeal, he preferred an application under Order XLI Rule 27 of CPC for adducing additional evidence, i.e., Will executed by his maternal grandfather dated 1.3.1929 in his favour bequeathing the suit property. The first appellate court allowed the said application and thereafter also allowed the first appeal. The judgment of the first appellate court was upheld in second appeal by the High Court.

In the instant appeal, the appellants submitted that there was no documentary evidence or trustworthy oral evidence that the suit property had been given to the fore-fathers of the plaintiff/respondent no.1 by the Maratha Government in the year 1800 or that there was partition among the fore-fathers of plaintiff/respondent no.1 in the year 1819; that the first appellate Court had no occasion

to decide the application under Order XLI Rule 27 CPC prior to the hearing of the appeal itself; that more so, as there was no reference to the Will in the plaint or First Appeal, it could not be taken on record for want of pleadings in this respect; that taking the Will on record did not mean that either the Will or its contents stood proved; that none had proved the said Will and thus, it could not be relied upon and if the Will was ignored, there was no evidence on record to prove the case of the plaintiff/respondent no.1; that the High Court had framed 4 substantial questions of law at the time of admission of the appeal and 2 additional substantial questions at a later stage but did not answer either of them nor recorded any finding that none of them was, in fact, a substantial question of law; and that merely because the Union of India did not produce the revenue record before the trial Court, the first appellate Court could not have drawn adverse inference under Section 114(g) of the Evidence Act, 1872.

Allowing the appeal, the Court

HELD:

<u>Presumption under Section 114(g) of the Evidence Act</u> :

1.1. Generally, it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114(g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. [Para 6] [61-E-F]

1.2. The issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by

deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The court cannot loose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI CPC. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and other side failed to comply with the court's order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary. [Para 16] [66-A-E]

1.3. In the instant case, the plaintiff/respondent no.1 did not submit any interrogatory statement or an application for making inspection or for production of the document as provided under Order XI CPC. In such a fact-situation, it was not permissible for the first appellate Court or the High Court to draw any adverse inference against the appellant/defendant no.1. [Para 17] [66-F-H]

Kamma Otukunta Ram Naidu v. Chereddy Pedda Subba Reddy & Ors. **AIR 2003 SC 3342;** *Mohinder Kaur v. Kusam Anand* **(2000) 4 SCC 214: 2000 (2) SCR 594;** *Takhaji Hiraji v. Thakore Kubersing Chamansing & Ors.* **AIR 2001 SC 2328;** *Municipal Corporation, Faridabad v. Siri Niwas* **AIR 2004 SC 4681: 2004 (4) Suppl. SCR 145;** *Mahant Shri*

Srinivas Ramanuj Das v. Surjanarayan Das & Anr. **AIR 1967 SC 256: 1966 SCR 436;** *Ramrati Kuer v. Dwarika Prasad Singh & Ors.* **AIR 1967 SC 1134: 1967 SCR 153;** *Ravi Yashwant Bhoir v. District Collector, Raigad & Ors.* **AIR 2012 SC 1339:** *Smt. Indira Kaur & Ors. v. Shri Sheo Lal Kapoor* **AIR 1988 SC 1074;** *Mahendra L. Jain & Ors. v. Indore Development Authority & Ors.* **(2005) 1 SCC 639: 2004 (6) Suppl. SCR 242;** *Manager, R.B.I., Bangalore v. S. Mani & Ors.* **AIR 2005 SC 2179: 2005 (2) SCR 797;** *A. Jayachandra v. Aneel Kaur* **AIR 2005 SC 534: 2004 (6) Suppl. SCR 599;** *R.M. Yellatti v. Assistant Executive Engineer* **AIR 2006 SC 355: 2005 (4) Suppl. SCR 1010 and** *Pratap Singh & Anr. v. State of M.P.* **AIR 2006 SC 514: 2005 (5) Suppl. SCR 439 – relied on.**

Mt. Bilas Kunwar v. Desraj Ranjit Singh **AIR 1915 PC 96;** *Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi* **AIR 1917 PC 6;** *Hiralal & Ors. v. Badkulal & Ors.* ***AIR 1953 SC 225: 1953 SCR*** **758;** *A. Raghavamma & Anr. v. A.Chenchamma & Anr.* **AIR 1964 SC 136: 1964 SCR 933;** *The Union of India v. Mahadeolal Prabhu Dayal* **AIR 1965 SC 1755: 1965 SCR 145;** *Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors.* **AIR 1968 SC 1413: 1968 SCR 862;** *M/s. Bharat Heavy Electrical Ltd. v. State of U.P. & Ors.* **AIR 2003 SC 3024: 2003 (1) Suppl. SCR 625;** *Musauddin Ahmed v. State of Assam* **AIR 2010 SC 3813 and** *Khatri Hotels Pvt. Ltd. & Anr. v. Union of India & Anr.* **(2011) 9 SCC 126 – referred to.**

Admissions:

2.1. Order XII CPC deals with admission of the case, admission of the documents and judgment on admissions. Admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may

operate as an estoppel. Law requires that an opportunity be given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff. [Paras 19, 23] [67-E; 68-G-H; 69-A]

2.2. In the instant case, the first appellate Court held that not filing any document in rebuttal of the Will dated 1.3.1929 amounts to admission of the said Will as well as its contents. It is evident that the first appellate court misdirected itself so far as the issue of admission is concerned. The finding recorded by it that appellant/ defendant No.1 failed to produce any document in rebuttal of the Will is not only wrong but preposterous. [Para 24] [69-B-G]

Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi & Ors. **AIR 1960 SC 100: 1960 SCR 773;** *Basant Singh v. Janki Singh & Ors.,* **AIR 1967 SC 341: 1967 SCR 1;** *Sita Ram Bhau Patil v. Ramchandra Nago Patil* **AIR 1977 SC 1712: 1977 (2) SCR 671;** *Sushil Kumar v. Rakesh Kumar*, **AIR 2004 SC 230: 2003 (4) Suppl. SCR 802;** *United Indian Insurance Co Ltd. v. Samir Chandra Choudhary* **(2005) 5 SCC 784: 2005 (1) Suppl. SCR 613;** *Charanjit Lal Mehra & Ors v. Kamal Saroj Mahajan & Anr.* **AIR 2005 SC 2765: 2005 (2) SCR 661;** *Udham Singh v. Ram Singh & Anr.* **(2007) 15 SCC 529;** *Nagubai Ammal & Ors. v. B.Shama Rao & Ors.* **AIR 1956 SC 593: 1956 SCR 451 and** *L.I.C of India & Anr v. Ram Pal Singh Bisen* **(2010) 4 SCC 491: 2010 (3) SCR 438 – relied on.**

Slatterie v. Pooley, **(1840) 6 M & W 664 – referred to.**

Order XLI Rule 27 C.P.C.

3.1. The general principle is that the Appellate Court

should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. [Para 25] [69-H; 70-A-C]

3.2. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule. [Paras 28 and 31] [71-B-D, H; 72-B-C]

3.3. The application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory

provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. [Para 37] [74-E-H; 75-A]

K. Venkataramiah v. A. Seetharama Reddy & Ors. **AIR 1963 SC 1526: 1964 SCR 35;** *The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors.* **AIR 1965 SC 1008: 1965 SCR 542;** *Soonda Ram & Anr. v. Rameshwaralal & Anr.* **AIR 1975 SC 479: 1975 (3) SCR 146;** *Syed Abdul Khader v. Rami Reddy & Ors.* **AIR 1979 SC 553;** *Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co.* **AIR 1978 SC 798: 1978 (3) SCR 571;** *State of U.P. v. Manbodhan Lal Srivastava* **AIR 1957 SC 912: 1958 SCR 533;** *S. Rajagopal v. C.M. Armugam & Ors.* **AIR 1969 SC 101: 1969 SCR 254;** *State of Orissa v. Dhaniram Luhar* **AIR 2004 SC 1794: 2004 (2) SCR 68;** *State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi* **AIR 2008 SC 2026: 2008 (4) SCR 804;** *The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors.* **AIR 2010 SC 1285: 2010 (3) SCR 190;** *Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors.* **(2010) 13 SCC 336: 2010 (13) SCR 621;** *The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc.* **AIR 1976 SC 2403: 1977 (1) SCR 178 and** *Basayya I. Mathad v. Rudrayya S. Mathad and Ors.* **AIR 2008 SC 1108: 2008 (1) SCR 1155– relied on.**

Order XLI Rule 27 C.P.C. – Stage of Consideration :

4.1. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/ bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. [Para 38] [75-B-E]

4.2. An application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored. In the instant case, the application under Order XLI Rule

27 CPC was filed on 6.4.1998 and it was allowed on 28.4.1999 though the first appeal was heard and disposed of on 15.10.1999 and thus, the order dated 28.4.1999 is just to be ignored. [Para 41] [76-H; 77-A-B]

4.3. The High Court while admitting the appeal had framed 4 substantial questions of law, but admittedly did not answer any of them, though had the question Nos. 2, 3 and 4 been decided, the result would have been otherwise. [Para 42] [77-D, 78-B]

Arjan Singh v. Kartar Singh & Ors. **AIR 1951 SC 193: 1951 SCR 258 and** *Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors.* **AIR 1976 SC 1053: 1976 (3) SCR 620 – relied on.**

Parsotim Thakur & Ors. v. Lal Mohar Thakur & Ors. **AIR 1931 PC 143 and** *Indirajit Pratab Sahi v. Amar Singh* **AIR 1928 P.C. 128 – referred to.**

Section 34 of the Specific Relief Act, 1963 :

5.1. Section 34 of the Specific Relief Act, 1963 provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so. [Para 43] [78-C-D]

5.2. It is not permissible to claim the relief of declaration without seeking consequential relief. In the instant case, suit for declaration of title of ownership had been filed though, the plaintiff/respondent no. 1 was admittedly not in possession of the suit property. Thus, the suit was barred by the provision of Section 34 of the Specific Relief Act and, therefore, ought to have been dismissed solely on this ground. The High Court though

framed a substantial question on this point but for unknown reasons did not consider it proper to decide the same. [Para 46] [78-G-H, 79-A-B]

Ram Saran & Anr. v. Smt. Ganga Devi **AIR 1972 SC 2685: 1973 (2) SCC 60;** *Vinay Krishna v. Keshav Chandra & Anr.* **AIR 1993 SC 957 and** *Gian Kaur v. Raghubir Singh* **(2011) 4 SCC 567: 2011 (2) SCR 486 – relied on.**

Section 100 CPC :

6. Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a Second Appeal does not lie on question of facts or of law. However, there may be exceptional circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100 CPC. It may be necessary to do so for the reason that after all the purpose of the establishment of courts of justice is to render justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal the court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the court comes to the conclusion that the question(s) framed could not be the substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal. In the instant case, none of the substantial questions framed by the High Court had been answered. [Paras 47, 57 and 58] [79-C, 83-E-H, 84-A]

State Bank of India & Ors. v. S.N. Goyal **AIR 2008 SC 2594: 2008 (7) SCR 631;** *Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd.* **AIR 1962 SC 1314: 1962 Suppl. SCR 549;** *Vijay Kumar Talwar v.*

Commissioner of Income Tax, New Delhi **(2011) 1 SCC 673: 2010 (14) SCR 499;** *Rajeshwari v. Puran Indoria* **(2005) 7 SCC 60: 2005 (2) Suppl. SCR 1016;** *Jagdish Singh v. Nathu Singh,* **AIR 1992 SC 1604: 1991 (2) Suppl. SCR 567;** *Smt. Prativa Devi (Smt.) v. T.V. Krishnan* **(1996) 5 SCC 353:** *Satya Gupta (Smt.) @ Madhu Gupta v. Brijesh Kumar* **(1998) 6 SCC 423: 1998 (3) SCR 1183;** *Ragavendra Kumar v. Firm Prem Machinary & Co.* **AIR 2000 SC 534: 2000 (1) SCR 77;** *Molar Mal (dead) through Lrs. v. M/s. Kay Iron Works Pvt. Ltd.* **AIR 2000 SC 1261: 2000 (4) SCC 285;** *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.* **AIR 2010 SC 2685: 2010 (7) SCR 154;** *Dinesh Kumar v. Yusuf Ali* **(2010) 12 SCC 740: 2010 (7) SCR 222;** *Jai Singh v. Shakuntala* **AIR 2002 SC 1428: 2002 (2) SCR 431;** *Kashmir Singh v. Harnam Singh & Anr.* **AIR 2008 SC 1749: 2008 (3) SCR 763 and** *Mysore State Road Transport Corporation v. Mirja Khasim Ali Beg & Anr.* **AIR 1977 SC 747: 1977 (2) SCR 282 – relied on.**

Gadakh Yashwantrao Kankarrao v. E.V. alias Balasaheb Vikhe Patil & ors. **AIR 1994 SC 678: 1994 (1) SCC 682;** *Smt. Bibhabati Devi v. Ramendra Narayan Roy & Ors.* **AIR 1947 PC 19;** *Suwalal Chhogalal v. Commissioner of Income Tax* **(1949) 17 ITR 269;** *Oriental Investment Company Ltd. v. Commissioner of Income Tax, Bombay* **AIR 1957 SC 852: 1958 SCR 49 and** *Sree Meenakshi Mills Ltd., Madurai v. Commissioner of Income Tax, Madras* **AIR 1957 SC 49: 1956 SCR 691 – referred to.**

7.1. In the instant case, much reliance was placed on the Will which was liable to be ignored. Even otherwise, the Will could not be relied upon for want of pleadings. Relief not founded on the pleadings cannot be granted. [Paras 58 and 62] [83-H; 84-A; 86-F]

7.2. There is nothing on record to show that Maratha Government had made a gift to the ancestors of the plaintiff. The claim of the plaintiff to get a title by virtue of

the Will cannot be taken note of being not based on pleadings. Even this Will is dated 1.3.1929, affidavits filed by the plaintiff/respondent no.1 before this Court reveal that on 26.3.2012 he was 80 years of age. The date of Will is 1.3.1929. So, it appears that the Will had been executed prior to the birth of the plaintiff/respondent no.1. In such a fact-situation, it could not have been taken into consideration without proper scrutiny of facts and, that too, without any pleading. In the plaint, the plaintiff for the reasons, best known to him, did not even make reference to the Will. In absence of any factual foundation of the case, based on Will, the first appellate Court committed a grave error taking into consideration the said Will. More so, the Will had not been proved as required under Section 68 of the Evidence Act. [Para 63] [87-B-E]

7.3. The High Court had placed a very heavy reliance on the rent note allegedly executed by the fore-fathers of the plaintiff/ respondent no.1, however, the said rent note does not provide any description of the property nor does it bear any date, so it cannot be determined as on what date it was executed; what was the duration of the lease; in whose favour the lease had been executed; and what was the lease rent because it simply mentions that the rent to be Rs.22/-. It is not evident whether it was a rent for a month, or a year or for a total indefinite period. The rent note does not provide any period at all. In fact, such a vague document could not be linked in the circumstances proving the title. [Para 64] [87-F; 88-B-C]

7.4. The appellant/defendant No.1 produced the certified copies of the Extract from General Land Register prepared on 15.3.1948 in support of its case and denying title of the plaintiff/respondent No.1. The High Court considered the said entries and rejected the same on the ground that the partition among the ancestors of the plaintiff/respondent No.1 had taken place prior to

enactment of the Cantonment Land Administration Rules, 1925, though there is nothing on record to prove the said partition. More so, the partition made among the ancestors of plaintiff/respondent No.1 in 1819 would not be a conclusive factor to determine the title of ownership in favour of the plaintiff/respondent No.1. The High Court dealt with the issue in an unwarranted manner. The General Land Register and other documents maintained by the Cantonment Board under the Cantonment Act, 1924 and the Rules made thereunder are public documents and the certified copies of the same are admissible in evidence in view of the provisions of Section 65 read with Section 74 of the Evidence Act. The entries made in General Land Register maintained under Cantonment Land Administration Rules is conclusive evidence of title. [Paras 65, 66] [88-D; 89-B-C, F-G]

7.5. The appellate courts dealt with the case in an unwarranted manner giving a complete go-by to the procedure prescribed by law. The appellate courts examined the title of government instead of the plaintiff/ respondent no.1. Such a course was not warranted. The title of government cannot be disputed. In any event possession of government for decades is not disputed. The plaintiff shifted the case from time to time but failed to prove his title. [Paras 67 and 68] [90-A-C]

Kalyan Singh Chouhan v. C.P. Joshi **AIR 2011 SC 1127: 2011 (2) SCR 216;** *Bachhaj Nahar v. Nilima Mandal & Ors.* **AIR 2009 SC 1103: 2008 (14) SCR 621;** *Chief Executive Officer v. Surendra Kumar Vakil* **AIR 1999 SC 2294: 1999 (2) SCR 118 and *Union of India & Ors. v. Kamla Verma* (2010) 13 SCC 511 – relied on.**

Messrs. Trojan & Co. v. RM.N.N. Nagappa Chettiar **AIR 1953 SC 235: 1953 SCR 780;** *Om Prakash Gupta v. Ranbir B. Goyal* **AIR 2002 SC 665: 2002 (1) SCR 359;** *Ishwar Dutt v. Land Acquisition Collector & Anr.* **AIR 2005 SC 3165: 2005**

(1) Suppl. SCR 903 and *State of Maharashtra v. M/s. Hindustan Construction Company Ltd.* **AIR 2010 SC 1299: 2010 (4) SCR 46 – referred to.**

8.1. In conclusion it is held as follows: (i) The first appellate court as well as the High Court committed grave error in shifting the burden of proof on the Union of India, appellant/defendant No.1, though it could have been exclusively on the plaintiff/respondent No.1 to prove his case. (ii) There is nothing on record to prove the grant/ gift by the Maratha Government in favour of ancestors of plaintiff/respondent No.1 in the year 1800. (iii)Plaintiff/ Respondent No.1 miserably failed to prove the pedigree produced by him. (iv) The alleged partition in the year 1819 among the ancestors of plaintiff/respondent No.1 even if had taken place, cannot be a proof of title of the plaintiff/respondent No.1 over the suit property as the pedigree has not been proved. Presumption under Section 90 of the Evidence Act in respect of 30 years' old document coming from proper custody relates to the signature, execution and attestation of a document i.e. to its genuineness but it does not give rise to presumption of correctness of every statement contained in it. The contents of the document are true or it had been acted upon have to be proved like any other fact. More so, in case the Will is ignored, there is nothing on record to show as how the plaintiff/respondent no. 1 could claim the title. (v) The rent note produced by the appellant/ defendant No.1 before the court below does not prove anything in favour of the plaintiff/respondent. The same being a vague document is incapable of furnishing any information and, thus, is liable to be rejected. The said document does not make it clear as who has executed it and in whose favour the same stood executed. It does not bear any date as it cannot be ascertained when it was executed. The lease deed cannot be executed without the signature/thumb impression of the lessee. The said lease

does not contain any signature/thumb impression of any lessee and also the tenure of the lease has not been mentioned therein. The rent has been mentioned as Rs.22/- without giving any detail as to whether it was per day, fortnightly, monthly, quarterly or yearly or for ever. More so, there is no reference to the said rent note in the pleadings contained in the plaint, therefore, it is just to be ignored. (vi) Had there been any Will in existence and not available with the plaintiff/respondent No.1 for any reason whatsoever at the time of institution of the suit, the plaintiff/respondent No.1 could have definitely mentioned that Will had been executed in his favour by his maternal grand-father which could not be traced. Therefore, the application under Order XLI Rule 27 CPC was liable to be rejected. Even otherwise, the Will in absence of any pleading either in the plaint or first appeal could not be taken on record. More so, the Will was not proved in accordance with law i.e. Section 68 of the Evidence Act. (vii)The court cannot travel beyond the pleadings as no party can lead the evidence on an issue/ point not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the Court, it is just to be ignored. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it. (viii) The first appellate court committed a grave error in deciding the application under Order XLI Rule 27 CPC much prior to the hearing of the appeal. Thus, the order allowing the said application is liable to be ignored as the same had been passed in gross violation of the statutory requirement. (ix) The documents produced by the Union of India have not been properly appreciated by the first appellate court and the High Court. (x) The courts below further committed an error holding that in case the document is taken on record, the document as well as

the content thereof would be deemed to have been proved. (xi)The appellate courts have also wrongly rejected the certified copies of the documents prepared by the Cantonment Board which were admissible in evidence. (xii)The High Court committed a grave error in not addressing itself to the substantial questions of law framed at the time of admission of the appeal and it ought to have decided the same or after discussing the same a finding could have been recorded that none of them was substantial question of law. (xiii) The suit was barred by the proviso to Section 34 of the Specific Relief Act, for the reason that plaintiff/respondent No.1, admittedly, had not been in possession and he did not ask for restoration of possession or any other consequential relief. (xiv)The first appellate court as well as the High Court recorded a finding that the Union of India failed to prove its title over the suit land. The said courts did not realise that this was not the issue to be determined, rather the issue had been as to whether the plaintiff/respondent No.1 was the owner of the suit land. (xv)The first appellate court has not decided the issue of admission of documents in correct perspective and recorded a perverse finding. (xvi) Question of filing a document in rebuttal of a Will could not arise. The other party has to admit or deny the document as required under Order XII CPC. There could be no Will in favour of the Union of India by the predecessors of the plaintiff, on the basis of which it could also claim title. (xvii) The courts below had wrongly drawn adverse inference against the appellant/defendant No.1 for not producing the documents as there was no direction of the court to produce the same. Neither the plaintiff/respondent No.1 had ever made any application in this respect nor he filed any application under Order XI CPC submitting any interrogation or for inspection or production of document. (xviii) The appellate courts have decided the appeals in unwarranted manner in complete derogation of the statutory requirements. Provisions of

CPC and Evidence Act have been flagrantly violated. [Para 69] [90-C-H; 91-A-H; 92-A-H; 93-A-H; 94-A-B]

8.2. The judgments and decrees of the first and second appellate courts are set aside and the judgment and decree passed by trial court is restored. [Para 70] [94-C]

Case Law Reference:

AIR 1917 PC 6	referred to	Para 6
1953 SCR 758	referred to	Para 6
1964 SCR 933	referred to	Para6
1965 SCR 145	referred to	Para 6
1968 SCR 862	referred to	Para 6, 9
2003 (1) Suppl. SCR 625	referred to	Para 6
AIR 2010 SC 3813	referred to	Para 6
(2011) 9 SCC 126	referred to	Para 6
AIR 1915 PC 96	referred to	Para7
AIR 2003 SC 3342	relied on	Para 8
2000 (2) SCR 594	relied on	Para 8
AIR 2001 SC 2328	relied on	Para 8
2004 (4) Suppl. SCR 145	relied on	Para 9
1966 SCR 436	relied on	Para10
1967 SCR 153	relied on	Para11
AIR 2012 SC 1339	relied on	Para 11
AIR 1988 SC 1074	relied on	Para 13
2004 (6) Suppl. SCR 242	relied on	Para 13

2005 (2) SCR 797	**relied on**	**Para 14**
2004 (6) Suppl. SCR 599	**relied on**	**Para 14**
2005 (4) Suppl. SCR 1010	**relied on**	**Para 14**
2005 (5) Suppl. SCR 439	**relied on**	**Para 14**
1960 SCR 773	**relied on**	**Para 20**
1967 SCR 1	**relied on**	**Para 20**
1977 (2) SCR 671	**relied on**	**Para 20**
2003 (4) Suppl. SCR 802	**relied on**	**Para 20**
2005 (1) Suppl. SCR 613	**relied on**	**Para 20**
2005 (2) SCR 661	**relied on**	**Para 20**
(2007) 15 SCC 529	**relied on**	**Para 20**
1956 SCR 451	**relied on**	**Para 21**
(1840) 6 M & W 664	**referred to**	**Para 21**
2010 (3) SCR 438	**relied on**	**Para 22**
1964 SCR 35	**relied on**	**Paras 25, 35**
1965 SCR 542	**relied on**	**Paras 25, 27**
1975 (3) SCR 146	**relied on**	**Para 25**
AIR 1979 SC 553	**relied on**	**Para 25**
1978 (3) SCR 571	**relied on**	**Para 26**
1958 SCR 533	**relied on**	**Para 28**
1969 SCR 254	**relied on**	**Para 28**
2004 (2) SCR 68	**relied on**	**Para 33**
2008 (4) SCR 804	**relied on**	**Para 33**

2010 (3) SCR 190	**relied on**	**Para 33**
2010 (13) SCR 621	**relied on**	**Para 33**
1977 (1) SCR 178	**relied on**	**Para 34**
2008 (1) SCR 1155	**relied on**	**Para 34**
1951 SCR 258	**relied on**	**Paras 38, 40**
1976 (3) SCR 620	**relied on**	**Para 38**
AIR 1931 PC 143	**referred to**	**Para 39**
AIR 1928 P.C. 128	**referred to**	**Para 39**
1973 (2) SCC 60	**relied on**	**Para 44**
AIR 1993 SC 957	**relied on**	**Para 45**
2011 (2) SCR 486	**relied on**	**Para 45**
2008 (7) SCR 631	**relied on**	**Para 48**
1962 Suppl. SCR 549	**relied on**	**Para 48**
2010 (14) SCR 499	**relied on**	**Para 49**
2005 (2) Suppl. SCR 1016	**relied on**	**Para 49**
1994 (1) SCC 682	**referred to**	**Para 50**
AIR 1947 PC 19	**referred to**	**Para 51**
(1949) 17 ITR 269	**referred to**	**Para 52**
1958 SCR 49	**referred to**	**Para 53**
1956 SCR 691	**referred to**	**Para 53**
1991 (2) Suppl. SCR 567	**relied on**	**Para 54**
(1996) 5 SCC 353	**relied on**	**Para 54**
1998 (3) SCR 1183	**relied on**	**Para 54**

2000 (1) SCR 77	**relied on**	**Para 54**
2000 (4) SCC 285	**relied on**	**Para 54**
2010 (7) SCR 154	**relied on**	**Para 54**
2010 (7) SCR 222	**relied on**	**Para 54**
2002 (2) SCR 431	**relied on**	**Para 55**
2008 (3) SCR 763	**relied on**	**Para 55**
1977 (2) SCR 282	**relied on**	**Para 56**
2011 (2) SCR 216	**relied on**	**Para 62**
1953 SCR 780	**referred to**	**Para 62**
2002 (1) SCR 359	**referred to**	**Para 62**
2005 (1) Suppl. SCR 903	**referred to**	**Para 62**
2010 (4) SCR 46	**referred to**	**Para 62**
2008 (14) SCR 621	**relied on**	**Para 63**
1999 (2) SCR 118	**relied on**	**Para 66**
(2010) 13 SCC 511	**relied on**	**Para 66**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1374 of 2008.

From the Judgment & Order dated 19.4.2007 of the High Court of Judicature at Allahabad in Second Appeal No. 289 of 2000.

R.P. Bhatt, Madhurima Tatia, B. Krishna Prasad for the Appellant.

A.K Ganguly, C.L. Pandey, J.M. Sharma, Vibhor Garg, Anmanya Pandey, Satya Mitra Garg, N. Shoba, Sri Ram J. Thalapathy, V.Adhmoolam for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and decree dated 19.4.2007 passed by the High Court of Judicature at Allahabad in Second Appeal No.289 of 2000 by which it has upheld the judgment and decree of the first appellate Court dated 15.10.1999 passed in Civil Appeal No.81 of 1998 by which the first appellate Court had reversed the judgment and decree of the Civil Court dated 20.1.1998 passed in Original Suit No.442 of 1995 wherein the plaintiff/respondent no.1 had sought declaration of title of the ownership in respect of the suit property.

2. Facts and circumstances giving rise to this appeal are:

A. Plaintiff/respondent no.1-Ibrahim Uddin filed Original Suit No.442 of 1995 in the Court of Civil Judge, Agra on 25.7.1995 seeking a decree for declaration that he was the owner of the suit property (Agriculture land measuring 25 bighas), making averments that the suit land originally had been with the Maratha Government (Scindia-Gwalior). The ancestors of the plaintiff having close association with the Maratha Government, were made a grant in respect of the suit land in the year 1800. Subsequently, the land was partitioned between the ancestors of the plaintiff in the year 1819. The plaintiff/respondent no.1 being the only heir (descendant) of Smt. Hasin Begum and Zafaruddin became the absolute owner of the land after the death of his mother Smt. Hasin Begum. The said land was never sold, alienated, transferred or gifted to any person either by the plaintiff or his ancestors at any point of time. The suit land was given on rent to the State authorities in Agra by executing a rent note for a sum of Rs.22/- per month. The Union of India claimed title over the suit land illegally and in an unauthorised manner on 22.2.1993 and afterwards, thus the cause of action arose to approach the court.

B. The defendant no.1/appellant filed the written statement

denying the averments and ownership of the plaintiff/respondent no.1 and averred that the land belonged to the Ministry of Defence, i.e., Union of India, a part of which has been leased out to several persons for agriculture work and their lease has been renewed from time to time. As they became unauthorised occupants, proceedings had been initiated in accordance with law and eviction order had been passed against the occupants/ tenants.

C. In view of the pleadings, 8 issues were framed by the Trial Court and after appreciating the evidence on record, the trial Court came to the conclusion that Pedigree produced by the plaintiff alongwith the plaint was not successfully proved; the plaintiff could not prove any kind of grant by the Maratha Government to his ancestors/great-grandfathers in the year 1800. Plaintiff failed to prove the partition between his ancestors in 1819. The lease deed alleged to have been executed in favour of the Military Estate Officer under the Union of India, appellant/defendant No.1, was not successfully proved. In view of the above, the suit was dismissed vide judgment and decree dated 20.1.1998.

D. Aggrieved, the plaintiff/respondent no.1 preferred the first appeal before the District Judge, Agra. During the pendency of the said appeal, he preferred an application under Order XLI Rule 27 of the Code of Civil Procedure 1908 (hereinafter called "CPC") on 6.4.1998 for adducing additional evidence, i.e., Will executed by his maternal grandfather dated 1.3.1929 in his favour bequeathing the suit property. The said application was allowed by the first appellate Court vide order dated 28.4.1999. The First Appeal itself stood allowed by the first appellate Court vide judgment and decree dated 15.10.1999 wherein the first appellate Court came to the conclusion that Maratha Government had made the gift of land in favour of plaintiff's fore-fathers which was subsequently partitioned. The registered partition deed stood duly proved and it was the proof of the title of the plaintiff/respondent no.1.

The plaintiff/respondent no.1 made an application for inspection of the record before the officers of the appellant/defendant no.1 but perusal of the record was not permitted. The appellant/ defendant no.1 did not produce any document to show its title and failed to produce the original record, thus, adverse inference was drawn against it in view of the provisions of Section 114 clause(g) of the Indian Evidence Act, 1872 (hereinafter called the Evidence Act). The Will, taken on record as an additional evidence at appellate stage stood proved and thus, contents thereof automatically stood proved.

E. Aggrieved, the appellant preferred Second Appeal before the High Court which has been dismissed vide impugned judgment and decree. Hence, this appeal.

3. Shri R.P. Bhatt, learned Senior counsel duly assisted by Ms. Madhurima Tatia, Advocate has submitted that there was no documentary evidence or trustworthy oral evidence that the suit property had been given to the fore-fathers of the plaintiff/respondent no.1 by the Maratha Government in the year 1800. Same remained the factual aspect in respect of alleged partition among his fore-fathers in the year 1819. The first appellate Court had no occasion to decide the application under Order XLI Rule 27 CPC prior to the hearing of the appeal itself. More so, as there has been no reference to the Will in the plaint or First Appeal, thus, it could not be taken on record for want of pleadings in this respect. Further, taking the Will on record did not mean that either the Will or its contents stood proved. None had proved the said Will and thus, could not be relied upon. If the Will is ignored, there is no evidence on record to prove the case of the plaintiff/respondent no.1.

The High Court had framed 4 substantial questions of law at the time of admission of the appeal and 2 additional substantial questions at a later stage but did not answer either of them nor recorded any finding that none of them was, in fact, a substantial question of law, rather the appeal has been decided placing reliance on the Will, which was liable to be

ignored altogether and making reference to the record of the Cantonment Board. In case, the Union of India did not produce the revenue record before the trial Court, the first appellate Court has wrongly drawn adverse inference under Section 114(g) of the Evidence Act. Thus, the appeal deserves to be allowed.

4. Per contra, Shri Asok Ganguly and Shri C.L. Pandey, learned Senior counsel with Shri Vibhor Garg, Advocate vehemently opposed the appeal contending that concurrent findings recorded by the first and second appellate Court are not liable to be interfered with in discretionary jurisdiction under Article 136 of the Constitution of India, 1950. The registered partition deed of 1819 is the proof of title of the plaintiff/ respondent no. 1. In view of the fact that the Second Appeal could be decided on limited issues, the High Court was not bound to answer the substantial questions of law, framed by it. The appeal lacks merit and is liable to be dismissed.

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

Presumption under Section 114(g) of the Evidence Act :

6. Generally, it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114(g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. (Vide: *Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi,* AIR 1917 PC 6; *Hiralal & Ors. v. Badkulal & Ors.,* AIR 1953 SC 225; *A. Raghavamma & Anr. v. A. Chenchamma & Anr.,* AIR 1964 SC 136; *The Union of India v. Mahadeolal Prabhu Dayal,* AIR 1965 SC 1755; *Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors.,* AIR 1968 SC 1413; *M/s. Bharat Heavy Electrical Ltd. v. State of U.P. & Ors.,* AIR 2003 SC 3024; *Musauddin Ahmed v. State of Assam,* AIR

2010 SC 3813; and *Khatri Hotels Pvt. Ltd. & Anr. v. Union of India & Anr.,* (2011) 9 SCC 126).

7. However, in *Mt. Bilas Kunwar v. Desraj Ranjit Singh,* AIR 1915 PC 96, a view has been expressed that it is open to a litigant to refrain from producing any document that he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for interrogatories/inspections and production of documents. If he fails to do so, neither he nor the Court at his suggestion, is entitled to draw any inference as to the contents of any such documents.

8. In *Kamma Otukunta Ram Naidu v. Chereddy Pedda Subba Reddy & Ors.,* AIR 2003 SC 3342, this Court held that *all the pros and cons must be examined before drawing an adverse inference against a party.* In that case the issue had been, as to whether two persons had been travelling together in the vehicle and presumption had been drawn only on the basis that the bus tickets of both the persons were not produced. This Court held that presumption could not have been drawn if *other larger evidence was shown to the contrary.* (See also: *Mohinder Kaur v. Kusam Anand,* (2000) 4 SCC 214; and *Takhaji Hiraji v. Thakore Kubersing Chamansing & Ors.,* AIR 2001 SC 2328).

9. In *Municipal Corporation, Faridabad v. Siri Niwas,* AIR 2004 SC 4681, this Court has taken the view that the law laid down by this Court in *Gopal Krishnaji Ketkar* (supra) did not lay down any law, that in all situations the presumption in terms of clause (g) of Section 114 of the Evidence Act must be drawn.

10. In *Mahant Shri Srinivas Ramanuj Das v. Surjanarayan Das & Anr.,* AIR 1967 SC 256, this Court held that mere withholding of documentary evidence by a party is not enough to draw adverse inference against him. The other party must ask the party in possession of such evidence to produce the same, and in case the party in possession does not produce it, adverse inference may be drawn:

"It is true that the *defendant-respondent also did not call upon the plaintiff-appellant to produce the documents* whose existence was admitted by one or the other witness of the plaintiff and that therefore, strictly speaking**,** *no inference adverse to the plaintiff can be drawn from his non-producing the list of documents.* The Court may not be in a position to conclude from such omission that those documents would have directly established the case for the respondent. But it can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the respondent case."

11. In *Ramrati Kuer v. Dwarika Prasad Singh & Ors.,* AIR 1967 SC 1134, this Court held:

"It is true that Dwarika Prasad Singh said that his father used to keep accounts. But no attempt was made on behalf of the appellant to ask the court to order Dwarika Prasad Singh to produce the accounts. *An adverse inference could only have been drawn against the plaintiffs-respondents if the appellant had asked the court to order them to produce accounts and they had failed to produce them after admitting that Basekhi Singh used to keep accounts.* But no such prayer was made to the court, and in the circumstances no adverse inference could be drawn from the non-production of accounts."

(See also: *Ravi Yashwant Bhoir v. District Collector, Raigad & Ors.,* AIR 2012 SC 1339).

12. In *Smt. Indira Kaur & Ors. v. Shri Sheo Lal Kapoor,* AIR 1988 SC 1074, the lower courts drew an adverse inference against the appellant-plaintiff on the ground that the plaintiff was not ready and willing to perform his part of the contract. The question arose as to whether the party had the means to pay. The court further held that before the adverse inference is drawn against a particular party, *the conduct and diligence of the other party is also to be examined.* Where a person deposed that as he had deposited the money in the Bank and the other party did not even ask as on what date and in which Bank the amount had been deposited and did not remain diligent enough, the question of drawing adverse inference against such a person for not producing the Pass Book etc. cannot be drawn.

13. In *Mahendra L. Jain & Ors. v. Indore Development Authority & Ors.,* (2005) 1 SCC 639, this Court held that mere non-production of documents would not result in adverse inference. If a document was called for in the *absence of any pleadings, the same was not relevant.* An adverse inference need not necessarily be drawn only because it would be lawful to do so.

14. In *Manager, R.B.I., Bangalore v. S. Mani & Ors.,* AIR 2005 SC 2179, this Court dealt with the issue wherein the Industrial Tribunal directed the employer to produce the attendance register in respect of the first party workmen. The explanation of the appellant was that the attendance registers being very old, could not be produced. The Tribunal, however, in its award noticed the same and drew an *adverse inference* against the appellants for non-production of the attendance register alone. This Court reversed the finding observing:

"As noticed hereinbefore, *in this case also the respondents did not adduce any evidence whatsoever. Thus, in the facts and circumstances of the case, the Tribunal erred in drawing an adverse inference.*

The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service"

(See also: *A. Jayachandra v. Aneel Kaur,* AIR 2005 SC 534; *R.M. Yellatti v. Assistant Executive Engineer* AIR 2006 SC 355; and *Pratap Singh & Anr. v. State of M.P.,* AIR 2006 SC 514).

15. Order XI CPC contains certain provisions with the object to save expense by obtaining information as to material facts and to obtain admission of any fact which he has to prove on any issue. Therefore, a party has a right to submit interrogatories relating to the same matter in issue. The expression "matter" means a question or issue in dispute in the action and not the thing about which such dispute arises. The object of introducing such provision is to secure all material documents and to put an end to protracted enquiry with respect to document/material in possession of the other party. In such a fact-situation, no adverse inference can be drawn against a party for non-production of a document unless notice is served and procedure is followed. Under Rule 14 of Order XI, the court is competent to direct any party to produce the document asked by the other party which is in his possession or power and relating to any material in question in such suit. Rule 15 Order XI provides for inspection of documents referred to in pleadings or affidavits. Rule 18 thereof, empowers the court to issue order for inspection. Rule 21 thereof provides for very stringent consequences for non-compliance with the order of discovery, as in view of the said provisions in case the party fails to comply with any order to answer interrogatories or for discovery or inspection of documents, he shall, if he is a plaintiff, be liable to have his suit dismissed for want of prosecution and if he is a defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect. Thus, in view of the above, the suit may be dismissed for non-compliance of the aforesaid orders by the plaintiff and the plaintiff shall also be precluded from bringing a fresh suit on the same cause of action. Similarly, defence of the defendant may be struck off

for non-compliance of such orders.

16. Thus, in view of the above, the law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The court cannot loose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI CPC. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and other side failed to comply with the court's order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary.

17. In the instant case, admittedly, the plaintiff/respondent no.1 during the pendency of his suit had made an application before the authorities under the control of the appellant/ defendant no.1 to make the inspection. However, he was not permitted to have any inspection. The plaintiff/respondent no.1 did not submit any interrogatory statement or an application for making inspection or for production of the document as provided under Order XI CPC. In such a fact-situation, in view of the law referred to hereinabove, it is not permissible for the first appellate Court or the High Court to draw any adverse

inference against the appellant/defendant no.1.

Admissions:

18. The first appellate court while dealing with the issue of admission and proof of documents held as under:

> "The plaintiff has produced will dated l.3.1929 of his maternal grandfather, Syed Nazim Ali which the court had taken on record on 28.4.99 and the defendant No.1 *was given one week time for producing the rebuttal, but the defendant No.1 did not produce any paper against the Will.* Therefore, it has been given in section 58 of the Evidence that if the defendant does not produce any paper in rebuttal, then it means that he admitted the paper produced by the plaintiff. There is no need of proving the same." (Emphasis added)

19. The question does arise as to whether not filing a document in rebuttal of a document amounts to an admission and whether the provisions of Section 58 of the Evidence Act are attracted.

Order XII CPC deals with admission of the case, admission of the documents and judgment on admissions. Rule 1 thereof provides that a party to a suit may give notice by his pleading or otherwise in writing that he admits the truth of the whole or any party of the case of any other party. Rule 2 deals with notice to admit documents – it provides that each party may call upon the other party to admit within 7 days from the date of service of the notice of any document saving all such exceptions. Rule 2A provides that a document could be deemed to have been admitted **if not denied** after service of notice to admit documents.

20. Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved

erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission. (Vide: *Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi & Ors.,* AIR 1960 SC 100; *Basant Singh v. Janki Singh & Ors.,* AIR 1967 SC 341; *Sita Ram Bhau Patil v. Ramchandra Nago Patil,* AIR 1977 SC 1712; *Sushil Kumar v. Rakesh Kumar,* AIR 2004 SC 230; *United Indian Insurance Co Ltd. v. Samir Chandra Choudhary.,* (2005) 5 SCC 784; *Charanjit lal Mehra & Ors v. Kamal Saroj Mahajan & Anr.,* AIR 2005 SC 2765; and *Udham Singh v. Ram Singh & Anr.,* (2007) 15 SCC 529.)

21. In *Nagubai Ammal & Ors. v. B.Shama Rao & Ors.,* AIR 1956 SC 593, this Court held that admission made by a party is admissible and best evidence, unless it is proved that it had been made under a mistaken belief. While deciding the said case reliance has been placed upon the judgment in *Slatterie v. Pooley,* (1840) 6 M & W 664, wherein it had been observed "What a party himself admits to be true, may reasonably be presumed to be so."

22. In *L.I.C of India & Anr v. Ram Pal Singh Bisen,* (2010) 4 SCC 491, this Court held that "failure to prove the defence does not amount to an admission, nor does it reverse or discharge the burden of proof of the plaintiff."

23. In view of the above, the law on the admissions can be summarised to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be

given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff.

24. In the instant case, the Court held that not filing any document in rebuttal of the Will dated 1.3.1929 amounts to admission of the said Will as well as it contents. Without following the procedure as required under Order XII CPC or admission having not been made during the course of hearing before the Court, the question of application of Section 58 of the Evidence Act could not arise. Section 58 provides that a fact may not need to be proved in any proceeding which the parties thereto agreed to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands or which they admitted by their pleading, even in that case court may, in its discretion, even if such a admission has been made by the party, require the fact admitted to be proved otherwise than by such admission. In fact, admission by a party may be oral or in writing. 'Admissions' are governed under Sections 17 to 31 of the Evidence Act and such admission can be tendered and accepted as substantive evidence. While admission for purposes of trial may dispense with proof of a particular fact. Section 58 deals with admissions during trial i.e. at or before the hearing, which are known as judicial admissions or stipulations dispense it with proof. Admissions are not conclusive proof but may operate as estoppel against its maker. Documents are necessarily either proved by witness or marked on admission.

In view of above, it is evident that the first appellate court has misdirected itself so far as the issue of admission is concerned. The finding recorded by it that appellant/defendant No.1 failed to produce any document in rebuttal of the Will is not only wrong but preposterous.

Order XLI Rule 27 C.P.C.

25. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: *K. Venkataramiah v. A. Seetharama Reddy & Ors.,* AIR 1963 SC 1526; *The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors.,* AIR 1965 SC 1008; *Soonda Ram & Anr. v. Rameshwaralal & Anr.,* AIR 1975 SC 479; and *Syed Abdul Khader v. Rami Reddy & Ors.,* AIR 1979 SC 553)**.**

26. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: *Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co.,* AIR 1978 SC 798).

27. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment.

This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: *Lala Pancham & Ors.* (supra)].

28. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the *absence of satisfactory reasons for the non-production of the evidence in the trial court,* additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: *State of U.P. v. Manbodhan Lal Srivastava,* AIR 1957 SC 912; and *S. Rajagopal v. C.M. Armugam & Ors.,* AIR 1969 SC 101).

29. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

30. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

31. Whenever the appellate Court admits additional evidence it *should record its reasons* for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. *The omission to record the reasons must, therefore, be treated as a serious defect.* But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

32. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

33. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice – delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every

conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: *State of Orissa v. Dhaniram Luhar,* AIR 2004 SC 1794; *State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi,* AIR 2008 SC 2026; *The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors.,* AIR 2010 SC 1285; and *Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors.,* (2010) 13 SCC 336).

34. In *The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc.,* AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:

> "We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence." (Emphasis added)

A similar view has been reiterated by this Court in *Basayya I. Mathad v. Rudrayya S. Mathad and Ors.,* AIR 2008 SC 1108.

35. A Constitution Bench of this Court in *K. Venkataramiah* (Supra), while dealing with the same issue held:

> "It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and *should record their reasons for* admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."
>
> (Emphasis added)

In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

36. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

37. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion

that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

Stage of Consideration :

38. An application under Order XLI Rule 27 CPC *is to be considered at the time of hearing of appeal on merits so* as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: *Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors.,* AIR 1976 SC 1053).

39. In *Parsotim Thakur & Ors. v. Lal Mohar Thakur & Ors.,* AIR 1931 PC 143, it was held:

> ?"The provisions of S.107 as elucidated by O.41, R.27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. Under R.27, Cl.(1) (b) it is only where the appellate Court "requires" it (i.e. finds it needful). …… *The legitimate occasion for the exercise of this discretion is not*

> *whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent",* it may well be that the defect may be pointed out by a party, or that a party may move the Court to apply the defect, but the *requirement must be the requirement of the court upon its appreciation of evidence as it stands.* Wherever the Court adopts this procedure it is bound by R. 27(2) to record its reasons for so doing, and under R.29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. *The power so conferred* upon the Court by the Code ought *to be very sparingly exercised* and one requirement at least of any new evidence to be adduced should be that it should have a *direct and important bearing on a main issue in the case…* (Emphasis added)

(See also: *Indirajit Pratab Sahi v. Amar Singh,* AIR 1928 P.C. 128)

40. In *Arjan Singh v. Kartar Singh & Ors.* (supra), this Court held:

> "…….If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, *it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent*……. The order allowing the appellant to call the additional evidence is dated 17.8.1942. The appeal was heard on 24.4.1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing the judgment" (Emphasis added)

41. Thus, from the above, it is crystal clear that application

for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored.

In the instant case, the application under Order XLI Rule 27 CPC was filed on 6.4.1998 and it was allowed on 28.4.1999 though the first appeal was heard and disposed of on 15.10.1999. In view of law referred to hereinabove, the order dated 28.4.1999 is just to be ignored.

42. The High Court while admitting the appeal had framed the following substantial questions of law:

1. Whether the judgment and decree passed by the lower appellate court is vitiated in law inasmuch as the land in dispute which was recorded in Column B-4 under Rule 6 of the Cantonment Land Administration Rule 1937 was wrongly and illegally discarded on the ground of secondary evidence in the presence of the original register maintained by the Military Estate Officer.

2. Whether the certified copy of the relevant registers maintained under the Cantonment Act are admissible in evidence and appellate court erred in law in discarding the same illegally against the relevant provisions of the Evidence Act and decreed the suit of the plaintiff on the false pretext that there is no document was filed on behalf of the defendant?

3. Whether the appellate court did not consider this aspect at all that the suit for declaration without possession is not maintainable is barred by the provision of Specific Relief Act.

4. Whether the lower appellate court has committed illegality while accepting the Will dated 1.3.1992 filed on 28.4.1999 without its proof by plaintiff?

The High Court admittedly did not answer any of them, though had the question Nos. 2, 3 and 4 been decided, the result would have been otherwise.

Section 34 of the Specific Relief Act, 1963 :

43. The Section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.

44. In *Ram Saran & Anr. v. Smt. Ganga Devi,* AIR 1972 SC 2685, this Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section 34 of Specific Relief Act, 1963 (hereinafter called 'Specific Relief Act') and, thus, not maintainable.

45. In *Vinay Krishna v. Keshav Chandra & Anr.,* AIR 1993 SC 957, this Court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to Section 34 of the Specific Relief Act. (See also: *Gian Kaur v. Raghubir Singh,* (2011) 4 SCC 567).

46. In view of above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief. In the instant case, suit for

declaration of title of ownership had been filed though, the plaintiff/respondent no. 1 was admittedly not in possession of the suit property. Thus, the suit was barred by the provision of Section 34 of the Specific Relief Act and, therefore, ought to have been dismissed solely on this ground. The High Court though framed a substantial question on this point but for unknown reasons did not consider it proper to decide the same.

Section 100 CPC :

47. Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a Second Appeal does not lie on question of facts or of law.

48. In *State Bank of India & Ors. v. S.N. Goyal,* AIR 2008 SC 2594, this Court explained the terms "substantial question of law" and observed as under :

> "The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or *effect of the question of law on the decision in the lis between the parties.* 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. ……..... any *question of law which affects the final decision in a case is a substantial question of law as between the parties.* A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case."
>
> (Emphasis added)

Similarly, in *Sir Chunilal V. Mehta & Sons Ltd. v. Century*

Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314, this Court for the purpose of determining the issue held:-

> "The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public importance or *whether it directly and substantially affects the rights of the parties….."*(Emphasis added)

49. In *Vijay Kumar Talwar v. Commissioner of Income Tax, New Delhi,* (2011) 1 SCC 673, this Court held that, a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstance of each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

(See also: *Rajeshwari v. Puran Indoria,* (2005) 7 SCC 60).

50. The Court, for the reasons to be recorded, may also entertain a second appeal even on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. Therefore, the existence of a substantial question of law is a *sine-qua-non* for the exercise of jurisdiction under the provisions of Section 100 CPC. The second appeal does not lie on the ground of erroneous findings

of facts based on appreciation of the relevant evidence.

There may be a question, which may be a "question of fact", "question of law", "mixed question of fact and law" and "substantial question of law." Question means anything inquired; an issue to be decided. The "question of fact" is whether a particular factual situation exists or not. A question of fact, in the Realm of Jurisprudence, has been explained as under:-

> "A question of fact is one capable of being answered by way of demonstration. A question of opinion is one that cannot be so answered. An answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong."

(Vide: Salmond, on Jurisprudence, 12th Edn. page 69, cited in *Gadakh Yashwantrao Kankarrao v. E.V. alias Balasaheb Vikhe Patil & ors.,* AIR 1994 SC 678).

51. In *Smt. Bibhabati Devi v. Ramendra Narayan Roy & Ors.,* AIR 1947 PC 19, the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the amendment of 1976, observing as under:-

> "..... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word 'judicial procedure' at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law.

'That the question of admissibility of evidence is a proposition of law but it must be such as to affect materially the

finding. The question of the value of evidence is not sufficient reason for departure from the practice....."

52. In *Suwalal Chhogalal v. Commissioner of Income Tax,* (1949) 17 ITR 269, this Court held as under:-

> "A fact is a fact irrespective of evidence, by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient evidence."

53. In *Oriental Investment Company Ltd. v. Commissioner of Income Tax, Bombay,* AIR 1957 SC 852, this Court considered a large number of its earlier judgments, including *Sree Meenakshi Mills Ltd., Madurai v. Commissioner of Income Tax, Madras,* AIR 1957 SC 49, and held that where the question of decision is whether certain profit is made and shown in the name of certain intermediaries, were, in fact, profit actually earned by the assessee or the intermediaries, is a mixed question of fact and law. The Court further held that inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or a "mixed question of law and fact" and that a finding of fact without evidence to support it or if based on relevant or irrelevant matters, is not unassailable.

54. There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse. (Vide: *Jagdish Singh v. Nathu Singh,* AIR 1992 SC 1604; *Smt. Prativa Devi (Smt.) v. T.V. Krishnan,* (1996) 5 SCC 353; *Satya Gupta (Smt.) @ Madhu Gupta v. Brijesh Kumar,* (1998) 6 SCC 423; *Ragavendra Kumar v. Firm Prem Machinary & Co.,* AIR 2000 SC 534; *Molar Mal (dead) through Lrs. v. M/s. Kay Iron Works Pvt. Ltd.,* AIR 2000 SC 1261; *Bharatha Matha*

& Anr. v. R. Vijaya Renganathan & Ors., AIR 2010 SC 2685; and *Dinesh Kumar v. Yusuf Ali,* (2010) 12 SCC 740).

55. In *Jai Singh v. Shakuntala,* AIR 2002 SC 1428, this Court held that it is permissible to interfere even on *question of fact* but it may be only in "very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible it is a rarity rather than a regularity and thus in fine it can thus be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection."

Similar view has been taken in the case *of Kashmir Singh v. Harnam Singh & Anr.,* AIR 2008 SC 1749.

56. Declaration of relief is always discretionary. If the discretion is not exercised by the lower court "in the spirit of the statute or fairly or honestly or according to the rules of reason and justice", the order passed by the lower court can be reversed by the superior court. (See: *Mysore State Road Transport Corporation v. Mirja Khasim Ali Beg & Anr.,* AIR 1977 SC 747).

57. There may be exceptional circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100 CPC. It may be necessary to do so for the reason that after all the purpose of the establishment of courts of justice is to render justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal the court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the court comes to the conclusion that the question(s) framed could not be the substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so

arises at the time of the final hearing of the appeal.

58. In the instant case, none of the substantial questions framed by the Court had been answered. Much reliance has been placed on the Will which was liable just to be ignored. Even otherwise, the Will in the instant case cannot be relied upon for want of pleadings.

59. The pleading taken in the plaint dated 25.7.1995 clearly revealed that the land in dispute belonged to Hafiz Ahmad Bux and Hafiz Kareem Bux who were the ancestors of the plaintiff and they were the owners of the same in the year 1800. The property was partitioned between ancestors of the plaintiff in the year 1819. There had been succession of the property by various documents of Hafiz Kareem Bux and Hafiz Ahmad Bux. The plaintiff claims to be heir and successor of one Smt. Hasin Begum wife of Zafaruddin and daughter of Sri Hazim Ali. He had inherited the suit property being a lone heir of Shri Hafiz Ahmed Bux after the death of his mother Smt. Hasin Begum.

In case, the plaint does not make any reference that the property had been given to the plaintiff/respondent no.1 by way of Will, and pleadings had not been amended at the stage of first appeal, the question does arise as to whether, the Will could be taken into consideration, while deciding the case.

The trial court had considered as many as seven issues and does not make any reference that the property had been gifted to the ancestors of the plaintiff by the Maratha rulers. Further finding has been recorded that in respect of documents, the plaintiff/respondent no. 1 had given paper to defendant no. 1 for inspection of the record but he did not make any inspection. However, a passing reference had been made by the trial court that no record had been produced by the plaintiff to show that the Maratha Government had given the land to the forefathers of the plaintiff.

So far as the First Appellate Court is concerned, it placed a very heavy reliance on the *Will* and further recorded a finding that in spite of the fact that the plaintiff filed an application for inspection before the appellant/defendant no.1, he was not permitted to have the inspection. Nor the said revenue record was presented by the present appellant and, therefore, an adverse inference was drawn against it. So far as the Will is concerned, it is evident that it was taken on the record as an additional evidence without any pleading anywhere. There is nothing on record that the plaintiff/defendant no. 1 made any attempt to make an amendment in the plaint even at the appellate stage by moving an application under Order VI Rule 17 CPC.

60. Relevant part of the application under Order XLI Rule 27 CPC, reads as under:

?"2. That the property in suit belongs to the ancestors of the plaintiff. The grand father of the plaintiff/appellant had made the Will in favour of the plaintiff regarding the property in suit inter alia other properties in year 1929.

3. That at the time of trial of the suit the said will was not in possession of the plaintiff and the same was misplaced in the other lot of old papers of the plaintiff kept in store.

4. That even after best effort, and due diligence the aforesaid Will could not be available at the time of trial of the suit and now after due diligence and best effort it has been available and traced our.

5. That the papers were not available earlier so it could not be filed in the lower court.

6. That the said paper is very much relevant to establish the right, title or interest in the disputed property of the plaintiff so the same is very necessary to be taken on record.

7. That if the said paper is not taken on record the plaintiff will be deprived from getting justice."

61. The first Appellate Court allowed the application filed by the plaintiff under Order XLI Rule 27 CPC vide order dated 28.4.1999 which reads as under:

"The Will in question is necessary for the disposal of the appeal because the applicant/appellant obtains right in the disputed property from this Will. The respondent/ defendants have neither opposed it that as to why it was not produced in the subordinate court, there is no any relevancy of it. The applicant has given reason of not producing the Will in the subordinate court that this will was lost. In my opinion, the will appears to be necessary for the disposal of the appeal for the property which was obtained to the appellant earlier by this Will. Proper reason has been given for not producing this Will in the subordinate court."

62. This Court while dealing with an issue in *Kalyan Singh Chouhan v. C.P. Joshi,* AIR 2011 SC 1127, after placing reliance on a very large number of its earlier judgments including *Messrs. Trojan & Co. v. RM.N.N. Nagappa Chettiar,* AIR 1953 SC 235; *Om Prakash Gupta v. Ranbir B. Goyal,* AIR 2002 SC 665; *Ishwar Dutt v. Land Acquisition Collector & Anr.*, AIR 2005 SC 3165; and *State of Maharashtra v. M/s. Hindustan Construction Company Ltd.,* AIR 2010 SC 1299, held that *relief not founded on the pleadings* cannot be granted. A decision of a case cannot be based on grounds outside the pleadings of the parties. No evidence is permissible to be taken on record in absence of the pleadings in that respect. No party can he permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It was further held that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into or relied upon.

63. In *Bachhaj Nahar v. Nilima Mandal & Ors.,* AIR 2009 SC 1103, this court held that a case not specifically pleaded can be considered by the court unless the pleadings in substance contain the necessary averments to make out a particular case and issue has been framed on the point. In absence of pleadings, the court cannot make out a case not pleaded, suo motu.

Therefore, in view of the above, there is nothing on record to show that Maratha Government had made a gift to the ancestors of the plaintiff. The claim of the plaintiff to get a title by virtue of the Will cannot be taken note of being not based on pleadings. Even this Will is dated 1.3.1929, affidavits filed by the plaintiff/respondent no.1 before this Court reveal that on 26.3.2012 he was 80 years of age. The date of Will is 1.3.1929. So, it appears that the Will had been executed prior to the birth of the plaintiff/respondent no.1. In such a fact-situation, it could not have been taken into consideration without proper scrutiny of facts and, that too, without any pleading. In the plaint, the plaintiff for the reasons, best known to him, did not even make reference to the Will. In absence of any factual foundation of the case, based on Will, the first appellate Court committed a grave error taking into consideration the said Will. More so, the Will had not been proved as required under Section 68 of the Evidence Act.

64. The High Court had placed a very heavy reliance on the rent note allegedly executed by the fore-fathers of the plaintiff/ respondent no.1. The same reads as under:

> "Applicant caretaker masque noori darwaza which was constructed by Hafiz Ahmed is of our ancestor and who received cash payment which has been deposited register board no.38 treasury collectorate agra situated namner cantt., Agra, questioner is entitled to which is following mentioned money which has been stated after enquiry it be given to me, and if govt. has any objection to pay to me the information about the same given to us that condition govt. will be liable for the expenses of court I hafiz ahmed is receiver of rent of this land which has been situated at namner the rent which is rupees 22."

The said rent note does not provide any description of the property nor does it bear any date, so it cannot be determined as on what date it was executed; what was the duration of the lease; in whose favour the lease had been executed; and what was the lease rent because it simply mentions that the rent to be Rs.22/-. It is not evident whether it was a rent for a month, or a year or for a total indefinite period. The rent note does not provide any period at all. In fact, such a vague document could not be linked in the circumstances proving the title.

65. Appellant/defendant No.1 produced the certified copies of the Extract from General Land Register prepared on 15.3.1948 in support of its case and denying title of the plaintiff/ respondent No.1. The relevant part thereof reads as under:

Sl.No.	Survey No.5	Existing Entry
1	———	———
2.	———	———
3.	———	———
4.	Area in acres	9.447 acres
5.	Description	Agricultural land
6.	Class	B-4
7.	By whom managed	Military Estate Officer
8.	Landlord	Govt. of India
9.	———	———

10. ——— ———-

Similarly, another land had also been shown in Survey No.6 in the same manner and showing the similar entries.

The High Court has considered the said entries and rejected the same on the ground that the partition among the ancestors of the plaintiff/respondent No.1 had taken place prior to enactment of the Cantonment Land Administration Rules, 1925, though there is nothing on record to prove the said partition. More so, the partition made among the ancestors of plaintiff/respondent No.1 in 1819 would not be a conclusive factor to determine the title of ownership in favour of the plaintiff/ respondent No.1. The High Court dealt with the issue in an unwarranted manner as it observed as under:

"Clause B-1, B-2, B-3, B-4 and B-5 Classification of land was first time introduced by enactment of Cantonment Land Administration Rule 1925. The General Land Register was prepared near about in the year 1928, whereas the partition is in the year 1819. The appellant also failed to file the notification in the official gazette regarding survey Nos. 5 and 6 which are situated outside the notified area and to establish that such area was declared under Section 43A of the Cantonment Act, 1924. In the circumstances, I do not find that it is a case where this court in exercise of jurisdiction under Section 100 CPC can set aside the findings of fact arrived at by the court below."

66. The General Land Register and other documents maintained by the Cantonment Board under the Cantonment Act, 1924 and the Rules made thereunder are public documents and the certified copies of the same are admissible in evidence in view of the provisions of Section 65 read with Section 74 of the Evidence Act. It is settled legal position that the entries made in General Land Register maintained under Cantonment Land Administration Rules is conclusive evidence of title. (Vide: *Chief Executive Officer v. Surendra Kumar Vakil,* AIR 1999 SC 2294; and *Union of India & Ors. v. Kamla Verma,* (2010) 13 SCC 511).

67. In view of the above, we are of the considered opinion that the appellate courts dealt with the case in an unwarranted manner giving a complete go-by to the procedure prescribed by law.

68. The appellate courts examined the title of government instead of the plaintiff/respondent no.1. Such a course was not warranted. The title of government cannot be disputed. In any event possession of government for decades is not disputed. The plaintiff shifted the case from time to time but failed to prove his title.

69. To sum up: In view of the above discussion, we reach the following conclusion:

(i) The first appellate court as well as the High Court committed grave error in shifting the burden of proof on the Union of India, appellant/defendant No.1, though it could have been exclusively on the plaintiff/respondent No.1 to prove his case.

(ii) There is nothing on record to prove the grant/gift by the Maratha Government in favour of ancestors of plaintiff/respondent No.1 in the year 1800.

(iii) Plaintiff/Respondent No. 1 miserably failed to prove the pedigree produced by him.

(iv) The alleged partition in the year 1819 among the ancestors of plaintiff/respondent No.1 even if had taken place, cannot be a proof of title of the plaintiff/respondent No.1 over the suit property as the pedigree has not been proved. Presumption under Section 90 of the Evidence Act in respect of 30 years' old document coming from proper custody relates to the signature, execution and

attestation of a document i.e. to its genuineness but it does not give rise to presumption of correctness of every statement contained in it. The contents of the document are true or it had been acted upon have to be proved like any other fact. More so, in case the Will is ignored, there is nothing on record to show as how the plaintiff/respondent no. 1 could claim the title.

(v) The rent note produced by the appellant/defendant No.1 before the court below does not prove anything in favour of the plaintiff/respondent. The same being a vague document is incapable of furnishing any information and, thus, is liable to be rejected. The said document does not make it clear as who has executed it and in whose favour the same stood executed. It does not bear any date as it cannot be ascertained when it was executed. The lease deed cannot be executed without the signature/thumb impression of the lessee. The said lease does not contain any signature/thumb impression of any lessee and also the tenure of the lease has not been mentioned therein. The rent has been mentioned as Rs.22/- without giving any detail as to whether it was per day, fortnightly, monthly, quarterly or yearly or for ever. More so, there is no reference to the said rent note in the pleadings contained in the plaint, therefore, it is just to be ignored.

(vi) Had there been any Will in existence and not available with the plaintiff/respondent No.1 for any reason whatsoever at the time of institution of the suit, the plaintiff/respondent No.1 could have definitely mentioned that Will had been executed in his favour by his maternal grand-father which could not be traced. Therefore, the application

under Order XLI Rule 27 CPC was liable to be rejected. Even otherwise, the Will in absence of any pleading either in the plaint or first appeal could not be taken on record. More so, the Will was not proved in accordance with law i.e. Section 68 of the Evidence Act.

(vii) The court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the Court, it is just to be ignored. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it.

(viii) The first appellate court committed a grave error in deciding the application under Order XLI Rule 27 CPC much prior to the hearing of the appeal. Thus, the order allowing the said application is liable to be ignored as the same had been passed in gross violation of the statutory requirement.

(ix) The documents produced by the Union of India have not been properly appreciated by the first appellate court and the High Court.

(x) The courts below further committed an error holding that in case the document is taken on record, the document as well as the content thereof would be deemed to have been proved.

(xi) The appellate courts have also wrongly rejected the certified copies of the documents prepared by the Cantonment Board which were admissible in evidence.

(xii) The High Court committed a grave error in not addressing itself to the substantial questions of law framed at the time of admission of the appeal and it ought to have decided the same or after discussing the same a finding could have been recorded that none of them was substantial question of law.

(xiii) The suit was barred by the proviso to Section 34 of the Specific Relief Act, for the reason that plaintiff/respondent No.1, admittedly, had not been in possession and he did not ask for restoration of possession or any other consequential relief.

(xiv) The first appellate court as well as the High Court recorded a finding that the Union of India failed to prove its title over the suit land. The said courts did not realise that this was not the issue to be determined, rather the issue had been as to whether the plaintiff/respondent No.1 was the owner of the suit land.

(xv) The first appellate court has not decided the issue of admission of documents in correct perspective and recorded a perverse finding.

(xvi) Question of filing a document in rebuttal of a Will could not arise. The other party has to admit or deny the document as required under Order XII CPC. There could be no Will in favour of the Union of India by the predecessors of the plaintiff, on the basis of which it could also claim title.

(xvii) The courts below had wrongly drawn adverse inference against the appellant/defendant No.1 for not producing the documents as there was no direction of the court to produce the same. Neither the plaintiff/respondent No.1 had ever made any

application in this respect nor he filed any application under Order XI CPC submitting any interrogation or for inspection or production of document.

(xviii) The appellate courts have decided the appeals in unwarranted manner in complete derogation of the statutory requirements. Provisions of CPC and Evidence Act have been flagrantly violated.

70. In view of above, appeal succeeds and is allowed, judgments and decrees of the first and second appellate courts are set aside and the judgment and decree dated 20.1.1998 passed by Civil Court in Original Suit No.442 of 1995 is restored. No costs.

B.B.B. Appeal allowed.

CICILY KALLARACKAL
vs.
VEHICLE FACTORY
(S.L.P (C) Nos. 24228-24229 of 2012)

AUGUST 6, 2012

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Limitation – Special Leave Petition (SLP) – Delay in filing – Condonation of the delay – Held: On facts there was inordinate unexplained delay in filing the SLP – Condonation of such delay would amount to substituting the period of limitation prescribed by the legislature for filing SLP – Petition dismissed on the ground of delay – Constitution of India, 1950 – Article 136.

Anshulal Aggarwal v. NOIDA **(2011) CPJ 63 (SC) – relied on.**

Constitution of India, 1950 – Article 226 – Writ jurisdiction – Challenge to the order of National Consumer Disputes Redressal Commission – Maintainability of – Held: Orders of the Commission are incapable of being questioned under the writ jurisdiction of High Court, because a statutory appeal in terms of s. 27A(1)(c) of the Consumer Protection Act lies to Supreme Court – Consumer Protection Act, 1986 – s. 27A (1)(c).

Mohammad Swalleh and Ors. v. IIIrd All. District Judge, Meerutand Anr. **AIR 1988 SC 94: 1988 (1) SCR 840 – referred to.**

Case Law Reference:

1988 (1) SCR 840	**Referred to**	**Para 2**
(2011) CPJ 63 (SC)	**Relied on**	**Para 4**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 24228-24229 of 2012.

From the Judgment & Order dated 16.09.2008 and 17.12.2009 of the High Court of Kerala at Ernakulam in W.A. No. 2518 of 2007 and RP No. 380 of 2009.

Tulika Prakash, M. Khairati, K. Rajeev for the Appellant.

The following Order of the Court was delivered

O R D E R

1. These special leave petitions have been filed against the impugned judgments and orders dated 16.9.2008 in Writ Appeal No. 2518 of 2007 and 17.12.2009 in Review Petition No. 380 of 2009. In order to decide the controversy it is not necessary to make the reference to the factual controversy involved herein.

The basic issue has been raised in the petitions that the Kerala High Court did not have jurisdiction to entertain the writ petition against the judgment and order passed by the National Consumer Disputes Redressal Commission (hereinafter called 'the Commission'). The said order could be challenged only before this Court in view of the provisions of National Consumer Protection Act, 1986, thus, the order passed by the High Court impugned herein is a nullity for want of jurisdiction.

2. So far as the issue of jurisdiction is concerned, the learned counsel for the petitioner is right that the High Court had no jurisdiction to deal with the matter against the order of the Commission. However, while dealing with a similar issue this Court in *Mohammad Swalleh & Ors. v. IIIrd All. District Judge, Meerut & Anr.,* AIR 1988 SC 94, observed:

> "7. It was contended before the High Court that *no appeal lay from the decision of the Prescribed Authority to the District Judge. The High Court accepted this contention.* (sic no appeal lay)… On that ground the High Court declined to interfere with the order of the learned District

Judge. It is true that there has been some technical breach because if there is no appeal maintainable before the learned District Judge, in the appeal before the learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Art. 226 of the Constitution. The High Court had come to the conclusion that the order of the Prescribed Authority was invalid and improper. The High Court itself could have set it aside. Therefore in the facts and circumstances of the case justice has been done though, as mentioned hereinbefore, *technically the appellant had a point that the order of the District Judge was illegal and improper.* If we reiterate the order of the High Court as it is setting aside the order of the Prescribed Authority in exercise of the jurisdiction under Art. 226 of the Constitution then no exception can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the Prescribed Authority has been set aside, no objection can be taken." (Emphasis added)

In view of the above, it is not always necessary to set aside an order if found to have been passed by an authority/court having no jurisdiction.

Despite this, we cannot help but to state in absolute terms that it is not appropriate for the High Courts to entertain writ petitions under Article 226 of the Constitution of India against the orders passed by the Commission, as a statutory appeal is provided and lies to this Court under the provisions of the Consumer Protection Act, 1986. Once the legislature has provided for a statutory appeal to a higher court, it cannot be proper exercise of jurisdiction to permit the parties to bypass the statutory appeal to such higher court and entertain petitions in exercise of its powers under Article 226 of the Constitution of India. Even in the present case, the High Court has not exercised its jurisdiction in accordance with law. The case is one of improper exercise of jurisdiction. It is not expected of

us to deal with this issue at any greater length as we are dismissing this petition on other grounds.

3. So far as these petitions are concerned, there is an inordinate unexplained delay of 1314 days in filing the petition against the order dated 16.9.2008 and of 851 days against the order dated 17.12.2009. Cause shown for not approaching this Court within limitation is stated that petitioner was not physically fit and for **some days** remained in hospital. The cause shown is not sufficient as it was not necessary for the petitioner to come here personally.

4. This Court in *Anshulal Aggarwal v. NOIDA,* (2011) CPJ 63 (SC) has explained the scope of condonation of delay in a matter where the special courts/tribunals have been constituted in order to provide expeditious remedies to the person aggrieved and Consumer Protection Act, 1986 is one of them. Therefore, this Court held that while dealing with the application for condonation of delay in such cases the court must keep in mind the special period of limitation prescribed under the statute (s).

5. In the instant case, condoning such an inordinate delay without any sufficient cause would amount to substituting the period of limitation by this Court in place of the period prescribed by the legislature for filing the special leave petition. Therefore, we do not see any cogent reason to condone the delay.

6. Hence, in the facts and circumstance of the case as explained hereinabove, we are not inclined to entertain these petitions. The same are dismissed on the ground of delay.

7. While declining to interfere in the present Special Leave Petition preferred against the order passed by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, we hereby make it clear that the order of the Commission are incapable of being questioned under

the writ jurisdiction of the High Court, as a statutory appeal in terms of Section 27 A(1)(c) lies to this Court. Therefore, we have no hesitation in issuing a direction of caution that it will not be proper exercise of jurisdiction by the High Courts to entertain writ petitions against such orders of the Commission.

A copy of this order may be sent to the Registrar General of all the High Courts, for bringing the same to the notice of Hon'ble the Chief Justices and Hon'ble Judges of the respective High Courts.

K.K.T. SLPs dismissed.

RATTAN LAL (SINCE DECEASED) THROUGH HIS LEGAL REPRESENTATIVES

v.

S.N. BHALLA & ORS.

(Civil Appeal No. 5787 of 2012)

AUGUST 08, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

Specific performance – Agreement to sell – Payment of earnest money – As per clause of the agreement, if permission for transfer not granted within a specific time, the vendors had the option to determine the agreement – Permission not granted – Vendor determined the agreement and returned the earnest money – Purchaser by a letter telling the vendors that they were willing to purchase the property even beyond the stipulated period and telling that they accepted the earnest money under protest – Suit for specific performance of the agreement – Dismissed by trial court – Order upheld by High Court – On appeal, held: Agreement was wrongly terminated – The purchaser was always ready and willing to perform his part of contract – The refund of earnest money was accepted under protest – Vendors were not entitled to determine the agreement having not made positive efforts in procuring the necessary sale permission and clearance certificates – Suit decreed – However, in view of the facts that the agreement was executed 34 years ago, during which period price of real estate has escalated sharply, and that the purchaser has not suffered any material loss, direction to vendors to pay the purchaser the costs of litigation i.e. Rs. 25,00,000/-.

Respondents entered into an agreement to sell the property in question with the appellant in the year 1978. The appellant (purchaser) paid Rs. 50,000/- as earnest

money. The agreement stipulated that the vendors were to apply within 15 days for permission to transfer and to obtain Clearance Certificate from tax authorities. As per clause 9 of the agreement, if despite applying for the permission within stipulated time, the seller did not get the permission within 6 months from the date of the agreement, the vendor had the option to determine the agreement.

The vendors made application for transfer to the authority concerned within 15 days. The authority asked the vendors to file certain documents. Ultimately the authority did not grant sale permission on the ground that affidavit filed by one of the vendors was defective. Thereupon the vendors determined the agreement to sell in terms of Clause 9 of the agreement, on the expiry of 6 months period. They also refunded the earnest money.

In the meantime, the purchaser sent a letter to the vendors requesting them to file necessary documents with the authority to enable the authority to give the sale permission. Purchaser also sent a telegram to the vendors stating that he was ready to purchase the property even beyond 6 months. Since there was no response from the vendors, he sent a legal notice stating that he was ready and willing to purchase the property and that he had accepted the earnest money under protest. Thereafter, the purchaser filed a suit for specific performance of the agreement. Trial court dismissed the suit on the ground that since the purchaser accepted the refund of earnest money, he abandoned his claim and was no longer ready and willing to purchase the property; that it was the purchaser who was in default in submitting documents before the authority; and that since the suit was filed on the last day of limitation, this also showed that the purchaser was not ready and willing to complete the sale transaction. Appeal against the order

was dismissed by High Court. Hence the present appeal.

Disposing of the appeal, the Court.

HELD: 1. The Agreement to Sell dated 8th September, 1978, was wrongly terminated. The reasoning of both the trial court and the High Court, cannot be supported. The acceptance of refund of the earnest money paid by the appellant to the respondents was not considered by the trial court as also the High Court in its proper perspective, as both the courts appeared to have ignored the fact that such refund had been accepted by the appellant, without prejudice to his rights and contentions in the suit. That the said amount was received under protest, was not considered either by the trial court or by the High Court, which had relied mainly on the provisions of Clauses 2 and 9 of the Agreement to Sell in dismissing the appellant's suit for specific performance. It is not found from the materials on record that the appellant had ever given up his claim under the Agreement or that he was not ready and willing to perform his part of the contract. [Paras 23 and 28] [114-D-F; 116-E]

2. The trial court also quite erroneously absolved the respondents of their obligation under the Agreement to obtain sale permission and Income Tax Clearance Certificate, which were required for completion of the sale. The role of the appellant was merely that of a facilitator and the primary responsibility for obtaining permission and clearance from the Income Tax Authorities remained with the Respondents. In fact, there is nothing on record to indicate that by his acts, the appellant ever agreed to play a role other than that of a supportive role and that too in his own interest, in obtaining the necessary clearances. [Para 24] [114-G-H, 115-A]

3. Clause 9 was never meant to provide the respondents with an escape route if they themselves failed to discharge their responsibility of not only applying for sale permission, but to also follow up the matter with the authorities in order to obtain the same within the stipulated period of six months. In the absence of any material on record to show that the respondents had made positive efforts for procuring the necessary sale permission and clearance certificates, they were not entitled to determine the Agreement in terms of Clause 9. [Para 25] [115-B-D]

4. In the absence of definite evidence to show that the appellant/purchaser was not ready and willing to conclude the sale transaction, the respondents cannot be given the benefit of the delay in concluding the same. It is not correct to say that appellant's filing the suit for specific performance on the last day of limitation indicated that the appellant was not ready and willing to complete the sale transaction, as otherwise he would have filed the suit earlier. The appellant filed the suit within the period of limitation and his readiness and willingness to conclude the sale transaction was quite obvious from the fact that he had taken upon himself the burden of pursuing the matter with the authorities for obtaining sale permission and Income Tax Clearance Certificate. The role played by the appellant in this regard cannot, therefore, be applied to his disadvantage. The fact that the appellant had made several requests to the respondents to file a proper affidavit, as requested by the DDA, is another indication that the appellant was ready and willing to complete the sale transaction. [Paras 26 and 27] [115-E-H; 116-A-B]

5. Having regard to the fact that the Agreement to Sell was executed 34 years ago and during this period the price of real estate has escalated sharply; and that the

appellant has not suffered any material loss, since only the earnest money of Rs.50,000/- had been paid by him and that too was returned to the appellant immediately upon termination of the Agreement and the said amount was duly accepted by the appellant, the appellant should be compensated for the time spent by him in pursuing his remedy in respect of the Agreement to Sell. Accordingly, the suit is decreed and the respondents are directed to pay the appellant costs for the litigation right throughout, assessed at Rs.25,00,000/-, without the appellant having to proceed in execution for recovery of the same. In the event, the respondents fail to pay the said amount to the appellant within the aforesaid period, the appellant will be entitled to put this decree for costs into execution before the trial court and the said amount will carry simple interest at the rate of 18% per annum from one month after the date of the decree till its realization. [Para 29 and 30] [116-E-G; 117-B-D]

Balwantrai Chimanlal Trivedi vs. M.N. Nagrashna and Ors. **(1961) 1 SCR 113 – referred to.**

Case Law Reference:

(1961) 1 SCR 113	**Referred to.**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5787 of 2012.

From the Judgment & Order dated 18.12.2008 of the High Court of Delhi at New Delhi in RFA No. 272 of 2004.

Altaf Ahmad, Anil R. Kher, Bhargava V. Desai for the Appellant.

Mukul Rohtagi, Ashok Mathur, P.S. Sudheer, Dharmveer, Rishi Maheshwari for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The Respondents are perpetual Sub-lessees of Plot No.C-2/13, Vasant Vihar, New Delhi, measuring 600 sq. yards, allotted to them through the Government Servants Co-operative House Building Society Limited. They erected a single-storeyed structure on the said land and vide Agreement dated 8th September, 1978, they agreed to sell the said property to the Appellant together with the building erected thereon for a consideration of Rs.5,90,000/-. The Appellant paid a sum of Rs.50,000/- to the Respondents in advance to enable them to apply for necessary permission for transfer and to obtain Clearance Certificate from the Tax authorities. The Agreement stipulated that on receipt of the said Clearance, the Respondents were to inform the Appellant of its receipt, and, thereafter, the Appellant was required to complete the sale within 60 days by paying the balance consideration agreed to between the parties. In case the Respondents failed to apply for permission to sell within 15 days from the date of the Agreement, the Appellant had the option to determine the Agreement whereupon the Respondents were required to refund the earnest money and to pay damages to the Appellant assessed at Rs.50,000/-.

3. The provision in the Agreement which is crucial for a decision in this Appeal is Clause 9, which is extracted hereinbelow :

> "9. That if the Seller applies for sale permission within the time stipulated in clause 8 above, but does not get it within 6 months, the Seller may determine this Agreement and the Seller shall refund to the Purchaser the earnest money received by him without any damages or interest, within a period of 15 days from the date of determination of the Agreement."

4. Inasmuch as, the sale was not being completed by the Respondents, the Appellant filed Suit No.278 of 2003, in the

Court of Additional District Judge, Delhi, for specific performance of the contract.

5. Clause 2 of the Agreement to Sell stipulates that upon execution of the Agreement, the Respondents would immediately apply to the Delhi Development Authority (DDA) and the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976, for permission to transfer the said property to the Purchaser/Appellant free from all encumbrances, after obtaining requisite permissions from any other Body or Authority. In Clause 3 of the Agreement, the Respondents also undertook to obtain the Income Tax Clearance Certificate immediately on obtaining the sale permission from the concerned authorities and to inform the Purchaser/Appellant by Registered Post with Acknowledgment Due accordingly. As indicated hereinabove, Clause 4 of the Agreement stipulates that on being informed of the receipt of the requisite permission from the Respondents, the Appellant would have to complete the sale within a period of 60 days from the date of receipt of such intimation and on being furnished with the copies of the permission and the Income Tax Clearance Certificate.

6. Clause 8 of the Agreement to Sell is of special significance to the facts of this case and is, accordingly, extracted hereinbelow :

> "8. That if for any reason the Seller fails to apply for permission to sell the said property to the Purchaser within a period of 15 days from the date of signing this Agreement, the Purchaser shall have the option to determine this Agreement and in that event the Seller shall refund the earnest money of Rs.50,000/- (Rupees Fifty Thousand only) as received by him and pay to the Purchaser damages which are assessed as the sum of Rs.50,000/- (Rupees Fifty Thousand only)."

7. As will be evident from the aforesaid Clause, the Purchaser was given the option to exit from the Agreement in

case the Seller failed to apply for permission for sale of the property within a period of 15 days from the date of signing of the Agreement. Clause 9 of the Agreement which is crucial for a decision in this appeal, contains the right of the Seller to determine the Agreement and is extracted hereinbelow :

> "9. That if the Seller applies for sale permission within the time stipulated in clause 8 above, but does not get it within 6 months, the Seller may determine this Agreement and the Seller shall refund to the Purchaser the earnest money received by him without any damages or interest, within a period of 15 days from the date of determination of the Agreement."

8. In terms of Clause 9 of the Agreement extracted hereinabove, the Respondents submitted a request application in terms of Clause 2 of the said Agreement dated 12th September, 1978, i.e., well-within the period of 15 days contemplated in the said Clause. In response to the said application made to the Delhi Development Authority (DDA) for grant of sale permission, a letter dated 23rd/27th November, 1978, was addressed by DDA to the Respondents asking for certain documents to be filed. Interestingly, although, the said letter was addressed to the Respondents, it was responded to by the Appellant. The said letter sent by the Appellant has been marked as Ex.PW-1/3. On 7th March, 1979, the DDA informed the Respondents of the decision not to grant sale permission on the ground that the affidavit filed by Shri S.N. Bhalla, one of the two vendors was defective. On receiving the said intimation from the DDA, the Respondents sent a telegram to the Appellant on 8th March, 1979, determining the Agreement to Sell in terms of Clause 9 of the Agreement, on the expiry of the 6 months' period for completion of the sale on 7th March, 1979. The Appellant was also informed that the earnest money paid by him would be refunded within 15 days. Pursuant to such intimation, on 12th March, 1979, the Respondents sent a Bank

Draft of Rs.50,000/- to the Appellant, being the earnest money received in terms of Clause 9 of the Agreement to Sell dated 8th September, 1978.

9. Coincidentally, on 8th March, 1979 itself, the Appellant also addressed a letter to the Respondents stating that the Lieutenant Governor, Delhi, had granted permission for sale of House No.C-2/13, Vasant Vihar, New Delhi (the property in question), in favour of the Appellant. However, the same could not be communicated since the affidavit filed by Shri S.N. Bhalla, the Respondent No.1 herein, was found to be defective and such permission could be conveyed only on production of the correct affidavit as required by the DDA. The Respondents were, accordingly requested by the Appellant to file a proper affidavit in the Department and to file all the necessary documents with the DDA to enable them to convey the required sale permission. It was also mentioned that the failure to do so would make the Respondents responsible for all costs and consequences thereof. The original letter No. F.H.(199)78-CS/DDA dated 7th March, 1979, was attached with the notice sent on behalf of the Appellant. The said letter was followed up by a telegram sent by the Appellant indicating that time was not the essence of the Agreement and that he was prepared to purchase the house of the Respondents even beyond the period of 6 months since, although, DDA was ready to give permission, the Respondents had defaulted in filing the correct affidavit to enable DDA to grant permission.

10. Inasmuch as, no positive response was received by the Appellant from the Respondents to his communications, he sent a legal notice to the Respondents informing them that he was ready and willing to complete the transaction and to have the Sale Deed executed in his favour for the property in question by paying the balance price. The Respondents were asked to inform the Appellant as to how the transaction could be completed so that he could tender the sale consideration by Bank Draft. It was also indicated in the notice that the Bank

Draft sent by the Respondents refunding the earnest money, had been encashed under protest, but it did not mean that the contract was repudiated. The contract continued to subsist and the Appellant was always ready and willing to perform his part of the contract.

11. In the absence of a positive response to the said notice, the Appellant filed Suit No.278 of 2003, on 8th March, 1982, for specific performance of the Agreement to Sell dated 8th September, 1978. On the pleadings of the parties, the following issues were settled by orders dated 1st November, 1983 and 19th February, 1991 :

"(1) Whether the Plaintiff has been ready and willing to perform his part of agreement dated 08.09.1978?

(2) Whether the Defendant has committed breach of the said Agreement?

(3) Whether the agreement dated 08.09.1978 stands terminated or frustrated as alleged by the defendant and there is no subsisting agreement to sell?

(4) Whether the plaintiff is to be granted relief of specific performance in the facts and circumstances of the present case?

(5) Whether the agreement dated 08.09.1978 is void for uncertainty?

(6) Whether the time was the essence of the contract and whether the agreement dated 08.09.1978 was rightly terminated?"

The last issue was an additional issue settled vide order dated 19th February, 1991.

12. Considering Clauses 2, 8 and 9 of the Agreement to Sell dated 8th September, 1978, the Trial Court dismissed the

suit, *inter alia*, upon holding that the Appellant had intentionally and without demur accepted refund of the earnest money sent to him by Bank Draft and, thereafter, he sent the lawyer's notice on 26th April, 1979, stating that the said Draft was encashed without prejudice to his rights and contentions in the Suit. The learned Trial Court held that encashing the Bank Draft amounted to acceptance of the contract being determined. The learned Trial Court also was of the view that in view of his conduct it would be clear that the Appellant had abandoned his claim under the contract and he was no longer ready and willing to pursue his remedies under the contract. The Trial Court also took note of the fact that although the Agreement contemplated that the Respondents would take steps to obtain the necessary sale permission and the Income Tax Clearance Certificate, the same was pursued by the Appellant and that it was the Appellant who was in default in complying with the requests made by DDA, which had resulted in the sale permission not being granted. The Trial Court categorically held that there was deficiency in respect of the documents to be filed. Even on the question of the Suit being filed on the last date of limitation, the same was construed to mean that the Appellant was not ready and willing to complete the sale transaction.

13. Aggrieved by the judgment and decree passed by the learned Additional District Judge on 10th February, 2004, the Appellant filed a Regular First Appeal before the Delhi High Court, being RFA No.272 of 2004, which was dismissed by the impugned judgment.

14. The Division Bench of the Delhi High Court in effect, accepted the reasoning of the Trial Court and indicated further that a contract, which is by its nature determinable, is incapable of being specifically enforced under Section 14(1)(c) of the Specific Relief Act, 1963. The Division Bench held that in terms of Clause 9 of the Agreement to Sell, the contract was determinable if the sale permission was not forthcoming within a period of 6 months from the date of execution of the

Agreement. The Division Bench also referred to Section 20 of the aforesaid Act to indicate that relief of specific performance is discretionary and in the instant case, such discretion should not be exercised in favour of the Appellant who had approached the Court on the last date of limitation, i.e., within 3 years from the date when cause of action for the suit had accrued. Observing that it was a matter of common knowledge that between 1979 and 1982 the price of property had risen very sharply in Delhi, the Division Bench also observed that it could not also be lost sight of that the Appellant had accepted the refund of Rs.50,000/-, which had been paid by him to the Respondents as earnest money-cum-part Sale consideration. It is on the basis of such reasoning that the appeal was dismissed by the Division Bench of the Delhi High Court.

15. Mr. Altaf Ahmad, learned Senior Advocate, who appeared in support of the Appeal, contended that in terms of Clause 2 of the Agreement to Sell, the Sellers were under an obligation to apply to the DDA and the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976, to obtain the requisite permission to transfer the property to the Appellant, free from all encumbrances. Mr. Ahmad submitted that the liberty given to the Respondents/Sellers under Clause 9 of the Agreement to exit therefrom could not be taken advantage of by the Sellers in case they were in default in obtaining the said permission within the stipulated time, without making serious and conscientious efforts to obtain the same. Mr. Ahmad submitted that in the instant case, the Respondents had been informed by the DDA of the deficiencies in the affidavit filed by them, but they did not take any step to remove the deficiencies. Mr. Ahmad submitted that it is no doubt true that the Appellant/Purchaser had taken upon himself the burden of acquiring the sale permission and Income Tax Clearance Certificate, but it was only to assist the Respondents and the same did not absolve the Respondents of their responsibility of performing the tasks that they were required to perform under

the Agreement. Mr. Ahmad contended that the role played by the Appellant in the entire episode was at best that of a facilitator in his own interest.

16. Mr. Ahmad submitted that both the Trial Court, as well as the High Court, had erred in holding that the Appellant was not ready and willing to complete the sale transaction and the same would be evident from the fact that he filed the suit for specific performance on the last date of limitation. Mr. Ahmad submitted that the very fact that the Appellant took on himself the burden of assisting the Respondents to procure the necessary sale permission and Income Tax Clearance Certificate, indicated his willingness and anxiety to complete the transaction. Learned counsel submitted that despite the Appellant's readiness and willingness to complete the sale transaction, he was unable to do so on account of the deficiencies on the part of the Respondents in complying with the instructions of the DDA. Learned counsel submitted that both the Courts below had dealt with the issues in the suit without properly understanding the case made out by the Appellant vis-à-vis the terms and conditions of the Agreement to Sell dated 8th September, 1978, and the judgment and decree of the Trial Court as well as the judgment of the High Court were liable to be set aside.

17. On the other hand, appearing for the Respondents, Mr. Mukul Rohatgi, learned Senior Advocate, contended that despite the obligation cast upon the Respondents to obtain the necessary sale permission and Income Tax Clearance Certificate, the Appellant had taken upon himself the responsibility to obtain the same and the Respondents could not be made responsible for the Appellant's failure to obtain the same. Mr. Rohatgi submitted that the Respondents/Sellers were fully justified in invoking Clause 9 of the Agreement to Sell and to terminate the same.

18. In order to drive home his point, Mr. Rohatgi submitted

that the letters dated 27th November, 1978 and 7th March, 1979, which had been addressed to the Respondents by the Executive Officer, DDA, requesting that a proper affidavit be filed in the department to enable the DDA to take further steps in the matter, had been received by the Appellant and forwarded to the Respondents in original with his letter dated 8th March, 1979.

19. Mr. Rohatgi urged that from his conduct it would be clear that the Appellant was not ready and willing to complete the sale and both the Courts had rightly dismissed the Appellant's suit.

20. Mr. Rohatgi referred to various decisions on Section 20 of the Specific Relief Act, 1963, to bolster his submissions, but the same are all peculiar to the facts of each case. Relying on the Constitution Bench decision of this Court in *Shri Balwantrai Chimanlal Trivedi Vs. M.N. Nagrashna and Others* [(1961) 1 SCR 113], Mr. Rohatgi lastly submitted that the Supreme Court is not bound to interfere under Article 136 of the Constitution when dealing with an appeal where there is no failure of justice.

21. What emerges from the submissions made on behalf of the respective parties is that the Appellant's suit was dismissed by the Trial Court on the finding that he had intentionally and without demand, accepted refund of the earnest money, though, without prejudice to his rights and contentions in the suit. The learned Trial Court also found that by encashing the Bank Draft, the Appellant had clearly indicated that he was no longer interested in completing the sale transaction. The Trial Court also took note of the fact that although under the Agreement it was for the Respondents to obtain the sale permission and Income Tax Clearance Certificate, it was the Appellant who had elected to pursue the matter and was, therefore, responsible for the failure to obtain the same within the stipulated period of six months, which

entitled the Respondents/Sellers to terminate the Agreement under Clause 9 thereof.

22. The High Court approved the view taken by the Trial Court, but adding that in view of Section 14(1)(c) of the Specific Relief Act, 1963, the contract, which was by its very nature determinable, was incapable of being specifically enforced. The High Court, for abundant caution, also referred to Section 20 of the aforesaid Act to indicate that the relief of specific performance was purely discretionary and dependent on the facts of each case. The High Court also took note of the steep rise in the prices of real estate while dismissing the Appellant's suit for specific performance.

23. In our view, the reasoning of both the Trial Court and the High Court, cannot be supported on several grounds. Firstly, the acceptance of refund of the earnest money paid by the Appellant to the Respondents was not considered by the Trial Court as also the High Court in its proper perspective, as both the Courts appeared to have ignored the fact that such refund had been accepted by the Appellant, without prejudice to his rights and contentions in the suit. That the said amount was received under protest has not been considered either by the Trial Court or by the High Court, which had relied mainly on the provisions of Clauses 2 and 9 of the Agreement to Sell in dismissing the Appellant's suit for specific performance. We do not find from the materials on record that the Appellant had ever given up his claim under the Agreement or that he was not ready and willing to perform his part of the contract.

24. Secondly, the Trial Court also quite erroneously absolved the Respondents of their obligation under the Agreement to obtain sale permission and Income Tax Clearance Certificate, which were required for completion of the sale. We reiterate that the role of the Appellant was merely that of a facilitator and the primary responsibility for obtaining permission and clearance from the Income Tax Authorities remained with the Respondents. In fact, there is nothing on

record to indicate that by his acts, the Appellant ever agreed to play a role other than that of a supportive role and that too in his own interest, in obtaining the necessary clearances.

25. The other point raised on behalf of the Respondents regarding the import of Clause 9 of the Agreement to sell is also not of much substance. In our view Clause 9 was never meant to provide the Respondents with an escape route if they themselves failed to discharge their responsibility of not only applying for sale permission, but to also follow up the matter with the authorities in order to obtain the same within the stipulated period of six months. In the absence of any material on record to show that the Respondents had made positive efforts for procuring the necessary sale permission and clearance certificates, they were not entitled to determine the Agreement in terms of Clause 9.

26. The last point, and, in our view the most substantive point, is the steep hike in the value of real estate which has been taken note of by the High Court. However, in the absence of definite evidence to show that the Appellant/purchaser was not ready and willing to conclude the sale transaction, the Respondents cannot be given the benefit of the delay in concluding the same.

27. Both the Courts below have attached a good deal of importance to the fact that the Appellant filed the suit for specific performance on the last day of limitation, which, according to the learned Judges, indicated that the Appellant was not ready and willing to complete the sale transaction, as otherwise he would have filed the suit earlier. We have no hesitation in rejecting the said contention, since the Appellant filed the suit within the period of limitation and his readiness and willingness to conclude the sale transaction was quite obvious from the fact that he had taken upon himself the burden of pursuing the matter with the authorities for obtaining sale permission and Income Tax Clearance Certificate. The role played by the Appellant in this regard cannot, therefore, be

applied to his disadvantage. In our view, the approach of both the Courts below to the problem was coloured by the fact that the Appellant had actively involved himself in the matter of obtaining the sale permission as well as Income Tax Clearance Certificate. The fact that the Appellant had made several requests to the Respondents to file a proper affidavit, as requested by the DDA, is another indication that the Appellant was ready and willing to complete the sale transaction. Both the Courts below dealt with the suit filed by the Appellant, as though the Respondents had no obligation under the agreement for completing the sale and this appears to have influenced their judgment in dismissing the Appellant's suit for specific performance.

28. Issue Nos.1, 3 and 4 as settled by the Trial Court on 1st November, 1983 and 19th February, 1991, are, therefore, answered in favour of the Appellant and the remaining issues are answered against the Respondents. In the light of what has been indicated hereinabove, we are of the view that the Agreement to Sell dated 8th September, 1978, has been wrongly terminated.

29. This, however, brings us face to face with a rather difficult situation having regard to the fact that the Agreement to Sell was executed 34 years ago on 8th September, 1978, in respect of the suit property. We cannot shut our eyes to the fact that during this period the price of real estate has escalated sharply. In addition to the above, the Appellant has not suffered any material loss, since only the earnest money of Rs.50,000/- had been paid by him to the Respondents and the balance consideration was yet to be paid when the agreement came to be terminated. Even the said sum of Rs.50,000/- was returned to the Appellant immediately upon termination of the Agreement and the said amount was duly accepted by the Appellant, though by recording his objections subsequently. The Appellant, therefore, has not suffered any monetary loss, and, on the other hand, the value of the property must have sky-

rocketed during the period between the execution of the Agreement till date. In fact, that is why there is no prayer in the alternative for return of any sums advanced, which is one of the usual prayers in suits for specific performance.

30. However, we are also of the view that the Appellant should be compensated for the time spent by him in pursuing his remedy in respect of the Agreement to Sell. Accordingly, we decree the suit, but instead of decreeing the suit for specific performance of the Agreement, we direct that the Respondents shall pay the Appellant costs for the litigation right throughout, assessed at Rs.25,00,000/-, to be paid by the Respondents to the Appellant within one month from date, without the Appellant having to proceed in execution for recovery of the same. In the event, the Respondents fail to pay the said amount to the Appellant within the aforesaid period, the Appellant will be entitled to put this decree for costs into execution before the Trial Court and the said amount will carry simple interest at the rate of 18% per annum from one month after the date of the decree till its realization.

31. The Appeal is disposed of, accordingly.

K.K.T. Appeal disposed of.

PUNJAB URBAN PLANNING & DEV. AUTHORITY & ORS.
v.
RAGHU NATH GUPTA & ORS.
(Civil Appeal No. 5887 of 2012 etc.)

AUGUST 16, 2012

[K.S. RADHAKRISHNAN AND MADAN B. LOKUR, JJ.]

URBAN DEVELOPMENT:

Allotment of commercial plots in auction by Urban Development Authority – On 'as is where is' basis – Allottee accepting the same – Allottee taking the instalment facility for payment of the cost of the site – Allotment letter stipulating for interest, penal interest and penalty for delayed payment of instalment – Writ petition by allottee seeking direction to the Authority not to charge interest on the instalments till the basic amenities were provided on the site – Writ allowed by High Court – On appeal, held: The allottee having accepted the allotment on 'as is where is' basis, is estopped from seeking basic amenities from the Authority – On facts, there was not much delay in providing the basis amenities by the Authority – Therefore, allottee liable to pay the interest, penal interest and penalty on account of delayed payment of instalments.

The question for consideration in the present appeals was whether the respondents were legally obliged to pay the interest, penal interest and penalty on account of delayed payment of instalments after having accepted the allotment of commercial plots by way of auction.

The High Court, in the impugned order had taken the view that since there was delay on the part of the appellant-Authority in providing the basic amenities in

time, it could not have legally claimed the interest, penal interest and penalty on account of delayed payment of instalments.

Allowing the appeals, the Court

HELD: The High Court was not justified in holding that the respondents were not liable to pay the interest, penal interest and penalty for the belated payment of installments. The respondents had accepted the commercial plots with the open eyes, subject to the terms and conditions stipulated in the auction Notification. Evidently, the commercial plots were allotted on "as is where is" basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on "as is where is" basis, they cannot be heard to contend that the appellant-Authority had not provided the basic amenities like parking, lights, roads, water, sewerage etc. If the allottees were not interested in taking the commercial plots on "as is where is" basis, they should not have accepted the allotment and after having accepted the allotment on "as is where is" basis, they are estopped from contending that the basic amenities were not provided by the appellant-Authority when the plots were allotted. The facts would clearly indicate that there was not much delay on the part of the appellant-Authority to provide those facilities as well. [Paras 12 and 15] [125-B-E; 127-F]

Municipal Corporation, Chandigarh and Ors. v. Shantikunj Investment (P) Ltd. **2006 (4) SCC 109: 2006 (2) SCR 768;** *UT Chandigarh Administration and Anr. v. Amerjeet Singh and Ors.* **(2009) 4 SCC 660: 2009 (4) SCR 541– relied on.**

Case Law Reference:

2006 (2) SCR 768	**Relied on**	**Para 12**

2009 (4) SCR 541	**Relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5887 of 2012.

From the Judgment & Order dated 5.11.2008 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition 6929 of 2007.

WITH

C.A.No. 5888 of 2012.

Rachana Joshi Issar, Nidhi Tiwari, Ambreen Rasool for the Appellants.

P.S. Patwalia, Tushar Bakshi, Rajat Singh, Amita Gupta, Jagjit Singh Chhabra for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. The questions raised in both these appeals are the same, hence, we are disposing of both the appeals by a common judgment.

3. The question that has come up for consideration in these appeals is whether the respondents are legally obliged to pay the interest, penal interest and penalty on account of the delayed payment of installments after having accepted the allotment of commercial plots by way of auction. The High Court has taken the view that since there was delay on the part of the Punjab Urban Planning and Development Authority (for short "PUDA") in providing the basic amenities like parking, lights, road, water, sewerage etc. in time, PUDA cannot legally claim the interest, penal interest as well as penalty on account of the delayed payment of installments. The High Court placed reliance on the judgment of this Court in *Municipal Corporation, Chandigarh and Ors. v. Shantikunj Investment (P) Ltd.* (2006)

4 SCC 109 to reach that conclusion.

4. We heard Mrs. Rachna Joshi, learned counsel appearing on behalf of PUDA as well as Shri P.S. Patwalia, learned senior counsel assisted by Mr. Tushar Bakshi, appearing for the respondents.

5. For the disposal of these appeals, we may refer to the facts of Civil Appeal No. …… of 2012 [arising out of SLP (Civil) No. 8732 of 2009], as follows:

PUDA, on 16.3.2001, conducted a public auction for sale of the commercial plots. Raghu Nath Gupta, the respondent was the successful bidder of a single storey shop no. 134 in Phase III BIT, for a total consideration of Rs.31,75,000/-. The possession of the said shop was handed over to the respondent on 25.5.2001 on payment of Rs.7,93,750/- being 25% of the total cost of site. Installment facility was extended to the respondent for paying the balance 75% of the amount, that was Rs.23,81,250/- The relevant clauses of the Allotment Letter dated 16.3.2011 are extracted below for easy reference:

> "4. The sum of Rs.7,93,750/- being 25% of the total cost of the site deposited by you after the ….. been adjusted as 25% of the sale.
>
> 5. The balance amount i.e. Rs.23,81,250/- being 75% of above piece of the writ, can be paid in lump sum without interest within 60 days from the date of auction or in 4 equated yearly installments along with interest @ 15 % per annum.
>
> 6. The annual quoted installment with interest @ 15% per annum will be payable as per the following schedule:

Installment	Due date	Amount of Installment	Interest	Total amount payable
1st	16.3.2002	5,95,313/-	3,57,188/-	9,52,501/-
2nd	16.3.2003	5,95,313/-	2,67,891/-	8,52,501/-
3rd	16.3.2004	5,95,312/-	1,78,594/-	7,73,906/-
4th	16.3.2005	5,95,312/-	89,297/-	6,84,609/-
		23,81,250/-	**8,92,970/-**	**32,74,220/-**

In case the installment is not paid on the 10th of the month following the month in which it falls due, PUDA can impose penalty. The penalty Clause 9 reads as follows:

> "9. In case the installment is not paid by the 10th of the month following the month, in which it falls due, the Estate Officer shall proceed to take action for imposition of penalty charged @ 2% per month of the amount i.e. from the due date in addition to normal simple interest. In case of non-payment of the installment along with interest due thereon for a continuous period of 3 months, the whole or any part of the money paid in respect of the site shall be forfeited and the Estate Officer shall cancel the allotment and resume the site, after giving you appropriate notice and an opportunity of being heard shall continue to be charged in the whole due amount till the date of payment of amount due."

6. Above mentioned conditions were accepted and the plot was allotted. On getting possession after payment of 25% of the total cost, respondent raised construction on the allotted site in the year 2002. PUDA completed the development work by 20.12.2002 and provided all the facilities for the enjoyment of the various commercial plots allotted.

7. Respondent filed CWP No. 6156 of 2002 before the High Court seeking a direction to PUDA not to charge interest on the balance installments till the basic amenities were provided on the site. The writ petition was disposed of by the High Court on 22.4.2002 directing the Estate Officer, PUDA, Mohali to pass a speaking order. Consequently, the Estate Officer passed the order on 5.9.2002 rejecting the demand made in the notice, which was challenged by the respondents by filing CWP No. 18753 of 2002, which was disposed of vide order dated 13.7.2006 directing the respondents to file detailed representations before the Additional Chief Administrator. Consequently, a detailed representation was filed by the respondents on 29.8.2006 before the Additional Chief Administrator stating that since PUDA had failed to provide the basic amenities like drinking water, drainage and public toilets, respondents were not legally obliged to pay interest, penal interest, penalty etc. on the delayed installments. PUDA took up the stand before the Additional Chief Administrator that the basic amenities like parking, lights, roads, water, sewerage etc. were not provided at the site when they were allotted, but the toilet was shown near SCF No. 124-125. PUDA submitted that the electrical works had been completed by 24.12.2002, public health works had been completed by 22.11.2002 and the development of the commercial pocket had been completed by 20.12.2002.

8. After having examined the contentions raised by both, respondents and PUDA, the Additional Chief Administrator rejected the representation vide his order dated 31.3.2007, which was challenged by the respondents before the High Court by filing CWP No. 6929 of 2007. The High Court allowed that CWP vide its judgment dated 5.11.2008 placing reliance on the judgment of this Court in *Shantikunj Investment* (supra), which is impugned before this Court.

9. Mrs. Rachana Joshi took us through the terms and conditions of Auction Notice and also to the various terms and

conditions of the allotment, as well as the judgment of this Court in *Shantikunj Investment* (supra).

10. Shri P.S. Patwalia submitted that the High Court was justified in allowing the writ petition, since there was a failure on the part of PUDA in providing the necessary facilities for enjoyment of the plots allotted to the respondents. Further, it was also contended by the learned senior counsel that the High Court had rightly applied the principle laid down by this Court in *Shantikunj Investment* (supra).

11. We are of the view that the terms and conditions stipulated in the auction notification for allotment of commercial plots, published by PUDA, has got considerable bearing in resolving the disputes between the parties. We, therefore, called for the auction notification published by PUDA and the same was made available to us. There was no dispute that the plots were auctioned on 16.3.2001 on the basis of the terms and conditions stipulated therein. Clause 25 is the most important clause, which binds both the parties, reads as follows:

> "25. The site is offered on "as is where is" basis and the Authority will not be responsible for leveling the site or removing the structures, if any, thereon."

In other words, the plot in question was auctioned on "as is where is" basis and the same was accepted by the respondent on "as is where is" basis. Plot was allotted to the respondent by PUDA vide Memo No. A-5/2001/3192 dated 25.5.2001. The relevant terms and conditions of the allotment have already been referred to by us in the earlier part of the judgment. Respondents could have paid the entire amount in lump sum, however, they availed off the installment facility offered. It was made clear in the allotment letter that, in case, there was a failure to pay the installment by the 10th of the month following the month in which the payment fell due, the Estate Officer should proceed to take action for imposition of penalty charged @ 2% per month of the amount i.e. from the due date in addition

to normal simple interest. Further, it was also stated in the allotment letter that in case of non-payment of installment along with interest due thereon for a continuous period of three months, the whole or any parts of the money paid in respect of the site, should be forfeited and the Estate Officer could even cancel the allotment.

12. We notice that the respondents had accepted the commercial plots with the open eyes, subject to the above mentioned conditions. Evidently, the commercial plots were allotted on "as is where is" basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on "as is where is" basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage etc. If the allottees were not interested in taking the commercial plots on "as is where is" basis, they should not have accepted the allotment and after having accepted the allotment on "as is where is" basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage etc. were not provided by PUDA when the plots were allotted. Over and above, the facts would clearly indicate that there was not much delay on the part of PUDA to provide those facilities as well. As noted, the electrical works and health works were completed by 24.12.2002 and 22.11.2002 respectively and all the facilities like parking, lights, roads, water, sewerage etc. were also provided.

13. On facts, we find that this is not a case where PUDA was callous or indifferent or had caused an inordinate delay in providing the basic facilities to allottees. In our view, the High Court has not properly comprehended the scope of the judgment of this Court in *Shantikunj Investment* (supra) and the terms and conditions of the auction. This Court, in that case, has specifically held as follows:

> "26.....It is the common experience that for full development of an area it takes years. It is not possible in

> every case that the whole area is developed first and allotment is served on a platter. Allotment of the plot was made on an as is where is basis and the Administration promised that the basic amenities will be provided in due course of time. It cannot be made a condition precedent.....
>
> 28. It is true that once allotment of the land has been made in favour of the allottee, he can take possession of the property and use the same in accordance with the Rules. That does not mean that all the facilities should be provided first for so called enjoyment of the property as this was not the condition of auction. The party knew the location & condition prevailing thereon. The interpretation given by the Division Bench of the High Court of Punjab & Haryana and contended before us cannot be accepted as a settled proposition of law.....
>
> (emphasis supplied)"

We may also refer to another judgment of this Court in *UT Chandigarh Administration and Anr. v. Amerjeet Singh and Ors.* (2009) 4 SCC 660, in which, after having referred to the judgment of this Court in Shantikunj Investment case, this Court held as follows:

> "19. .....In a public auction of sites, the position is completely different. A person interested can inspect the sites offered and choose the site which he wants to acquire and participate in the auction only in regard to such site. Before bidding in the auction, he knows or is in a position to ascertain, the condition and situation of the site. He knows about the existence or lack of amenities. The auction is on `as is where is basis'. With such knowledge, he participates in the auction and offers a particular bid. There is no compulsion that he should offer a particular price.

20. Where there is a public auction without assuring any specific or particular amenities, and the prospective purchaser/lessee participates in the auction after having an opportunity of examining the site, the bid in the auction is made keeping in view the existing situation, position and condition of the site. If all amenities are available, he would offer a higher amount. If there are no amenities, or if the site suffers from any disadvantages, he would offer a lesser amount, or may not participate in the auction. Once with open eyes, a person participates in an auction, he cannot thereafter be heard to say that he would not pay the balance of the price/premium or the stipulated interest on the delayed payment, or the ground rent, on the ground that the site suffers from certain disadvantages or on the ground that amenities are not provided."

14. We are of the view that the judgment in *Amarjeet Singh* (supra) is a complete answer to the various contentions raised by the respondents. We may reiterate that after having accepted the offer of the commercial plots in a public auction with a super imposed condition i.e. on "as is where is" basis and after having accepted the terms and conditions of the allotment letter, including installment facility for payment, respondents cannot say that they are not bound by the terms and conditions of the auction notice, as well as that of the allotment letter. On facts also, we have found that there was no inordinate delay on the part of PUDA in providing those facilities.

15. We are of the view that the High Court was not justified in holding that the respondents are not liable to pay the interest, penal interest and penalty for the period commencing from 1.6.2001 to 31.12.2002 for the belated payment of installments. Consequently, the judgments of the High Court are set aside and the writ petitions would stand dismissed and the appeals would stand allowed as above. There will be no order as to costs.

K.K.T. Appeals allowed.

M/S. MICHIGAN RUBBER (INDIA) LTD.
v.
THE STATE OF KARNATAKA & ORS.
(Civil Appeal No. 5898 of 2012)

AUGUST 17, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Contract – Tender by State Road Transport Corporation – For procuring tyres, tubes and flaps – Tender specifying pre-qualification criteria – The criteria challenged by appellant-company (manufacturer and supplier of the goods) in writ petition – Petition dismissed by Single Judge of High Court – The order affirmed by Division Bench of High Court – On appeal, held: Government and Public Undertakings must have free hand in setting terms of the tender – Court can interfere with it only if they are arbitrary discriminatory, mala fide or actuated by bias – The impugned conditions cannot be classified as arbitrary, discriminatory and mala fide – Judicial Review.

Respondent No. 2 (State Road Transport Corporation) floated a tender for supply of tyres, tubes and flaps specifying certain pre-qualification criteria. Appellant-Company, which was engaged in the manufacture and supply of tyres, tubes and flaps, filed a writ petition challenging the pre-qualification criteria. Single Judge of the High Court dismissed the petition. Writ Appeal against the same was further dismissed by Division Bench of High Court.

In appeal to this Court, appellant-Company contended that the pre-condition criteria was unreasonable, arbitrary, discriminatory and opposed to

public interest in general as the said conditions were incorporated to exclude the appellant-company and other similarly situated companies from the tender process on extraneous grounds and with ulterior motive.

Dismissing the appeal, the Court

HELD: 1.1. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. The actions of the State are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities. [Para 19] [145-G-H; 146-A]

1.2. Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited. [Para 19] [146-B-C]

1.3. In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted. [Para 19] [146-D]

1.4. Certain pre-conditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and if the State or its instrumentalities act reasonably, fairly and in public interest in awarding

contract, here again, interference by court is very restrictive since no person can claim fundamental right to carry on business with the Government. [Para 19] [146-E-F]

1.5. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions: (*i*) Whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (*ii*) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226. [Para 20] [146-G-H; 147-A]

Tata Cellular vs. Union of India **(1994) 6 SCC 651: 1994 (2) Suppl.SCR 122 ;** *Raunaq International Ltd. vs. I.V.R. Construction Ltd.and Ors.* **(1999) 1 SCC 492: 1998 (3) Suppl. SCR 421;** *Union of India and Anr. vs.International Trading Co. and Anr.* **(2003) 5 SCC 437: 2003 (1) Suppl. SCR 55;** *Jespar I. Slong vs. State of Meghalaya and Ors.* **(2004) 11 SCC 485;** *Association of Registration Plates vs. Union of India and Ors.* **(2005) 1 SCC 679: 2004 (6) Suppl. SCR 496;** *Reliance Airport Developers (P) Ltd. vs. Airports Authority of India and Ors.* **(2006) 10 SCC 12: 2006 (8) Suppl.SCR 398 ;** *Jagdish Mandal vs. State of Orissa and Ors.* **(2007) 14 SCC 517: 2006 (10) Suppl. SCR 606;** *Tejas Constructions and Infrastructure Pvt. Ltd. vs. Municipal Council, Sendhwa and Anr.* **(2012) 6 SCC 464 – relied on.**

2. There is no valid ground for interference with the reasoning of the High Court. The appellant has failed to establish that the award of contract was contrary to public interest and beyond the pale of discrimination or

unreasonable. To have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. The Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, *mala fide* or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, taking into account various aspects including the safety of the passengers and public interest, the Contract Management Group consisting of experienced persons, revised the tender conditions. The Committee had discussed the subject in detail for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, the court is satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or *mala fide*. [Paras 31 and 33] [151-B-F; 152-A-B]

Case Law Reference:

1994 (2) Suppl. SCR 122	**Relied on**	**Para 10**
1998 (3) Suppl. SCR 421	**Relied on**	**Para 11**
2003 (1) Suppl. SCR 55	**Relied on**	**Para 12**
(2004) 11 SCC 485	**Relied on**	**Para 13**
2004 (6) Suppl. SCR 496	**Relied on**	**Para 14**
2006 (8) Suppl. SCR 398	**Relied on**	**Para 16**
2006 (10) Suppl. SCR 606	**Relied on**	**Para 17**

(2012) 6 SCC 464 Relied Jon Para 18

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5898 of 2012.

From the Judgment & Order dated 2.7.2008 of the High Court of Karnataka at Bangalore in Writ Appeal No. 1928 of 2007.

Madhurima Tatia, R.M. Tatia, K.V. Bharathi Upadhyaya for the Appellant.

S.N. Bhat, V.N. Raghupathy for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 02.07.2008 passed by the High Court of Karnataka at Bangalore in Writ Appeal No. 1928 of 2007 whereby the High Court dismissed the appeal filed by the appellant-Company herein.

3.Brief facts:

(a) On 04.08.2005, the Karnataka State Road Transport Corporation (KSRTC) - Respondent No.2 herein floated a Tender being No. G30-05 for supply of Tyres, Tubes and Flaps specifying certain pre-qualification criteria.

(b) Challenging the said pre-qualification criteria, the appellant-Company, which is engaged in the manufacture and supply of tyres, tubes and flaps filed a Writ Petition being No. 20543 of 2005 before the High Court. After filing of the writ petition, the said criterion was withdrawn by the KSRTC. Thereafter, the KSRTC modified the pre-qualification criteria and issued a Tender being No. G-23-07 dated 05.07.2007 wherein, a new pre-qualification criterion was specified.

(c) Being aggrieved by the said pre-qualification criteria, the appellant-Company preferred a Writ Petition being No. 11951 of 2007 before the High Court. By judgment dated 13.09.2007, the learned Single Judge of the High Court dismissed their writ petition.

(d) Challenging the said judgment, the appellant filed a Writ Appeal being No. 1928 of 2007 before the Division Bench of the High Court. By impugned judgment dated 02.07.2008, the Division Bench of the High Court dismissed the same.

(e) Being aggrieved by the said judgment, the appellant-Company has preferred this appeal by way of special leave before this Court.

4. Heard Ms. Madhurima Tatia, learned counsel for the appellant-Company and Mr. S.N. Bhat, learned counsel for respondent Nos. 2 & 3 and Mr. V.N. Raghupathy, learned counsel for the State.

5. Ms. Madhurima Tatia, learned counsel for the appellant-Company, after taking us through the tender pre-qualification criteria and their performance, raised the following submissions:

(i) The pre-qualification criteria as specified in Condition Nos. 2(a) and 2(b) (amended Condition Nos. 4(a) and 4(b)) of the Tender in question, viz., G-23-07 dated 05.07.2007 is unreasonable, arbitrary, discriminatory and opposed to public interest in general.

(ii) The said conditions were incorporated to exclude the appellant-Company and other similarly situated companies from the tender process on wholly extraneous grounds which are unsustainable in law.

(iii) The appellant-Company was successful in previous three contracts and supplied their products to the KSRTC. There was no complaint pertaining to short supply and quality.

The financial capacity of the appellant-Company was never doubted by the KSRTC at any point of time, hence, the impugned pre-qualification criteria was included to exclude the appellant-Company from the tender bidding process with an ulterior motive.

6. Per contra, Mr. S.N. Bhat and Mr. V.N. Raghupathy, learned counsel for the respondents, after taking us through the relevant materials including the constitution of high level Committee i.e. Contract Management Group (CMG), its deliberations and decisions etc., submitted that:

(i) To have the best of the equipment for the vehicles, which ply on road carrying passengers, the respondents, in the circumstances, thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and hence only those manufacturers, who satisfy the eligibility criteria, should be permitted to participate in the tender.

(ii) The said two conditions were imposed in order to ensure the supply of good quality tyres.

(iii) The two conditions were incorporated in the tender notice pursuant to the decision of the Contract Management Group (CMG) of the KSRTC which consists of higher level officials having technical knowledge.

(iv) The corrigendum was issued to minimize the confusion, which might have occurred due to condition No. 2(a).

Discussion:

7. We have carefully considered the rival submissions and perused all the materials placed before us. It is not in dispute that the KSRTC has issued tender No. G-23-07 dated 05.07.2007. The pre-qualification criteria as specified in Condition No.2 of the tender dated 05.07.2007 reads as under:-

"2 Pre-qualification criteria for procurement of TTF Sets:

(a) Only the tyre manufacturers who have supplied a minimum average of 5000 sets of Tyres, Tubes and Flaps set per annum, in the preceding three years out of 2003-04, 2004-05, 2005-06 and 2006-07 to any one of the OE chassis manufacturer, i.e. Ashok Leyland, Tata Motors, Eicher, Swaraj Mazda and Volvo are eligible to participate, for supply of respective size/type of Tyres, Tubes and Flaps set. They should produce purchase order copies and invoice supplies in support of the same.

(b) The firm should have minimum average annual turnover of Rs.500 crores in the preceding three years out of 2003-04, 2004-05, 2005-06 and 2006-07 from the sale of tyres, Tubes and Flaps."

8. Being aggrieved by the above-mentioned conditions, viz., 2(a) and 2(b) of the tender dated 05.07.2007, the appellant-Company preferred W.P No. 11951 of 2007 before the High Court. After filing of the said writ petition, before opening of the tender bids, the KSRTC amended the tender conditions as were incorporated in the earlier tender document replacing Condition Nos. 2(a) and 2(b) with Condition Nos. 4(a) and 4(b). Condition Nos. 4(a) and 4(b) read as under:

"4. Pre-qualification criteria for procurement of TTF sets:

(a) Only the tyre manufacturers who have supplied a minimum average of 5000 sets of Tyres, Tubes and Flaps set per annum, in the preceding three years out of 2003-04, 2004-05, 2005-06 and 2006-07 to any of the heavy goods/passenger vehicles/chassis manufacturers in the country are eligible to participate. They should produce purchase order copies and invoice supplies in support of the same.

(b) The firm should have minimum average annual turnover of Rs.500 crores in the preceding three

years out of 2003-04, 2004-05, 2005-06 and 2006-07 from the sale of Tyres, Tubes and Flaps."

Under the said amendment, only Condition No. 2(a) was replaced by Condition No 4(a). In Condition No. 4(a), the classification of the vehicles was maintained but the names of the manufacturers were deleted. It is the grievance of the appellant-Company that the pre-qualification criteria as specified in Condition Nos. 2(a) and 2(b) (amended Condition Nos. 4(a) and 4(b)) of the tender in question is unreasonable, arbitrary, discriminatory and opposed to public interest in general. It is also their grievance that the said conditions were incorporated to exclude the appellant-Company and other similarly situated companies from the tender process on wholly extraneous grounds which is unsustainable in law. In other words, according to the appellant-Company, the decision of the KSRTC in restricting their participation in the tender to Original Equipment Manufacturer (OEM) suppliers is totally unfair and discriminatory.

9. This Court, in a series of decisions, considered similar conditions incorporated in the tender documents and also the scope and judicial review of administrative actions. The scope and the approach to be adopted in the process of such review have been settled by a long line of decisions of this Court. Since the principle of law is settled and well recognized by now, we may refer some of the decisions only to recapitulate the relevant tests applicable and approach of this Court in such matters.

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

"94. (1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

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

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

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

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

12. In *Union of India & Anr. vs. International Trading Co. & Anr.,* (2003) 5 SCC 437, this Court, in similar circumstances, held as under:

"15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

16. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in a different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary.

22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.

23. Reasonableness of restriction is to be determined in

an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. (See *Parbhani Transport Coop. Society Ltd. v. Regional Transport Authority, Shree Meenakshi Mills Ltd. v. Union of India, Hari Chand Sarda v. Mizo District Council and Krishnan Kakkanth v. Govt. of Kerala.*)"

13. In *Jespar I. Slong vs. State of Meghalaya & Ors.,* (2004) 11 SCC 485, this Court, in paragraph 17, held as under:

"17……fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable……"

14. In *Association of Registration Plates vs Union of India & Ors.,* (2005) 1 SCC 679, similar issue was considered by a bench of three Judges. In that case, the dispute was about the terms and conditions of notices inviting tenders (NITs) for supply of high security registration plates for motor vehicles. The tenders have been issued by various State Governments on the

guidelines circulated by the Central Government for implementing the provisions of the Motor Vehicles Act, 1988 and the newly amended Central Motor Vehicles Rules, 1989. The main grievance of the appellant therein was that all notices inviting tenders (NITs) which were issued by various State Governments, contained conditions which were tailored to favour companies having foreign collaboration. Their further grievance was that the tender conditions were discriminatory as per Article 14 of the Constitution and were being aimed at excluding indigenous manufacturers from the tender process. It was also contended that in all the cases, the work of supply of high security registration plates for all existing vehicles and new vehicles was being entrusted to a single licence plates manufacturer in a State or a region and for a long period of 15 years thus creating monopoly in favour of selected bidders to the complete exclusion of all others in the field. The further contention advanced therein was that creation of monopoly in favour of a few parties having connection with foreign concerns is violative of the fundamental right of trade under Article 19(1)(g) and discriminatory under Article 14 of the Constitution. It was also pointed out that in the name of implementing the amended Rule 50 of the Motor Vehicles Rules, 1989, the States are imposing conditions in the tender that would take away the existing rights of the manufacturers of plates in India. On the condition laid down for prescribed minimum turnover of business, the challenge made on behalf of the petitioners therein was that fixing such high turnover for such a new business is only for the purpose of advancing the business interests of a group of companies having foreign links and support. It is impossible for any indigenous manufacturer of security plates to have a turnover of approximately 12.5 crores from the high security registration plates which were sought to be introduced in India for the first time and the implementation of the project has not yet started in any of the States. On behalf of the Union of India, the State authorities and counsel appearing for the contesting manufacturers, in their replies, have tried to justify the manner and implementation of the policy contained in Rule

50 of the Motor Vehicles Rules. On behalf of the Union of India, learned ASG submitted that Rule 50 read with Statutory Order of 2001 issued under Section 109(3) of the Motor Vehicles Act, the State Governments are legally competent to formulate an appropriate policy for choosing a sole or more manufacturers in order to fulfil the object of affixation of security plates. The Scheme contained in Rule 50 read with the Statutory Order of 2001 leaves it to the discretion of the State concerned to even choose a single manufacturer for the entire State or more than one manufacturer regionwise. It was pointed out that such a selection cannot be said to confer any monopoly right by the State on any private individual or concern. He further pointed out that the tender conditions were formulated taking into account the public interest consideration and aspects of high security.

15. While considering the above submissions, the three-Judge Bench held as under:

> **"38.** In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep indigenous manufacturers out of the field. It is explained that on the

> date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by the Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.
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> **39.** The notice inviting tender is open to response by all and even if one single manufacturer is ultimately selected for a region or State, it cannot be said that the State has created a monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.
>
> **40.** Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)(g) of the Constitution read with clause (6) of the said article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain the data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of the record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be

forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population.

43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the *Bar* (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for."

After observing so, this Court dismissed all the writ petitions directly filed in this Court and transferred to this Court from the High Courts.

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

17. In *Jagdish Mandal vs. State of Orissa and Others,* (2007) 14 SCC 517, the following conclusion is relevant:

> **"22.** Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences,

either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/ contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

18. The same principles have been reiterated in a recent decision of this Court in *Tejas Constructions & Infrastructure Pvt. Ltd. vs. Municipal Council, Sendhwa & Anr.,* (2012) 6 SCC 464.

19. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly

for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that

no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.

21. Respondent No. 1-the State, in their counter affidavit, highlighted that tyre is very critical and a high value item being procured by the KSRTC and it procured 900x20 14 Ply Nylon tyres along with the tubes and flaps in sets and these types of tyres are being used only by the State Transport Units and not in the domestic market extensively. It is highlighted that the quality of the tyre plays a major role in providing safe and comfort transportation facility to the commuters.

22. It is also pointed out by the Respondent-State that in order to ensure procurement of tyres, tubes and flaps from reliable sources, the manufacturers of the same with an annual average turnover of Rs. 200 crores during the preceding three years, were made eligible to participate in the tenders. In the tender issued for procurement of these sets during October, 2004, the appellant participated and based on the L1 rates, the orders for supply for 16,000 sets of tyres were placed on the firm. It is also pointed out that the appellant supplied 10,240 sets of tyres and remaining quantity was cancelled due to quality problems.

23. Materials has also been placed to show that the appellant participated in subsequent tenders and orders were released for supply of 900 x 20 14 PR tyres, tubes and flaps from October 2006 to September, 2007. It is also explained that after going into various complaints, in order to achieve good results, new tyre mileage and safety of the public etc., and after noting that vehicle/chassis manufacturers such as M/s Ashok Leyland, M/s Tata Motors etc. have strict quality control system, it was thought fit to incorporate similar criteria as a pre-qualification for procurement of tyres.

24. It is also highlighted by the State as well as by the KSRTC that the tender conditions were stipulated by way of policy decision after due deliberation by the KSRTC. Both the respondents highlighted that the said conditions were imposed with a view to obtain good quality materials from reliable and experienced suppliers. In other words, according to them, the conditions were aimed at the sole purpose of obtaining good quality and reliable supply of materials and there was no ulterior motive in stipulating the said conditions.

25. Both the counsel for the respondents have brought to our notice that the two impugned conditions were incorporated in the tender notice pursuant to a decision of the Contract Management Group (CMG) of the KSRTC, which is an institutional mechanism for the purpose of devising proper method in the matter, inter alia, of procurement of materials to the KSRTC. The said Group consists of various high level officials representing different departments of KSRTC. The CMG constitutes of the following officials:

(a) Managing Director,
Bangalore Metropolitan Transport Corporation

(b) Managing Directors of four sister Corporations

(c) Director, Security & Vigilance

(d) Director, Personnel and Environment

(e) Chief Accounts Officer

(f) Chief Engineer (Production)

(g) Chief Engineer(Maintenance)

(h) Chief Accounts Officer(Internal Audit)

(i) Controller of Stores and Purchase

Thus it is clear that the said CMG is a widely represented body within the Respondent No. 2-KSRTC.

26. Further materials placed by KSRTC show that the CMG met on 17.05.2007 and deliberated on the question of conditions to be incorporated in the matter of calling of tenders for supply of tyres, tubes and flaps. It is pointed out that in view of the experience gained over the years, it was felt by the said Group that the impugned two conditions should be essential qualifications of any tenderer. The said policy decision was taken in the best interest of the KSRTC and the members of the traveling public to whom it is committed to provide the best possible service. In the course of hearing, learned counsel for the respondents have also brought to our notice the Minutes of Meeting of the CMG held on 17.05.2007. The said recommendation of the CMG was ultimately approved by the Vice Chairman of KSRTC. In the circumstances, the said impugned two conditions were incorporated in the tender notice dated 05.07.2007.

27. It is also brought to our notice that the KSRTC is governed by the provisions of the Karnataka Transparency in Public Procurements Act, 1999 and the Rules made thereunder, viz., Karnataka Transparency in Public Procurements Rules, 2000. Though in Condition No 2(a) in the tender notice dated 05.07.2007, the names of certain vehicle manufacturers were mentioned, after finding that it was inappropriate to mention the names of specific manufacturers in the said condition, it was decided to delete their names. Accordingly, a corrigendum was put up before the CMG and by decision dated 04.08.2007, CMG decided to revise the pre-qualification criteria by deleting the names of those manufacturers. Learned counsel for the respondents have also placed the Minutes of Meeting of the CMG held on 04.08.2007. It is also brought to our notice that the said corrigendum was also approved by the competent authority.

28. In addition to the same, it was not in dispute that the

appellant-Company was well aware of both the original tender notices and the corrigendum issued. It is also brought to our notice that the appellant wrote a letter making certain queries with regard to the corrigendum issued by the KSRTC and the said queries were suitably replied by the letter dated 11.08.2007.

29. It is also seen from the records that pursuant to the tender notice dated 05.07.2007, seven bids were received including that of the appellant-Company. They are:

(i) M/s Apollo Tyres

(ii) M/s Birla Tyres

(iii) M/s Ceat Ltd

(iv) M/s Good Year India

(v) M/s JK Industries

(vi) M/s MRF Ltd

(vii) M/s Michigan Rubber (Former Betul Tyres)

It is brought to our notice that successful bidders were CEAT and JK Tyres. Accordingly, contracts were entered into with the said two companies by the KSRTC and the purchase orders were placed and they have also effected supplies and completed the contract and the KSRTC also made payments to the said suppliers.

30. It is pertinent to point out that the second respondent has also issued 4 (four) more tender notices after the tender notice dated 05.07.2007. The said tender notices were dated 04.03.2008, 22.08.2008, 24.10.2008 and 19.03.2009. Pursuant to the tender notices dated 04.03.2008, 22.08.2008 and 24.10.2008, contracts have been awarded and have been substantially performed. It is also brought to our notice that all the said four subsequent tender notices also contained identical

conditions as that of the impugned conditions contained in tender notice dated 05.07.2007.

31. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The Courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, the CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.

32. The learned single Judge considered all these aspects in detail and after finding that those two conditions cannot be said to be discriminatory and unreasonable refused to interfere exercising jurisdiction under Article 226 of the Constitution and dismissed the writ petition. The well reasoned judgment of the

learned single Judge was affirmed by the Division Bench of the High Court.

33. In the light of what is stated above, we fully agree with the reasoning of the High Court and do not find any valid ground for interference. Consequently, the appeal fails and the same is dismissed with no order as to costs.

K.K.T. Appeal dismissed.

GHANSHYAM DASS GUPTA

v.

MAKHAN LAL

(Civil Appeal No. 5950 of 2012)

AUGUST 21, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Code of Civil Procedure, 1908 – Order 41 Rule 17 (1) Explanation – Scope of – Dismissal of appeal on merit by High Court, when there was no appearance on behalf of the appellant – Held: In view of the explicit language of Explanation to Order 41 Rule 17(1), High Court could not have gone into the merits of the case, if there was no appearance on behalf of the appellant – Direction to High Court to dispose of the appeal in accordance with law.

Abdur Rahman and Ors. vs. Athifa Begum and Ors. **(1996) 6 SCC62: 1996 (5) Suppl. SCR 391 – relied on.**

Case Law Reference:

1996 (5) Suppl. SCR 391 Relied on Para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5950 of 2012.

From the Judgment & Order dated 13.1.2012 of the High Court of Delhi at New Delhi in RFA No. 664 of 2003.

Rakesh Dahiya, Gagan Deep Sharma, Preeti Singh, Vikram Gulia for the Appellant.

The following Order of the Court was delivered

O R D E R

Leave granted.

1. The question that arises for consideration in this case is whether the High Court was justified in deciding the appeal on merits when there was no appearance on behalf of the

appellant, in view of the explanation to Order 41 Rule 17(1) of the Code of Civil Procedure. (CPC).

2. The appellant herein had engaged a lawyer for conducting his appeal before the Delhi High Court. The appeal was admitted and was pending for adjudication. Later, the lawyer of the appellant was elevated as a Judge of the Delhi High Court and hence he returned the files to the appellant. The appellant later engaged another lawyer to conduct the case. However, due to the mistake by the clerk, the Vakalatnama of that advocate could not be filed and hence the name of the newly engaged lawyer did not figure in the cause list. The appeal came up for final hearing on 13.1.2012. representation was made by a lawyer on behalf of the previous lawyer stating that the case files had already been returned to the party. Consequently, there was no effective appearance on behalf of the appellant before the High Court. In fact, there was no appearance on behalf of the respondent as well.

3. Learned Judge, however, proceeded to consider the appeal on merits, without the assistance of learned counsel on either side. By a detailed judgment, the appeal was dismissed on 13.1.2012 stating as follows:

> "6. In view of the above, there is no merit in the appeal inasmuch as not only because the appellant/defendant was guilty of breach of contract but also because the appellant/ defendant did not plead and prove the orfeiture of earnest money or any loss having been caused to him. The appellant/defendant was, therefore, liable to refund the amount which he received under the Agreement to Sell.
>
> 7. In view of the above, there is no merit in the appeal which is accordingly dismissed leaving the parties to bear their own costs."

4. Aggrieved by the judgment of the High Court, this appeal has been preferred.

5. Shri Rakesh Dahiya, learned counsel appearing on

behalf of the appellant, submitted that the High Court was not justified in deciding the appeal on merits since there was no representation on behalf of the appellant. Learned counsel pointed out that the only course open to the Court was either to dismiss the appeal on default or adjourn the same, but not to decide the matter on merits, in view of the explanation to Order 41 Rule 17(1) CPC.

6. Learned counsel appearing on behalf of the respondent supported the judgment of the High Court contending that the appeal was of the year 2003 and came up for final hearing after a period of nine years, and the High Court was justified in deciding the matter on merits even if there was no appearance on behalf of the appellant.

7. We are, in this case, called upon to consider whether the High Court was justified in deciding the appeal on merits in the absence of any representation on behalf of the appellant, in view of Explanation to Order 41 Rule 17(1) CPA. The said provision is given below for easy reference:

> *"Rule 17. Dismissal of appeal for appellant's default.*- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may take an order that the appeal be dismissed.
>
> *Explanation.*- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits."

8. Rule 17(1) of Order 41 deals with the dismissal of appeal for appellant's default. The above mentioned provision, even without explanation, if literally read, would clearly indicate that if the appellant does not appear when the appeal is called for hearing, the court has to dismiss the appeal. The provision does not postulate a situation where, the appeal has to be decided on merits, because possibility of allowing of the appeal is also there, if the appellant has a good case on merits; even if no body had appeared for the appellant. Prior to 1976,

conflicting views were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 CPC. Some High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for appellant's default. Conflicting views raised by the various High Courts gave rise to more litigation. The Legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, Explanation to sub-rule (1) of Rule 17 of Order 41 CPC was added by Act 104 of 1976, making it explicit that nothing in sub-rule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left un-represented on the day fixed for hearing the appeal. The reason for introduction of such an explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate court that there was sufficient cause for non-appearance. Such an opportunity is lost, if the courts decide the appeal on merits in absence of the counsel for the appellant.

9. We may, in this connection, refer to a judgment of this Court in *Abdur Rahman and Others v. Athifa Begum and Others* (1996) 6 SCC 62, wherein the scope of explanation to Rule 17(1) of Order 41 CPC came up for consideration. While interpreting the said provision, this Court took the view that the High Court could not go into the merits of the case if there was no appearance on behalf of the appellant. We also endorse that view.

10. For the reasons stated above, we are inclined to allow this appeal and set aside the judgment of the High Court and restore FRA No. 664 of 2003 and direct the High Court to dispose of the same in accordance with law. However, there will be no order as to costs.

K.K.T. Appeal allowed.

THE REGISTRAR, RAJIV GANDHI UNIVERSITY OF HEALTH SCIENCES, BANGALORE
v.
G. HEMLATHA AND OTHERS.
(Civil Appeal No. 5992 of 2012)

AUGUST 23, 2012

[A.K. PATNAIK AND RANJANA PRAKASH DESAI, JJ.]

Education – PG course – Admission – Qualifying examination – Eligibility criteria – Whether can be relaxed by rounding-off the marks – Held: Eligibility criteria should be strictly adhered to, when rounding-off is not permitted by any statute or rules – On facts, High Court erred in rounding-off the marks so as to make the candidate eligible for admission to PG course – However, clarified that since the candidate already completed the course, the judgment not to have adverse impact on the candidate.

The question for consideration in the present appeal was whether by applying the principle of rounding-off, the eligibility criteria prescribed for the qualifying examination for admission to the PG Course in M.Sc. (Nursing) could be relaxed.

Disposing of the appeal, the Court

HELD: No provision of any statute or any rules framed thereunder has been shown which permits rounding-off of eligibility criteria prescribed for the qualifying examination for admission to the PG course in M.SC (Nursing). When eligibility criteria is prescribed in a qualifying examination, it must be strictly adhered to. Any dilution or tampering with it will work injustice on other candidates. The Division Bench of the High Court erred in holding that Single Judge was right in rounding-

off of 54.71% to 55% so as to make respondent No. 1 eligible for admission to PG course. Such rounding-off is impermissible. It is clarified that this order merely settles the question of law and shall not have any adverse impact, in any manner, on the service of respondent No. 1, as she has completed the course. [Paras 3, 10 and 11] [159-C; 162-E-G]

Orissa Public Service Commission and Anr. v. Rupashree Chowdhary and Anr. **(2011) 8 SCC 108: 2011 (9) SCR 748 – relied on.**

Vani Pati Tripathi vs. Director General, Medical Education andTraining and Ors. **AIR 2003 All 164;** *Kuldip Singh, Legal Assistant,Punjab Financial Corporation vs. The State of Punjab and Ors.* **(1997) 117 PLR 1 – referred to.**

Case Law Reference:

2011 (9) SCR 748	**Relied on**	**Para 8**
AIR 2003 All 164	**Referred to**	**Para 9**
(1997) 117 PLR 1	**Referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5992 of 2012.

From the Judgment & Order dated 28.10.2010 of the High Court of Karnataka, Circuit Bench at Gulbarga in Writ Appeal No. 10223 of 2010(EDN-ADM).

S.N. Bhat for the Appellant.

Sharan Gounda Patil, Ashok Kumar Gupta II for the Respondents.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. This appeal, by special leave, is directed against the judgment dated 28.10.2010 of the Division Bench of the Karnataka High Court. By the impugned judgment, the Division Bench declined to entertain the appeal filed by the appellant challenging the judgment of learned Single Judge of the High Court permitting rounding-off of the percentage of marks obtained by respondent 1 so as to make her eligible to get admission to post-graduate course ["PG course", for convenience] in M.Sc (Nursing).

3. On 11.03.2011 this Court issued notice only to settle the question of law raised in the appeal because respondent 1 has completed the course. This court refused to stay the impugned order and directed that respondent 1's admission be regularized and her results be declared.

4. The question of law involved in this case is whether by applying the principle of rounding-off the eligibility criteria prescribed for the qualifying examination for admission to the PG course in M.Sc (Nursing) can be relaxed.

5. For deciding the question of law, it is necessary to know the facts of the case. Respondent 1 completed Bachelor of Science degree in Nursing with 54.71% aggregate marks from N.T.R. University of Health Sciences in the year 1997. Thereafter, she registered herself as a Public Health Nurse and Midwife. She also registered herself as a nurse under the provisions of the Andhra Pradesh Nurses and Midwives (Extension of Amendment) Act, 1964. She was appointed as a working staff nurse at the Primary Health Centre, Nagasamudram (Andhra Pradesh) on 08.07.1999. She served for eight years and three months in the said institution. She made a representation to the Regional Director of Medical Health Services seeking permission to pursue the PG course in M.Sc (Nursing). The eligibility criteria prescribed by the Indian Nursing Council for securing admission to the said PG course was 55% aggregate marks. The petitioner, however, secured 54.71% aggregate marks. She approached the

Secretary, Indian Nursing Council, the third respondent herein, requesting that a certificate of eligibility be issued to her. The third respondent communicated to her that 0.50% would normally be rounded-off to next digit. She was asked to approach the concerned authority of the institute in that regard. Accordingly, she approached the petitioner. The petitioner gave her the eligibility certificate. She, then, approached the Principal, Navodaya College of Nursing, Raichur, Karnataka, the second respondent herein. With the said certificate she obtained admission in the management quota.

6. When she was preparing to take the annual examination, she was informed by the second respondent that she was not eligible to take examination as she has secured less than 55% in the qualifying examination. She approached the petitioner for reconsideration of her case. She was informed that on reconsideration it was found that she was not eligible to take examination. She, therefore, preferred writ petition in the High Court challenging the said communication. She obtained an interim order permitting her to take first year examination. She took the examination but, results were withheld. She was also permitted to take the second year examination by an interim order. Thus, she has completed the PG course by taking both the examinations. As stated by us earlier, while issuing notice, this court directed that her results be declared and her admission be regularized.

7. By order dated 01.09.2010 learned Single Judge of the High Court, by applying the rule of rounding-off of numbers, held that 54.71% marks obtained by respondent 1 should be rounded-off to 55%. Thus, respondent 1 became eligible by virtue of the High Court's order. Learned Single Judge set aside the endorsement issued by the petitioner stating that respondent 1 was not eligible for admission to the PG course in M.Sc. (Nursing). The said order was carried in appeal to the Division Bench of the Karnataka High Court by the appellant. The Division Bench of the Karnataka High Court declined to entertain the appeal. The Division Bench observed that it was

not inclined to interfere with the discretion exercised by learned Single Judge in rounding-off of 54.71% to 55%. In the circumstances, the Division Bench held that respondent 1 did possess required qualification to get admission to PG course.

8.In *Orissa Public Service Commission and Another v. Rupashree Chowdhary and Another (2011) 8 SCC 108* this Court in somewhat similar fact situation considered whether the eligibility criteria could be relaxed by the method of rounding-off. The Orissa Public Service Commission published an advertisement inviting applications from suitable candidates for the Orissa Judicial Service Examination, 2009 for direct recruitment to fill-up 77 posts of Civil Judges (JD). Pursuant to the advertisement, the first respondent therein applied for the said post. She took the preliminary written examination. She was successful in the said examination. She, then, took the main written examination. The list of successful candidates, who were eligible for interview, was published in which the first respondent's name was not there. She received the mark sheet. She realized that she had secured 337 marks out of 750 i.e. 44.93% of marks in the aggregate and more than 33% of marks in each subject. As per Rule 24 of the Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 (for short "the Orissa Rules"), the candidates who have secured not less than 45% of the marks in the aggregate and not less than a minimum of 33% of marks in each paper in the written examination should be called for viva voce test. Since the first respondent therein had secured 44.93% marks in aggregate she was not called for interview/viva voce. The first respondent approached the Orissa High Court. The High Court allowed the writ petition. The appeal from the said order was carried to this court. After considering the Orissa Rules, this court held that Rule 24 thereof made it clear that in order to qualify in the written examination a candidate has to obtain a minimum of 33% marks in each of the papers and not less than 45% marks in the aggregate in all the written papers in the main examination. This court observed that when emphasis is given in the rule itself to the minimum marks to be obtained, there

can be no relaxation or rounding-off. It was observed that no power was provided in the statute/rules permitting any such rounding-off or giving grace marks. It was clarified that the Orissa Rules are statutory in nature and no dilution or amendment to such rules is permissible or possible by adding some words to the said statutory rules for giving the benefit of rounding-off or relaxation.

9. In our opinion, the ratio of this judgment is clearly applicable to the facts of this case. Judgment of the Full Bench of Allahabad High Court in *Vani Pati Tripathi vs. Director General, Medical Education and Training and Others (AIR 2003 All 164)* and judgment of the Full Bench of Punjab and Haryana High Court in *Kuldip Singh, Legal Assistant, Punjab Financial Corporation vs. The State of Punjab and Others (1997) 117 PLR 1,* were cited before us because they take the same view. However, in view of the authoritative pronouncement of this Court in *Orissa Public Service Commission (supra),* it is not necessary for us to discuss the said decisions.

10. No provision of any statute or any rules framed thereunder has been shown to us, which permits rounding-off of eligibility criteria prescribed for the qualifying examination for admission to the PG course in M.SC (Nursing). When eligibility criteria is prescribed in a qualifying examination, it must be strictly adhered to. Any dilution or tampering with it will work injustice on other candidates. The Division Bench of the High Court erred in holding that learned Single Judge was right in rounding-off of 54.71% to 55% so as to make respondent 1 eligible for admission to PG course. Such rounding-off is impermissible.

11. We make it clear that this order merely settles the question of law and shall not have any adverse impact, in any manner, on the service of respondent 1.

12. The appeal is disposed of in the aforesaid terms.

K.K.T. Appeal disposal of.

KANPUR DEVELOPMENT AUTHORITY THR. VICE CHAIRMAN

v.

SHEO PRAKASH GUPTA & ANR.

(Civil Appeal No. 6017 of 2012)

AUGUST 24, 2012

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

Notice – Service of – Whether effected on the opposite party – Complaint against appellant-Authority before State Consumer Disputes Redressal Commission – State Commission by ex-parte order allowing the complaint – Appellant-Authority filing appeal before National Consumer Disputes redressal Commission, taking plea that State Commission passed ex-parte order without affording it opportunity to be heard – National Commission rejected the plea of non-service of notice – On appeal, held: There is nothing on record to suggest that notice was issued by State Commission on appellant-Authority – Appeal allowed – Matter remitted to National Commission for deciding whether notice issued by State Commission was properly served on appellant-Authority and then to decide the appeal on merits.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6017 of 2012.

From the Judgment & Order dated 29.5.2012 of the National Consumer Disputes Redressal Commission, New Delhi in First Appeal No. 42 of 2012.

Abhishek Chaudhary for the Appellant.

K.P. Sunder Rao, Wajeeh Shafiq, Chandan Kumar Rai for the Respondents.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. Learned counsel for both the sides agree that the appeal may be disposed of at this stage.

3. This appeal is directed against the impugned order dated 29th May, 2012 passed by the National Consumers Disputes Redressal Commission, New Delhi (for short 'the National Commission')in First Appeal No.42 of 2012, whereby the appeal filed by the appellant-Kanpur Development Authority (hereinafter referred to as 'Authority') against the order of the State Consumer Disputes Redressal Commission, Uttar Pradesh, Lucknow (hereinafter referred to as the 'State Commission')dated 14th October, 2011 was dismissed.

4. According to the appellant-Authority vide its office order dated 31st October, 1992 it was determined that in the matter of allotment of any home or plot, if any dispute arises and it does not remain possible to complete the registration proceedings or to handover the possession in lieu thereof, an alternate house or plot shall not be offered and the amount deposited by the allottee shall be returned back to him alongwith the interest as per the rate of post office saving account.

5. In response to an advertisement issued by the appellant-Authority in the year 2005 for sale of various plots by auction pursuant to the Kakadeo Scheme, the respondents being interested to purchase one of the plots bearing Plot No.6 in Block M admeasuring 1364.15 sq.mtr., participated in the auction. The price of the said plot was fixed by the appellant-Authority at Rs.8,000/- per sq.mtr. with a condition precedent to deposit Rs.11,00,000/- as registration fee.

6. Pursuant to the guidelines dated 31st October, 1992, the respondents filed an affidavit on 18th August, 2005 before

the appellant-Authority, that if in giving the possession of the allotted plot, any delay is caused in land acquisition or judicial processes or due to the non-completion of the contract within the prescribed time or due to any other unavoidable reason, then they shall not be having any right to claim damages.

7.As the respondents were successful as the highest bidders, they were allotted the aforesaid plot vide a letter No.D/605/JointSecretary/ZoneNo.2 /2005-06 dated 20th August, 2005 whereunder the premium of the said plot was fixed at Rs.11,700/- per sq.mtr. They were informed that the remaining 3/4th of the premium was to be paid in four quarterly installments alongwith 15% of the interest while the amount of the first installment was Rs.32,76,623/-, payable on 1st October, 2005.

8. Earlier, the respondents in their affidavit filed before the appellant-Authority stated that they were ready to accept all the terms and conditions in the allotment of the plot.

9. Before giving possession of the plot to the respondents, in a civil proceeding, the Civil Court, Kanpur issued a temporary injunction. It was immediately conveyed by the appellant-Authority to the auction purchasers-respondents and for the said reason the orders of allotments were cancelled by the appellant-Authority. The respondents thereafter filed a Writ Petition No.27893 of 2006 before the Allahabad High Court wherein the High Court by order dated 23rd May, 2006 directed the appellant-Authority to decide the representation/application of the respondents within three months.

10. The case of the appellant-Authority is that in compliance of the order of the High Court dated 23rd May,2006 the appellant-Authority decided the application of the respondents and refunded their entire deposited amount of Rs.1,53,62,528/- vide Cheque dated 28th October, 2006 as per the rules and in absence of any rule or guideline, no damage was paid.

11. After the receipt of the amount, the respondents filed a Complaint No.25 of 2007 before the State Consumer Disputes Redressal Commission, Uttar Pradesh, Lucknow for the following reliefs:

> "a. A sum of Rs.32,49,174.67p.; on account of accrued interest @1.5 per mensum on Rs.1,53,62,528/- from the date of deposit till its refund alongwith *pendent lite* and future interest thereon @1.5% per mensum be awarded to the petitioners against the opposite party.
>
> b. A sum of Rs.10,00,000/- being damages on account of breach of contract may also be awarded to the petitioners against the opposite party.
>
> c. A sum of Rs.25,000/- being cost of litigation incurred by the petitioners in the present case before 4th A.C.M.M. Kanpur Nagar and the Hon'ble High Court of Judicature at Allahabad and present petition may also be awarded to the petitioners against the opposite party.
>
> d. Any other relief which this Hon'ble Court may deem fit and proper under the circumstances of the case may also be awarded to the petitioners against the opposite party."

12. The State Commission by an ex parte order dated 14th October, 2011 observed that the appellant-Authority despite receiving the entire amount did not give the possession of the disputed land to the complainants and without any reason vide Cheque dated 28.10.2006 returned the said amount to the complainants. It was held to be a deficiency in the part of the appellant-Authority and, therefore, the appellant-Authority was held to be guilty of adopting unfair trade practices. The application was allowed with the direction to the appellant-Authority that, on the amount deposited by the respondents-

complainants till the date of filing of the complaint, the total interest accrued i.e. Rs.32,49,175/- be paid to the complainants alongwith an interest @ 18% per annum for the period of the pendency of the complaint till the actual realisation of the amount. It was also held that the respondents-complainants are also entitled to receive from the appellant-Authority, a sum of Rs.50,000/- towards mental harassment and Rs.10,000/- towards litigation expenses.

13. Against the aforesaid ex parte order of the State Commission, the appellant-Authority preferred a First Appeal No.42 of 2012 before the National Commission after a delay of 69 days. In paragraph 3 of the appeal the appellant-Authority made the following statement:

> "That the impugned order was passed on 14.10.2011. That thereafter coming to know of the order, the appellant checked for the records wherein it was found that no notice has been received in the matter. Thereafter on 26.11.2011, the office was directed to trace the record of the file."

14. Before the National Commission the very first ground raised by the appellant-Authority was that the State Commission did not afford them an opportunity to be heard and decided the complaint ex-parte. But the National Commission rejected the aforesaid plea of non-service of notice with the following observation:

> "On the other hand, documents placed on record by the appellant include a letter from the postal department which shows that the registered cover was delivered to the KDA on 21.12.2006. The impugned order categorically notes that notice had been issued to the respondent/KDA but no body had appeared on their behalf. The State Commission had therefore decided to proceed ex-parte against the respondent. We, therefore, do not find any reason to accept this plea of absence of opportunity before the State Commission."

15. For the very same reason, the ground of delay in preferring the appeal was not accepted and the appeal was dismissed both on the ground of delay as well as on merits and the order of the State Commission was confirmed.

16. Learned counsel for the appellant-Authority reiterated the grounds as were taken in the First Appeal and argued that the State Commission did not afford them an opportunity to be heard and decided the complaint ex parte. He has further taken us to the date of filing of the Complaint No.25 of 2007 which was verified on 3rd May, 2007 to suggest that the question of service of notice by registered cover on 21st December, 2006 does not arise and that the National Commission erred in holding that the registered cover was delivered to the appellant-Authority on 21st December, 2006.

17. Learned counsel appearing on behalf of the respondents, could not lay his hand on the record to suggest that the notice of Complaint No.25 of 2007 was served on the appellant-Authority, though from the order of the State Commission it was brought to our notice that the notice was issued on the appellant-Authority.

18. From the perusal of Complaint No.25 of 2007, we find that the respondents before filing the complaint, gave a notice of demand to the appellant-Authority on 20th December, 2006 and it was stated to be served personally on 21st December, 2006 and lastly on 21st January, 2007. Relevant paragraph No.18 of the Complaint No.25 of 2007 filed by the respondents reads as follows:

> "18. That the cause of action for the petition arose to the petitioner against the opposite party firstly on 20.8.05 with the allotment letter was issued and thereafter continued to accrue on each and every date when the payments of balance premium amount were made to the opposite party and then on 28.10.06 when the opposite party made the refund of Rs.1,53,62,528/- to the *petitioners and then on*

20.12.06 when the notice of demand was got issued which was personally served on 21.12.06 and lastly on 21.1.07, when the notice period expired within the limitation and jurisdiction of this learned Forum."

19. The order of the State Commission dated 14th October, 2011, suggests that a notice was issued on the appellant-Authority but nobody appeared on its behalf. The relevant portion of the order reads as follows:

"The notice was issued to the respondent but nobody appeared on its behalf. Therefore, directions were given for ex-parte proceedings."

However, there is nothing on the record to suggest that the notice issued by the State Commission was served on the appellant-Authority.

20. The appellant-Authority specifically pleaded that no notice was served by the State Commission on it but the National Commission failed to appreciate the submission and erred in holding that a notice was served on 21st December, 2006, though the Complaint No.25 of 2007 was filed before the State Commission much thereafter on 3rd May, 2007.

21. In the result, the appeal is allowed, the impugned order and judgment passed by the National Commission is set aside and the matter is remitted to the National Commission for deciding whether the notice issued by the State Commission was properly served on the appellant-Authority and to decide the First Appeal No.42 of 2012 on merits.

K.K.T. Appeal allowed & Remitted Back.

NARAYAN MANIKRAO SALGAR

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 159 of 2008 etc.)

AUGUST 28, 2012

[SURINDER SINGH NIJJAR AND H.L GOKHALE, JJ.]

Penal Code, 1860 – ss. 326/149, 148, 341/149 and 323/149 – Prosecution of accused u/ss. 148,302/149,341/149 and 323/149 – Death of one caused – Two eye-witnesses – Two dying declarations – Recovery of blood-stained items, blood-stained weapons and blood-stained clothes of accused – Conviction by courts below – On appeal, held: The prosecution evidence leads to a conclusion, beyond reasonable doubt that the deceased was victim of premeditated assault by the appellants-accused – However, in view of the nature of weapons and injuries, accused cannot be said to have shared common object of causing the murder – Since the injuries were grievous in nature, conviction u/s. 302 altered to under s. 326 r/w s. 149 – Conviction on other counts maintained.

Constitution of India, 1950 – Article 136 – Special Leave Petition – Power under – To interfere with concurrent findings of facts – Held: Court not to interfere with concurrent findings of fact save in exceptional circumstances – Interference permissible only when High Court is found to have acted perversely or disregarded any vital piece of evidence which would shake the very foundation of prosecution case.

The appellant-accused alongwith others was prosecuted u/ss. 148, 302/149, 341/149 and 323/149 IPC for having caused death of one person. The prosecution case was that PW-1 (wife of the victim) and PW-2 were the eye-witnesses to the incident. PW-1 informed the

police after the incident. The victim told his father (PW-7) naming all the accused as assailants. The deceased was taken to hospital by the police in injured condition. There, on certification by the doctor (PW-8), the deceased made a statement to PW-9 (PSI) incriminating all the accused by name. Eventually he succumbed to the injuries. The statement of the deceased was treated as dying declaration. Trial court convicted the accused except accused Nos. 9 and 11 of all the charges. High Court upheld the order of trial court. However, the appeal against accused Nos. 2 and 10 abated because of their death. The present appeals were filed against the order of High Court

Partly allowing the appeals, the Court

HELD: 1. Even though the powers of this Court under Article 136 of the Constitution are very wide, but it would not interfere with the concurrent findings of fact, save in exceptional circumstances. It would interfere in the findings recorded by the trial court as well as the High Court if it is found that the High Court has acted perversely and/or disregarded any vital piece of evidence which would shake the very foundation of the prosecution case. In other words, this Court would exercise the powers under Article 136 where the conclusion of the High Court is manifestly perverse and unsupportable on the evidence on record. [Para 14] [184-G-H; 185-A]

2.1. The appellants have failed to point out any infirmity in the conclusions recorded by the Sessions Court as well as the High Court with regard to the assault. On this issue, both the judgments do not suffer from any such perversity, which would shock the conscious of this Court. The entire prosecution evidence when considered from all angles leads to a conclusion, beyond reasonable doubt, that the deceased was a victim of a premeditated

assault by all the appellants with their respective weapons. It cannot be said that the appellants have been falsely implicated, or that the assault did not take place in the manner projected by the prosecution. [Paras 19 and 15] [187-E-F; 185-A-B]

2.2. The narration of the events by PW1 was not shaken when she was subjected to a lengthy cross-examination by different counsel for all the accused. Her evidence cannot be discarded on the ground that she did not name each and every accused person at the first opportunity, when she went to the Police Station. Her plight at such a situation is not difficult to imagine. She had done whatever was feasible to report the matter to her father-in-law. She then proceeded to inform the police, without wasting any time. She has narrated the entire sequence of events as a witness in court. She has given the precise inter-se relationship of all the accused. She did not think that her husband was so seriously injured that he may die. Otherwise, her first impulse would have been to move him to the hospital or arrange for a doctor. She was aware that he had been injured only on arms and legs. But this does not detract from the fact that the assault had taken place as narrated by her. The fact that she could not indicate the precise injury caused by each of the accused is quite understandable as her husband was being attacked by a large group of people. In such a situation, it would perhaps be humanely impossible for anyone to indicate the precise injury caused by each one of the accused/appellant. Therefore, there is no infirmity in the ocular evidence given by PW1. [Para 16] [185-E-H; 186-A-B]

2.3. The evidence of PW 1 is duly supported by PW 2, who had come running to the scene of the crime on hearing the commotion at the farmhouse of the accused persons. On seeing PW2, all the accused are stated to

have discarded their weapons and ran away. The evidence of this witness also could not be shaken during cross-examination. [Para 17] [186-C-D]

2.4. The statement made by the injured before PW7 is further strengthened by the statement that was recorded subsequently at Hospital by PW9 in the presence of PW8. The statement clearly indicates that the incident took place exactly as narrated by PW1. The statement has been recorded at the time the deceased was certified to be conscious and in a fit medical condition to make a statement. The dying declaration being consistent and clear also cannot be discarded. [Para 17] [186-H; 187-A-B]

2.5. The medical evidence also indicates that the deceased had been very severely beaten. But at the same time, it can not be said to be an assault with intent to kill. Firstly, all the accused were armed with sticks and bricks etc. There is no evidence to indicate that one of the accused was holding a "Katti" (sickle). The deceased had sustained external injuries on the left wrist, right knee, right thigh, right leg, left leg, left palm as well as head. The number of injuries caused to the deceased clearly shows that the assault was premeditated. All the injuries were lacerated and caused by blunt weapons. None of the witnesses could say if any injury had been caused by Katti (sickle). According to PW 3 (doctor), the head injury could be the result of a rider falling from the motorcycle. [Para 18] [187-B-E]

2.6. However, given the nature of weapons used, the location of the injuries and the nature of the injuries caused, it would not be possible to hold that the appellants shared a common object of causing the murder of the deceased. The accused had merely decided to teach him a lesson for having a quarrel with

PW 2 on the previous day. They, therefore, appear to have made up their mind to give him a good thrashing for acting "a bit smart". In such circumstances, it would not be possible to uphold the conviction of the appellants under Section 302 IPC. However, at the same time, the nature of injuries cannot be said to be superficial. It has come in evidence that numerous bones in the legs and arms of the deceased had been broken. The injuries being grievous in nature, the offences committed by the appellants would fall within the mischief of Section 326 IPC. [Para 20] [187-G-H; 188-A-B]

2.7. The conviction of the appellants under Section 302 is set aside. Instead thereof, they are convicted under Section 326/149 IPC. For the offences under Section 326/149 IPC, the appellants are hereby sentenced to undergo Rigorous Imprisonment for seven years. The conviction and sentence recorded by the courts below under any other sections of IPC are maintained. [Para 21] [188-C-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 159 of 2008.

From the Judgment & Order dated 20.8.2007 of the High Court of Bombay, Bench at Aurangabad in Criminal Appeal No. 622 of 2005.

WITH

Crl. Appeal Nos. 803-804 & 297-298 of 2008.

Sudhanshu S. Choudhary, Rajshri Dubey, Sushil Karanjkar, Sudhanshu Choudhari (for Naresh Kumar), Manish Chitale (for Naresh Kumar), Chinmoy Khaladkar, Sanjay V. Kharde (for Asha Gopalan Nair) for the appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. By this common

judgment, we propose to decide criminal appeals being Criminal Appeal Nos.159 of 2008, 803-804 of 2008 and 297-298 of 2008. For the sake of convenience, the facts have been taken from Criminal Appeal No.159 of 2008. All the appellants have been convicted for offences punishable under Sections 148, 302 read with Sections 149, 341 read with Section 149, 323 read with Section 149 and sentenced to S.I. for one year, imprisonment for life and fine of Rs.100/-. It has also been directed that, in default, they shall undergo further S.I. for six months, in the event of non payment of fine, S.I. for one month and S.I. for one month respectively with a direction that all the substantive sentences would run concurrently. The aforesaid conviction and sentences have been recorded in the judgment of First Adhoc Additional Sessions Judge, Parbhani dated 20th August, 2005, in Sessions Trial No.180 of 1998. Separate appeals filed by the appellants have been dismissed by the High Court. The conviction and sentence recorded by the Sessions Court have been confirmed. The High Court also noticed that the original accused No.2 Manikrao and original accused No.10 Maroti had died during the pendency of the proceedings. Therefore, the appeal filed by them had abated.

2. We may now briefly notice the facts recorded by the High Court.

3. PW 9, P.S.I Mallikarjun Ingale, who was attached to Tadkalas Police Station as a P.S.I. was informed by PW 1 Sharda about an incident in which her husband had been viciously attacked by about 10 to 11 persons at about 6.30 pm on 9th March, 1998. He was told that PW 1 alongwith her infant son was riding on a motor cycle with her husband Khushal from Tadkalas to Phulkalas. The motor cycle was intercepted by accused No.2 Manikrao on the road from Tadkalas to Phulkalas near the farm house of Salgar. PW 1 informed PW 9 that her husband was lying in an injured condition near the farmhouse of the assailants. On receipt of this information, PW 9 P.S.I. Ingale went to the scene of the offence alongwith some other

police staff. PW 1 Sharda also accompanied the police party in a police jeep. The Police party headed by PW 9 alongwith PW1 and Jiwanaji PW7 on reaching the scene of crime noticed that Khushal was lying in a pool of blood in a very seriously injured condition. Khushal was taken to the Government Hospital at Tadkalas in a police jeep. However, as the medical officer was not available at the Hospital, the injured was sent to the hospital at Parbhani accompanied by one Head Constable and Constable in a police jeep. PW 9 recorded two entries in the station diary in this respect and thereafter went to General Hospital at Parbhani. By the time he arrived, the injured Khushal had already been admitted in the hospital. On enquiry PW 8 Mukashe informed the police that Khushal was in a fit condition to give his statement. The statement was duly recorded in the presence of the medical officer Dr.Mukashe, PW 8.

4. In his statement, Khushal stated that while he was going on the motor cycle to Tadkalas for buying some household goods, about 10 to 11 persons assaulted him near the farmhouse of Salgar. He stated that the cause of the assault was an altercation of accused No.2 on the previous day when accused No.2 had diverted the water which was meant for the land of Khushal to his own land. Khushal had in his statement named all the assailants. On the same night, at about 12.00-12.15 a.m., Khushal succumbed to the injuries and died. The statement given by Khushal has, therefore, been treated as a dying declaration. It was produced as Exh.94 at the trial. The High Court notices that the clothes of the deceased were seized vide memo at Exh.72 in the presence of PW 4 Hanumant. On his return to the Police Station, PW 9 registered the offence on the basis of statement made by Khushal vide crime No.14 of 1998 under Sections 307, 147, 148, 149, 341, 323 and 504 of IPC at 11.30 p.m. On receiving information about 12.15 a.m. on 10th March, 1998 that injured Khushal had died, the offence under Section 302 IPC was also added. Panchnama at the scene of offence was duly drawn in the presence of panchas

at Exh.76. Blood stained stones, blood mixed soil, a black bead neckless, pieces of bangles of green colour, one wrist watch, two sticks, one pair of Kolhapuri slipper, wooden leg of cot, four stones of different sizes, one motor cycle were seized from the scene of offence. On the very same day, the accused were arrested. Blood stained clothes of accused Laxman and Kundlik were seized in the presence of panchas by seizure memo at Exh.80 and Exh.81 respectively. Subsequently, accused Narayan willingly pointed out during the course of the investigation to the place where the sickle (Katti) had been hidden. The memorandum statement of accused Narayan was recorded in the presence of the panchas. Narayan took the police and the panchas to the place where sickle (Katti) had been hidden under a heap of dried stock of grains. It was seized by memo Exh.83. The seized articles were duly sent to the chemical examiner. The reports of the chemical analyzer were produced in court at Exh.96 and 97.

5. At the trial, PW 1 Sharda narrated the entire incident. She named all the accused. She also described how all the accused were inter-related and belonging only to one family of Salgars. She has given the details which were noticed by the trial court as well the High Court. It is not necessary to recapitulate the same. We may notice that she has narrated the incident which is consistent with the version recorded by the injured Khushal before PW 9 at the hospital. She narrates that when her husband returned home evening before the assault, he had told her about the scuffle that he had with accused No.2 because he had diverted the water of the canal to his own field. She also narrated about the obstruction of the motor cycle when she was going alongwith her husband and the infant from Tadkalas to Phulkalas for buying some household goods. She described how accused No.2 had obstructed the motor cycle and had asked Khushal about the quarrel on the previous day. He had also told Khushal that he was "acing a bit smart". After the motor cycle was stopped, accused No.1 called the other persons from the farm house. All the accused

came there armed with weapons like sticks, stones, sickle (Katti). They pushed PW 1 Sharda and deceased Khushal from the motor cycle. They started assaulting Khushal and she tried to shield her husband by lying on top of his body. However, she was pulled away by accused No.1. She was badly hit by accused No.1. She was kicked and also given fist blows. All the time Khushal and PW 1 were shouting for help. However, all the accused dragged Khushal away from the road to a spot in front of the farm of the accused. They continued assaulting her husband with their respective weapons. She points out that on hearing her shouts, Shivmurti Shirale, Shivhari Shirale and Ram Kubde came running to the place where the assault was taking place. On seeing them, the accused dropped their weapons and ran away. She has narrated also how she stopped an auto-rickshaw and went to the village Tadkalas to inform her father-in-law about the assault. Subsequently, in the same auto-rickshaw she went to the police station and informed the police about the incident. She further narrates how she accompanied her husband to the hospital at Parbhani. PW 2 Kishan is also an eye witness whose land is near the land of accused No.2 Manikrao. He has stated that at about 6.30 he was watering the groundnut crop in his field when he heard shouts coming from the farm house of the accused No.2 at about 6.30 p.m. He along with Shivmurti who was also watering his crop in the adjoining land went to the farm house, they saw that Khushal was being viciously assaulted by all the accused. He also narrates the entire incident as described by Khushal in the statement given to PW 9. PW 7, Jiwanaji is the father of deceased Khushal. He is not an eye witness. He was informed about the incident by his daughter-in-law. He closed his shop and he was on the way to the place where Khushal had been assaulted when he noticed that the police jeep coming on the road. He travelled in the police jeep to the scene of the incident. He states that Khushal was lying in a pool of blood in front of the farm house of the accused. He states that he had asked Khushal about the incident when Khushal had informed him that accused No.2 to 11 had assaulted him. He then narrates how

Khushal had been taken to the hospital and about his death. PW 9, PSI Ingale, also narrated the entire incident, as noticed above. The prosecution also examined PW 3, Dr. Chaudhari, who had conducted the post-mortem examination. He had noticed the following external injuries :-

1. "Contused lacerated wound over left wrist posteriorly 3 x 3 x 2 cms. Blood clots present.

2. Contused lacerated wound right knee anteriorly size 8 x 4 x 1 cms. Blood clots present.

3. Contused lacerated wound over right thigh medial aspect size 5 x 4 x 2 cms., blood clots present.

4. Contused lacerated wound right leg anteriorly size 2 x 2 x 1 cms. Blood clots present.

5. Contused lacerated wound left leg 3 x 2 x 1 cms. Blood clots present.

6. Contused lacerated wound left leg calf 6 x 2 x 1 cms. Blood clots present.

7. Contused lacerated wound left plam thenar aspect 6 x 3 x 2 cms. Blood clots present."

6. According to this doctor, all these injuries were caused by hard and blunt object and the injuries were caused within the last 12 hours. He had noticed the fracture of middle third right humerus, fracture of lower third radius ulna, fracture of lower third of right tibia and fracture of right patella. On internal examination, he noticed that one contusion on scalp right parietal region size 3 x 3 cms. On internal examination of scalp he found meninges contested and subdural of haematoma of 3 x 2 cms. Brain was found congested. He, therefore, opined that all the injuries were ante-mortem including the internal injuries. He also opined that the cause of death was due to subdural haematoma with pulmonary embolism with

haemorrhagic shock due to multiple fractures. The post mortem report was produced as Exh.70.

7. PW 8, Dr. Rajeshwar was the medical officer who had been assigned the duty of casualty on 9th March, 1998 from 8 pm to 8 am. He also states that on that night Khushal was admitted in the Civil Hospital Parbhani. He was having multiple injuries with cerebral concussion with multiple fractures with peripheral circulatory failure. He points out that he was brought by police constable and was referred by P.S.Tadkalas. He also states that PSI of Police Station Tadkalas had contacted him for recording the statement of the injured. He examined the patient and permitted the PSI to record the statement of the injured. He categorically stated that the PSI recorded the statement. He was present while the statement of the injured was being recorded. After the statement was recorded, he examined the patient and gave the certificate that the patient was conscious to give the statement. He identified the endorsement on the statement which was Exh.89.

8. Relying on the aforesaid evidence, the Sessions Court convicted all the accused, as noticed above. The High Court re-examined the entire evidence and did not find any reason to differ with the findings recorded by the trial court.

9. We have heard the learned counsel for the parties.

10. Learned counsel for the appellant has submitted that the case of the prosecution is unbelievable and deserves to be discarded. It is submitted that the ocular evidence is completely inconsistent with the medical evidence. It is pointed out that the whole story has been concocted. The entry made in the station diary about the incident on the basis of the statement made by PW 1 was never produced before the court. PW 9 PSI did not register the FIR even when he had gone to the scene of the crime. It is further pointed out that the dying declaration cannot be relied upon. According to PW 9, it was recorded between 8.20 p.m. to 8.30 p.m. However, PW 8 says that Khushal was

admitted at 8.55 p.m. The record says that the certificate of the doctor stating that the injured was fit to give statement between 10 p.m. to 10.10 p.m. The FIR came to be recorded at 11.30 p.m. and the injured died at 12.15 to 12.30 a.m. According to the learned counsel for the appellant, the whole story is concocted. It has been put forward only due to enmity between the family of the accused with the family of the deceased. Learned counsel has also pointed out that the deceased was in fact an undesirable character. Show cause notice has been issued to him as to why he should not be externed. According to the learned counsel, Khushal was actually riding the motorcycle when he was under the influence of liquor. He lost control of the motorcycle, as a result of which all the three riders fell of the motorcycle. The injuries suffered by them were due to the motorcycle accident. Learned counsel further pointed out that the conduct of the PW1 is wholly unnatural. According to her, after the assault she left her husband alone in a seriously injured condition and went away in a auto rickshaw. She also left her infant child on the road. According to the learned counsel, this is not expected from a wife who's husband is fighting for his life due to fatal injuries. It is further pointed out that all the witnesses have insisted that Khushal had been assaulted with the sickle (katti) but the injuries sustained by him were contused and lacerated wounds. They have pointed out the cross-examination of the PW 3 Dr.Kalidas, who had conducted the post mortem on the dead body of Khushal. The doctor had clearly stated that he cannot specify the external injuries corresponding to the injury mentioned in Column No.19. This injury was so serious that there was formation of blood on the brain which led to formation of pressure on the brain. He had further stated that due to formation of blood on the brain and haematomma a person becomes unconscious. Contused lacerated wounds can be caused by hard and blunt object and also by a fall on the ground. Learned counsel for the appellant placed heavy reliance on the observations that in case of major accident such types of injuries are possible. This doctor has further stated that injuries in column 17 are possible if a person

is driving the vehicle in drunken stage and the motor cycle skidded and it fell on one side and the rider falls on the other side. The appellants had also emphasised that none of the witness had seen any specific part on which the injuries were inflicted with Katti. Since according to the appellant, the medical evidence is inconsistent with the actual evidence, the entire prosecution case needs to be discarded.

11. Attacking the credibility of PW 1 and 2, the appellants submitted that PW 1 did not name any of the accused when she went to the police station though she was present there from 7 p.m. till 7.30 p.m. She also did not mention the names of the accused while she was travelling in the jeep with the police. She admitted in the cross examination that when her husband has been assaulted in front of the farm house of the accused, she could not see as to who had inflicted which injury. It is further pointed out that although she claims that she had been badly assaulted by accused No.1 yet she did not get her medical examination.

12. The evidence of PW2 is sought to be discredited on the sole ground that he happens to be related to the deceased. Lastly, it is submitted that the appellants have been convicted with the aid of Section 149. This according to the appellants is unsustainable. As there was no occasion for all the accused to come together at that particular time. All the accused are living at different places and there is no evidence of any common intention. It is further submitted by the learned counsel that even if there was a common intention, it was not to kill Khushal. At best it could be said that accused had come with the common intention of giving him a good thrashing because of the incident that occurred on the previous day. Therefore, at best, the appellant could have convicted for the offence under Section 326 IPC and not 302 IPC.

13. On the other hand, learned counsel for the State of Maharashtra has submitted that the trial court as well as the High Court, upon reconsideration of the entire evidence, has

concluded that the involvement of all the accused in the assault on Khushal has been proved beyond reasonable doubt. This Court, in exercising the powers under Article 136 of the Constitution of India, would not re-appreciate the evidence and substitute its own opinion for the findings recorded by the trial court and the High Court. It is only in very exceptional circumstances when a decision shocks the conscious of this Court that powers under Article 136 would be invoked. Learned counsel pointed out that in this case there is cogent evidence which is sufficient to support the conclusions recorded by the trial court as well as the High Court. Learned Counsel pointed out to the evidence of the eye-witness PW 1 Sharda, wife of the deceased, and PW 2 whose land virtually adjoins the land of the accused. Both these witnesses had given consistent eye-witness account**.** They were present when the assault had actually taken place. The evidence of the wife cannot be discarded as she herself is an injured witness. The evidence of these two witnesses corroborates the evidence of each other on three crucial aspects: (i) Genesis of the dispute (ii) the manner in which the assault took place and (iii) events that took place after the assault. He points out that both these witnesses were subjected to lengthy cross-examination but the evidence remained un-impeached. The ocular evidence of the two eye witnesses is consistent with the statement made by Khushal firstly before his father PW 7 Jiwanaji. Secondly the statement which was recorded at Parbhani Hospital in the presence of PSI Ingale PW 9, and Dr. Mukashe, PW8. The statement made by Khushal, having been certified by the Doctor, PW 8 to be made when he was conscious to make a statement, cannot be either disbelieved or discarded. Both these dying declarations are consistent with the ocular evidence. The third most important piece of evidence is the recovery of various items at the instance of the accused. The sickle allegedly used by the appellant Narayan was stained with human blood. Similarly, clothes of all the accused which were taken into custody by the police and seized were also stained with blood. The weapons used by the appellant were also stained with blood. Learned

counsel further pointed out that none of the accused was able to explain any of the evidence appearing against them in the statement recorded under Section 313 of the Cr.P.C, 1973. Learned counsel further pointed out that the medical evidence clearly shows that there are so many injuries caused to Khushal that his death resulted due to shock and hemorrhage. He submitted that none of the submissions made by the learned counsel for the appellants can be supported by the evidence on record. It is further pointed out by the learned counsel for the State of Maharashtra that all the appellants have been convicted under Section 302 read with Section 149 IPC. The offence under Section 149 is a specific and substantive offence. It is pointed out that for the purpose of application of Section 149 IPC, the prosecution had to prove the presence and participation of the accused in an unlawful assembly. This is duly proved by the fact that all the accused came together armed with various weapons which were used to assault Khushal. He further submits that Section 149 which fastened the criminal law on the accused does not require the prosecution to prove any overt act against any particular accused.

14. We have considered the submissions made by the learned counsel for the parties. At the outset, it must be noticed that the Trial Court as well as the High Court, on due appreciation of the evidence, have found all the appellants guilty of the offences punishable under Section 302/149 IPC. The acquittal of accused No.9 and accused No.11 of all the charges clearly demonstrates the care and caution with which the Trial Court as well as the High Court have examined the evidence. Even though the powers of this Court under Article 136 of the Constitution are very wide, but it would not interfere with the concurrent findings of fact, save in exceptional circumstances. It would interfere in the findings recorded by the Trial Court as well as the High Court if it is found that the High Court has acted perversely and/or disregarded any vital piece of evidence which would shake the very foundation of the prosecution case. In other words, this Court would exercise the powers under

Article 136 where the conclusion of the High Court is manifestly perverse and unsupportable on the evidence on record.

15. As noticed above, we have been taken through the evidence by the learned counsel of both sides. We are unable to agree with the submissions made by the learned counsel for the appellants that the appellants have been falsely implicated, or that the assault did not take place in the manner projected by the prosecution.

16. PW 1, Sharda has clearly stated that on the fateful day, she alongwith her infant child was riding on the motorcycle which was being driven by her husband. She has clearly stated that her husband was compelled to stop the motorcycle as accused No.2 had come and stood in the way. It is significant that the incident had taken place firstly on the road adjacent to the farm of the accused person, secondly Khushal was dragged by the accused person to a place in front of the farm of the accused persons. The assault was continued by all the accused with their respective weapons. This narration of the events was not shaken when she was subjected to a lengthy cross-examination by different learned counsel for all the accused. We do not find much substance in the submission that her evidence needs to be discarded as she did not name each and every accused person at the first opportunity, when she went to the Police Station. Her plight at such a situation is not difficult to imagine. She had done whatever was feasible to report the matter to her father-in-law. She then proceeded to inform the police, without wasting any time. She has narrated the entire sequence of events as a witness in Court. She has given the precise inter-se relationship of all the accused. However, we find substance in the submission of Mr. Sudhanshu S. Choudhari that even Sharda did not think that her husband was so seriously injured that he may die. Otherwise, her first impulse would have been to move him to the hospital or arrange for a doctor. She was aware that he had been injured only on arms and legs. But this does not detract from the fact that the assault had taken place

as narrated by her. The fact that she could not indicate the precise injury caused by each of the accused is quite understandable as her husband was being attacked by a large group of people. In such a situation, it would perhaps be humanely impossible for anyone to indicate the precise injury caused by each one of the accused/appellant. We, therefore, find no infirmity in the ocular evidence given by Sharda PW1.

17. Furthermore, her evidence is duly supported by PW 2, who had come running to the scene of the crime on hearing the commotion at the farmhouse of the accused persons. It is noteworthy that on seeing PW2, all the accused are stated to have discarded their weapons and ran away. The evidence of this witness also could not be shaken during cross-examination. It has further come in evidence that on receiving information about the assault on his son, PW7 promptly reached the scene of the crime. Luckily on his way he was picked up by the police jeep which had been brought by Sub-Inspector Ingale PW9 for investigation of the crime. On reaching the scene of the crime, both PW7 and PW9 have stated that they found the husband lying severely injured in a pool of blood. Both the witnesses have also fixed the spot in front of the farm of the accused persons. PW1 had clearly stated that she had tried to save her husband by lying on his body but she had been pulled away by accused No.1 who had then proceeded to assault her. She had also further stated that the accused had dragged her husband by the collar of his shirt to a spot in front of the farmhouse of the appellant. They continued to assault her husband with the respective weapons. The assault on Khushal in front of the farmhouse is further supported by the evidence of PW2 who has given a corresponding narration of the assault. Therefore, the evidence of PWs.1 and 2 being consistent cannot be lightly brushed aside. PW 7 further goes on to state that on his arrival, he inquired from his son as to who had caused the injuries. The son had clearly stated that family member of Salgar had assaulted him. The statement made by the injured before PW7 is further strengthened by the statement

that was recorded subsequently at Parbhani Hospital by PW9 in the presence of PW8. The statement clearly indicates that the incident took place exactly as narrated by PW1. The statement has been recorded at the time Khushal was certified to be conscious and in a fit medical condition to make a statement. The dying declaration being consistent and clear also cannot be discarded.

18. The medical evidence would also indicate that Khushal had been very severally beaten. But at the same time, it can not be said to be an assault with intent to kill. Firstly, all the accused are armed with sticks and bricks etc. In our opinion, there is no evidence to indicate that Narayan was holding a "Katti" (sickle). It is noteworthy that Khushal had sustained external injuries on the left wrist, right knee, right thigh, right leg, left leg, left palm as well as head. There was hardly a bone in his body that was not broken. The number of injuries caused to Khushal clearly shows that the assault was premeditated. All the injuries were lacerated and caused by blunt weapons. None of the witnesses could say if any injury had been caused by Katti (sickle). According to Dr. Chaudhari, PW 3, the head injury could be the result of a rider falling from the motorcycle.

19. In our opinion, the appellants have failed to point out any infirmity in the conclusions recorded by the Sessions Court as well as the High Court with regard to the assault. On this issue, both the judgments do not suffer from any such perversity, which would shock the conscious of this Court. In fact, in our opinion, the entire prosecution evidence when considered from all angles leads to a conclusion, beyond reasonable doubt, that Khushal was a victim of a premeditated assault by all the appellants with their respective weapons.

20. However, given the nature of weapons used, the location of the injuries and the nature of the injuries caused, it would not be possible to hold that the appellants shared a common object of causing the murder of Khushal. In our opinion, the accused had merely decided to teach him a lesson for

having a quarrel with PW 2 on the previous day. They, therefore, appear to have made up their mind to give him a good thrashing for acting "a bit smart". In such circumstances, it would not be possible to uphold the conviction of the appellants under Section 302 IPC. However, at the same time, the nature of injuries cannot be said to be superficial. It has come in evidence that numerous bones in the legs and arms of Khushal had been broken. The injuries being grievous in nature, the offences committed by the appellants would fall within the mischief of Section 326 IPC.

21. In view of the above, the appeals are partly allowed and the conviction of the appellants under Section 302 is set aside. Instead thereof, they are convicted under Section 326/149 IPC. For the offences under Section 326/149 IPC, the appellants are hereby sentenced to undergo Rigorous Imprisonment for seven years. The conviction and sentence recorded by the courts below under any other sections of IPC are maintained.

22. The appeals are partly allowed, as indicated above.

K.K.T. Appeals partly allowed.

GURU BASAVARAJ @ BEENE SETTAPPA
v.
STATE OF KARNATAKA
(Criminal Appeal No. 1325 of 2012)

AUGUST 29, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 – ss. 279, 337, 338 and 304-A – Prosecution under, with s. 187 of Motor Vehicles Act – Motor accident – Causing simple injuries to many, grievous injuries to two and death of one – Trial court convicting the accused-driver for the offences under IPC and acquitting him for the offence under Motor Vehicles Act – Accused was sentenced to SI for six months and fine with default clause – Appellate court upholding the conviction but setting aside sentence of fine – Order of appellate court upheld by High Court – On appeal, held: Conviction justified – Prosecution proved that the accident occurred due to rash and negligent driving of the accused – The sentence awarded by courts below also does not warrant any interference – Sentence/Sentencing – Motor Vehicles Act, 1988 – s. 187.

Sentence/Sentencing – Proportionality in sentence – In motor accident cases – An appropriate punishment works as an eye-opener for persons who are not careful while driving – It is duty of the court to see that appropriate sentence is imposed taking into regard commission of crime and its impact on social order.

Compensation – Grant of, u/s. 357(3) Cr.P.C. – Held: Such compensation not to be regarded as a substitute in all circumstances for adequate sentence – Code of Criminal Procedure, 1973 – s. 357(3) – Sentence/Sentencing.

Criminal Law – Conviction and sentence – Distinction between.

The appellant-accused was charged for the offences punishable u/ss. 279, 337, 338 and 304-A IPC r/w. s. 187 of Motor Vehicles Act, 1988. The prosecution case was that the accused was driving a new tractor attached with an old trailer in which goods were loaded alongwith many people. The trailer turned turtle resulting in simple injuries to many and grievous injuries to 3, one of whom succumbed to the injuries. The accused in his statement u/s. 313 Cr.P.C. stated that the accident occurred due to mechanical failure and not due to rash and negligent driving. Trial court acquitted the accused u/s. 187 of the Act and convicted him u/ss. 279, 337, 338 and 304-A IPC. The appellate court upheld the conviction imposed by the trial court, but set aside the sentence of fine for the offence punishable u/s. 279 IPC. High Court upheld the order of appellate court.

In appeal to this Court, appellant contended that accident was due to mechanical failure and not due to rash and negligent driving; that the accused having been acquitted u/s. 279 IPC could not have been punished in respect of rest of the offences; and that the age of the accused at the time of incident (22 years) and his solemnization of marriage to be taken as mitigating factor and the sentence of imprisonment to be restricted to the period already undergone and the quantum of fine be enhanced.

Dismissing the appeal, the Court

HELD: 1. On a careful scrutiny of the material brought on record, all the courts have placed reliance on independent witnesses as well as the testimony of PW-10, the Motor Vehicle Inspector. The manner in which the accident occurred due to detachment of the trailer from the tractor and the distance to which the tractor moved vividly reveals that the vehicle in question was driven recklessly at a high speed. The plea of mechanical failure

was not even suggested to the Inspector. What is sought to be emphasised before this Court is that PW-3 has deposed that the accident occurred due to mechanical failure. The trial court as well as the High Court has not accepted the testimony of PW-3 as he is only an agriculturist while the other technical experts including the Motor Vehicle Inspector have deposed about the rash and negligent driving. Analysing the evidence in entirety, the trial judge as well as the appellate judge has returned the finding as regards the rash and negligent driving. The analysis of the factual score in this regard cannot be regarded to be perverse and, therefore, not liable to be unsettled by this Court. [Para 12] [198-C-F, H; 199-A]

2. There is a distinction between conviction and sentence. A conviction is the proof of the offence committed by an accused. It is the proof of guilt of the offence. The punishment component is the sentence. In the instant case, as the judgment of the appellate court would show, the view has been expressed that a separate sentence under Section 279 IPC is not necessary and, accordingly, the said sentence has been set aside. The reading of the entire judgment makes it graphically clear that the conviction under Section 279 IPC has not been annulled. It is noticeable that the rash and negligent driving by the accused that resulted in the causation of injuries to the persons travelling in the trailer has been proved. There is no cavil that some have been seriously injured and one person who was grievously injured breathed his last. Thus, the plea that the appellant has been acquitted of the offence under Section 279 IPC does not deserve acceptance. [Para 13] [199-D-E; 200-A-C]

Rama Narang v. *Ramesh Narang and Ors.* **(1995) 2 SCC 513: 1995 (1) SCR 456 – relied on.**

3.1. There has to be a proportion between the crime and the punishment. It is the duty of the court to see that

appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice which includes adequate punishment cannot be lightly ignored. [Para 29] [206-E-F]

3.2. An appropriate punishment works as an eye-opener for the persons who are not careful while driving vehicles on the road and exhibit a careless attitude possibly harbouring the notion that they would be shown indulgence or lives of others are like "flies to the wanton boys". They totally forget that the lives of many are in their hands, and the sublimity of safety of a human being is given an indecent burial by their rash and negligent act. [Para 28] [206-D]

3.3. In a motor accident, when a number of people sustain injuries and a death occurs, it creates a stir in the society; sense of fear prevails all around. The negligence of one shatters the tranquility of the collective. When such an accident occurs, it has the effect potentiality of making victims in many a layer and creating a concavity in the social fabric. The agony and anguish of the affected persons, both direct and vicarious, can have nightmarish effect. It has its impact on the society and the impact is felt more when accidents take place quite often because of rash driving by drunken, negligent or, for that matter, adventurous drivers who have, in a way, no concern for others. Grant of compensation under the provisions of the Motor Vehicles Act, 1988 is in a different sphere altogether. Grant of compensation under Section 357(3) with a direction that the same should be paid to the person who has suffered any loss or injury by reason of the act for which the accused has been sentenced has a different contour and the same is not to be regarded as a substitute in all circumstances for adequate sentence. [Para 26] [205-E-H; 206-A]

3.4. Two aspects, namely, (i) the age of the accused at the time of the accident; and (ii) his present marital status, have been highlighted as mitigating factors. Weighing the individual difficulty as against the social order, collective conscience and the duty of the court, the substantive sentence affirmed by the High Court does not warrant any interference and, accordingly, the court concurs with the same. [Paras 15 and 30] [200-G; 207-D-E]

State of Karnataka v. Krishna alias Raju **(1987) 1 SCC 538: 1987 (1) SCR 1103;** *Sevaka Perumal and Anr. v. State of Tamil Nadu* **(1991) 3 SCC 471: 1991 (2) SCR 711 ;** *Jashubha Bharatsinh Gohil and Ors. v. State of Gujarat* **(1994) 4 SCC 353;** *Dalbir Singh v. State of Haryana* **(2000) 5 SCC 82: 2000 (3) SCR 1000;** *State of Karnataka v. Sharanappa Basanagouda Aregoudar* **(2002) 3 SCC 738: 2002 (2) SCR 692;** *State of M.P. v. Saleem alias Chamaru and Anr.* **(2005) 5 SCC 554: 2005 (1) Suppl. SCR 562;** *State of Punjab v. Balwinder Singh and Ors.* **(2012) 2 SCC 182;** *Alister Anthony Pareira v. State of Maharashtra* **(2012) 2 SCC 648;** *State Tr. P.S. Lodhi Colony, New Delhi v. Sanjeev Nanda* **2012 (7) SCALE 120;** *Rattiram and Ors. v. State of M.P. Through Inspector of Police* **AIR 2012 SCW 1772;** *Siriya alias Shri Lal v. State of M.P.* **AIR 2008 SC 2314 – relied on.**

B. Nagabhushanam v. State of Karnataka **(2008) 5 SCC 730: 2008 (8) SCR 444 – referred to.**

Case Law Reference:

1995 (1) SCR 456	**Relied on**	**Para 13**
1987 (1) SCR 1103	**Relied on**	**Para 16**
1991 (2) SCR 711	**Relied on**	**Para 17**
(1994) 4 SCC 353	**Relied on**	**Para 18**
2000 (3) SCR 1000	**Relied on**	**Para 19**

2002 (2) SCR 692	**Relied on**	**Para 20**
2005 (1) Suppl. SCR 562	**Relied on**	**Para 21**
2008 (8) SCR 444	**Referred to**	**Para 22**
(2012) 2 SCC 182	**Relied on**	**Para 23**
(2012) H 2 SCC 648	**Relied on**	**Para 24**
2012 (7) SCALE 120	**Relied on**	**Para 25**
AIR 2012 SCW 1772	**Relied on**	**Para 27**
AIR 2008 SC 2314	**Relied on**	**Para 29**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1325 of 2012.

From the Judgment & Order dated 21.06.2011 of the High Court of Karnataka, Circuit Bench at Dharwad in Crl. Revision Petition No. 2284 of 2009.

S.N. Bhat for the Appellant.

Vishruti Vijay (for Anitha Shenoy) for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. In this appeal preferred by special leave under Article 136 of the Constitution of India, the assail is to the judgment and order dated 21.06.2011 in Criminal Revision Petition No. 2284 of 2009 passed by the High Court of Karnataka Circuit Bench at Dharwad whereby the High court has concurred with the judgment of conviction and order of sentence passed by the learned Addl. Sessions Judge, Hospet in Criminal Appeal No. 58 of 2008 wherein the appellate court had set aside the sentence under Section 279 of the Indian Penal Code, 1860 (for short "the IPC") and affirmed the conviction and sentence for offences punishable under Sections 337, 338 and 304 A

of the IPC as passed by the Judicial Magistrate First Class, Hospet.

3. The broad essential facts leading to the trial of the accused-appellant (hereinafter referred to as 'the accused') are that on 25.03.2006, about 10.15 a.m., the accused-driver was driving an unregistered new tractor on National Highway No. 13 at bypass road near the open well of one Golya Naik. The tractor turned turtle towards the left side and caused simple injuries to many people who were sitting inside the trailer of the tractor and grievous injuries to three persons. Injured Kotraiah succumbed to the injuries sustained in the accident. Be it noted, all the injured persons were travelling along with their goods in the trailer of the said tractor.

4. After the accident took place, the concerned police sub-inspector (PSI) reached the spot, recorded the statement of the injured persons and after returning to the police station registered an FIR and thereafter proceeded to the spot, prepared the sketch map, seized the vehicle in question and sent the dead body for post-mortem. After completing the investigation, he placed the charge-sheet before the Competent Court for the offences punishable under Sections 279, 337, 338 and 304-A of the IPC read with Section 187 of the Motor Vehicles Act, 1988.

5. The prosecution, in order to substantiate the allegations, examined 10 witnesses and got a number of documents marked as exhibits P-1 to P-24.

6. The accused, in his statement under Section 313 Cr.P.C., denied the incriminating material brought against him and took the stand that the accident occurred due to mechanical failure and not because of rash and negligent driving. However, he chose not to adduce any evidence.

7. The learned Magistrate acquitted the accused of the offence under Section 187 of the 1988 Act and convicted him

for the offences punishable under Sections 279, 337, 338 and 304-A of the IPC and sentenced him to pay a certain sum as fine and, in default of payment of the same, to undergo simple imprisonment for a specific period in respect of the offences under Sections 279 and 337 and Section 338 of the IPC As far as the offence under Section 304-A of the IPC is concerned, the learned Magistrate imposed the sentence of simple imprisonment of six months and to pay a fine of Rs. 2000/- and, in default, to suffer simple imprisonment of 45 days.

8. On an appeal being preferred assailing the conviction and sentence, the learned appellate Judge basically posed two questions, namely, whether the findings recorded by the trial court are erroneous and whether the sentence passed by the trial court required to be interfered with in appeal. After analysing the evidence, the appellate court came to hold that it had been proven beyond doubt that the accused being the driver of a newly purchased unregistered tractor not only overloaded tamarind bags on the old trailer but also allowed 22 passengers to travel on the loaded trailer and due to his negligence, the trailer got detached from the tractor as a consequence of which it turned turtle by the side of the road. That apart, after detachment of the trailer, the tractor moved up to 30 feet which clearly reflected that the tractor was in high speed.

9. The learned appellate Judge concurred with the view of the learned Magistrate that the accident had not occurred due to mechanical defect but there was rash and negligence on the part of the accused and the same had been established by the unimpeachable evidence of independent witnesses. Because of the aforesaid view, he answered the first question in the negative. As far as the second question is concerned, he sustained the conviction in respect of all the offences but set aside the sentence imposed for the offence punishable under Section 279 of the IPC.

10. Questioning the legal sustainability of the conviction,

it is submitted by Mr. S. N. Bhat, learned counsel for the appellant, that all the courts have fallen into grave error by expressing the opinion that the accident had not occurred due to mechanical failure, namely, due to non-functioning of the hydraulic system in a proper manner, and such an expression of opinion vividly exposits perversity of approach. It is further urged by him that when the appellant has been acquitted of the offence punishable under Section 279 of the IPC, he could not have been punished in respect of the rest of the offences. The last limb of submission of Mr. Bhatt is that at the time of the accident, the appellant was 22 years of age and, in the meantime, his marriage has taken place and, therefore, the same should be regarded as acceptable mitigating factors and the substantive sentence should be restricted to the period already undergone in custody and the quantum of fine be enhanced.

11. Ms. Vishruti Vijay, learned counsel for the State, per contra, contended that the analysis of the evidence made by the learned Magistrate as well as by the appellate court are absolutely flawless and the concurrence thereof by the High Court, in no manner, can be stated to be perverse. It is put forth by him that there is ample evidence on record that the incident took place due to rash and negligent act on the part of the appellant and the said finding, being appositely founded on the material on record, does not warrant any interference by this Court. Commenting on the submission that the appellant has been acquitted under Section 279 of the IPC and hence, he deserves to be acquitted in respect of the other offences, it is propounded by Ms. Vishruti Vijay that on a studied perusal of the judgment of the learned appellate Judge, it is quite clear that he has maintained the conviction and not imposed a separate sentence under Section 279 of the IPC and, for that reason, he has set aside the sentence but not the conviction. The learned counsel further submitted that regard being had to the careless, negligent and callous attitude that has been exhibited by the drivers who are expected to be professionals,

the rate of road accidents that has extremely gone high and further, in the case at hand, when so many people have been injured, some have sustained grievous injuries and a life has been lost, lenient delineation would be an anathema to the concept of adequate punishment.

12. First, we shall deal with the facet of rash and negligent driving of the driver. The learned counsel for the appellant has submitted that the vehicle turned turtle due to mechanical failure i.e. non-functioning of the hydraulic system in a proper manner. To appreciate the said submission, we have carefully perused the material brought on record and the analysis made by the courts below. On a careful scrutiny of the same, we find that all the courts have placed reliance on independent witnesses as well as the testimony of PW-10, the Motor Vehicle Inspector. The manner in which the accident occurred due to detachment of the trailer from the tractor and the distance to which the tractor moved vividly reveals that the vehicle in question was driven recklessly at a high speed. The plea of mechanical failure as put forth by the accused was not even suggested to the Inspector. What is sought to be emphasised before this Court is that PW-3 has deposed that the accident occurred due to mechanical failure. The trial court as well as the High Court has not accepted the testimony of PW-3 as he is only an agriculturist while the other technical experts including the Motor Vehicle Inspector have deposed about the rash and negligent driving. Analysing the evidence in entirety, the learned trial judge as well as the appellate judge has returned the finding as regards the rash and negligent driving. The appellate court, on further scrutiny, has found that the evidence on record clearly shows that the driver has taken the vehicle to the left side of the road and, in the process, he moved away from the main road to the 'kachcha' road and thereby the link between the tractor and the trailer got detached. The High Court has opined that the accused has not taken care to see that the speed of the tractor was within limit so that the trailer could not be detached. In our considered view, the analysis of the factual

score in this regard cannot be regarded to be perverse and, therefore, not liable to be unsettled by this Court.

13. The next limb of submission of the learned counsel for the appellant is that when he has been acquitted under Section 279 of the IPC, he cannot be punished in respect of the other offences as the allegation of rash and negligent act cannot be treated to have been proven. The aforesaid submission, on a first blush, may look quite attractive, but on a deeper scrutiny of the judgment passed by the appellate court, it melts into total insignificance. The learned appellate judge, after due appreciation of the evidence on record as expected of an appellate court, has come to the conclusion that the accused was driving the vehicle in a rash and negligent manner. After ascribing some reason, he has thought it apposite that a separate sentence should not be imposed under Section 279 of the IPC, and, accordingly, he has set aside the sentence awarded by the trial court. It is apposite to state here that there is a distinction between conviction and sentence. A conviction is the proof of the offence committed by an accused. It is the proof of guilt of the offence. The punishment component is the sentence. In *Rama Narang v. Ramesh Narang and others*[1], a three-Judge Bench of this Court, after referring to Section 354 of the Code of Criminal Procedure, has stated that every judgment referred to in Section 353 of the Code, shall, inter alia, specify the offence of which the accused is convicted and the punishment to which he is sentenced. This Court, while dealing with the power of the High Court under Section 389(1) of the Code, has observed that ordinarily an order of conviction by itself is not capable of execution under the Code, but it is the order of sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution and which, if not suspended, would be required to be executed by the authorities. It has been further stated that in certain situations, the order of conviction can be executable in the sense that it may incur a disqualification. We have

1. (1995) 2 SCC 513.

referred to the aforesaid authority only to highlight that there is a distinction between a conviction and a sentence. In the instant case, as the judgment of the appellate court would show, the view has been expressed that a separate sentence under Section 279 of the IPC is not necessary and, accordingly, the said sentence has been set aside. The reading of the entire judgment makes it graphically clear that the conviction under Section 279 of the IPC has not been annulled. It is noticeable that the rash and negligent driving by the accused that resulted in the causation of injuries to the persons travelling in the trailer has been proved. There is no cavil that some have been seriously injured and one person who was grievously injured breathed his last. Thus, the submission of the learned counsel for the appellant that he has been acquitted of the offence under Section 279 of the IPC does not deserve acceptance, and, accordingly, we, unhesitatingly, repel the same.

14. The last plank of submission of Mr. Bhat is that the accused-appellant was a young man of 22 years at the time of the occurrence and in the meantime, he has entered into wedlock and, therefore, maintaining of substantive sentence would be inapposite, and in fitness of things, it should be restricted to the period already undergone and the amount of fine may be enhanced with the stipulation that it shall be paid as compensation to the victims of the accident.

15. The aforesaid submission, in our considered opinion, requires a careful and cautious examination. What is basically sought to be argued on behalf of the appellant is that there are mitigating circumstances warranting lenient treatment. As we perceive, two aspects, namely, (i) the age of the accused at the time of the accident; and (ii) his present marital status, have been highlighted as mitigating factors. Before we dwell upon whether these two aspects should be regarded as extenuating factors to reduce the sentence in a crime of this nature in the present social context, we think it apt to refer to certain authorities in the field.

16. In *State of Karnataka v. Krishna alias Raju*[2], while dealing with the concept of adequate punishment in relation to an offence under Section 304-A of the IPC, the Court stated that considerations of undue sympathy in such cases will not only lead to miscarriage of justice but will also undermine the confidence of the public in the efficacy of the criminal justice dispensation system. It need be hardly pointed out that the imposition of a sentence of fine of Rs. 250 on the driver of a Motor Vehicle for an offence under Section 304-A of the IPC and that too without any extenuating or mitigating circumstance is bound to shock the conscience of any one and will unmistakably leave the impression that the trial was a mockery of justice. Thereafter, this Court enhanced the sentence to six months rigorous imprisonment with fine of Rs. 1000 and, in default, to undergo rigorous imprisonment for two months.

17. In *Sevaka Perumal and another v. State of Tamil Nadu*,[3] it has been emphasized that undue sympathy resulting in imposition of inadequate sentence would do more harm to the justice system and undermine the public confidence in the efficacy of law.

18. In *Jashubha Bharatsinh Gohil and Ors. v. State of Gujarat*[4], the Court, adverting to the new challenges of sentencing, opined that the courts are constantly faced with the situation where they are required to answer to new challenges and mould the sentencing system to meet those challenges. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing appropriate sentence.

19. In *Dalbir Singh v. State of Haryana*[5], this Court expressed thus:

2. (1987) 1 SCC 538.
3. (1991) 3 SCC 471.
4. (1994) 4 SC 353.
5. (2000) 5 SCC 82.

> "Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence, to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence."

Thereafter, the Court proceeded to highlight what is expected of a professional driver:

> "A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of vehicle he cannot escape from jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

20. In *State of Karnataka v. Sharanappa Basanagouda Aregoudar*[6], it has been ruled that if the accused are found guilty of rash and negligent driving, courts have to be on guard to ensure that they do not escape the clutches of law very lightly.

6. (2002) 3 SCC 738.

The sentence imposed by the courts should have deterrent effect on potential wrong-doers and it should commensurate with the seriousness of the offence. Of course, the courts are given discretion in the matter of sentence to take stock of the wide and varying range of facts that might be relevant for fixing the quantum of sentence, but the discretion shall be exercised with due regard to the larger interest of the society and it is needless to add that passing of sentence on the offender is probably the most public face of the criminal justice system.

21. In *State of M.P. v. Saleem alias Chamaru and Anr*.[7], it has been ruled that the object should be to protect society and the avowed object of law is achieved by imposing appropriate sentence to deter the criminal. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

22. Yet again in *B. Nagabhushanam V. State of Karnataka*[8], the Court, taking note of the fact that the vehicle was being driven rashly and negligently, opined that six months' simple imprisonment and a direction to the appellant to pay a fine of Rs. 1,000/- for commission of the offence punishable under Section 304-A and simple imprisonment for one month and to pay a fine of Rs. 500/- for the offence punishable under Section 279 of the Indian Penal Code cannot be said to be shocking.

23. Recently, in *State of Punjab v. Balwinder Singh and Ors*.,[9] this Court while dealing with the concept of sentencing, has stated thus:

"While considering the quantum of sentence to be imposed

7. (2005) 5 SCC 554.

8. (2008) 5 SCC 730.

9. (2012) 2 SC 182.

for the offence of causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence. The persons driving motor vehicles cannot and should not take a chance thinking that even if he is convicted he would be dealt with leniently by the Court".

24. In *Alister Anthony Pareira v. State of Maharashtra,*[10] it has been laid down that sentencing is an important task in relation to criminal justice dispensation system. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. It has been further opined that the principle of proportionality in sentencing a crime-doer is well entrenched in criminal jurisprudence. As a matter of law, the proportion between crime and punishment bears the most relevant influence in the determination of sentencing the crime-doer. The court has to take into consideration all aspects including the social interest and conscience of the society for award of appropriate sentence.

25. In *State TR. P.S. Lodhi Colony, New Delhi v. Sanjeev Nanda*[11], one of us (K.S. Radhakrishnan, J.), in his separate opinion, pertaining to the conception of adequate sentencing, has expressed thus:

"Law demands that the offender should be adequately

10. (2012) 2 SCC 648.

11. 2012 (7) SCALE 120.

punished for the crime, so that it can deter the offender and other persons from committing similar offences. Nature and circumstances of the offence; the need for the sentence imposed to reflect the seriousness of the offence; to afford adequate deterrence to the conduct and to protect the public from such crimes are certain factors to be considered while imposing the sentence."

26. From the aforesaid authorities, it is luminous that this Court has expressed its concern on imposition of adequate sentence in respect of commission of offences regard being had to the nature of the offence and demand of the conscience of the society. That apart, the concern has been to impose adequate sentence for the offence punishable under Section 304-A of the IPC. It is worthy to note that in certain circumstances, the mitigating factors have been taken into consideration but the said aspect is dependent on the facts of each case. As the trend of authorities would show, the proficiency in professional driving is emphasized upon and deviation therefrom that results in rash and negligent driving and causes accident has been condemned. In a motor accident, when a number of people sustain injuries and a death occurs, it creates a stir in the society; sense of fear prevails all around. The negligence of one shatters the tranquility of the collective. When such an accident occurs, it has the effect potentiality of making victims in many a layer and creating a concavity in the social fabric. The agony and anguish of the affected persons, both direct and vicarious, can have nightmarish effect. It has its impact on the society and the impact is felt more when accidents take place quite often because of rash driving by drunken, negligent or, for that matter, adventurous drivers who have, in a way, no concern for others. Be it noted, grant of compensation under the provisions of the Motor Vehicles Act, 1988 is in a different sphere altogether. Grant of compensation under Section 357(3) with a direction that the same should be paid to the person who has suffered any loss or injury by reason of the act for which the accused has been sentenced has a

different contour and the same is not to be regarded as a substitute in all circumstances for adequate sentence.

27. Recently, this Court in *Rattiram & Ors. v. State of M.P. Through Inspector of Police*[12], though in a different context, has stated that criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the view point of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. It is the duty of the court to see that the victim's right is protected.

28. We may note with profit that an appropriate punishment works as an eye-opener for the persons who are not careful while driving vehicles on the road and exhibit a careless attitude possibly harbouring the notion that they would be shown indulgence or lives of others are like "flies to the wanton boys". They totally forget that the lives of many are in their hands, and the sublimity of safety of a human being is given an indecent burial by their rash and negligent act.

29. There can hardly be any cavil that there has to be a proportion between the crime and the punishment. It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice which includes adequate punishment cannot be lightly ignored. In *Siriya alias Shri Lal v. State of M.P*[13]., it has been held as follows: -

"Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the

12. AIR 2012 SCW 1772.

13. AIR 2008 SC 2314.

challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be – as it should be – a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be."

30. In view of the aforesaid, we have to weigh whether the submission advanced by the learned counsel for the appellant as regards the mitigating factors deserves acceptance. Compassion is being sought on the ground of young age and mercy is being invoked on the foundation of solemnization of marriage. The date of occurrence is in the month of March, 2006. The scars on the collective cannot be said to have been forgotten. Weighing the individual difficulty as against the social order, collective conscience and the duty of the Court, we are disposed to think that the substantive sentence affirmed by the High Court does not warrant any interference and, accordingly, we concur with the same.

31. Consequently, the appeal, being devoid of any substance, stands dismissed.

K.K.T. Appeal dismissed.

STATE OF N.C.T. OF DELHI
v.
AJAY KUMAR TYAGI
(Criminal Appeal No. 1334 of 2012)

AUGUST 31, 2012

[R.M. LODHA, CHANDRAMAULI KR. PRASAD AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Code of Criminal Procedure, 1973 – s. 482 – Criminal proceedings against accused under Prevention of Corruption Act for demand and acceptance of illegal gratification – Departmental proceedings also initiated on the same charges – Report of enquiry officer observing that charges not proved – Disciplinary proceedings kept in abeyance due to pendency of criminal case – High Court in a writ petition holding that keeping the departmental proceedings in abeyance was justified – In a petition u/s. 482 High Court quashed the criminal proceedings holding that as the accused has been exonerated in disciplinary proceeding, criminal proceeding deserved to be quashed – In appeal Division Bench of Supreme Court referred the question whether criminal proceedings to continue, if the accused exonerated of the charges in departmental proceedings, to Larger Bench – Larger Bench, held: The criminal proceedings were quashed erroneously by the High Court because the accused cannot be said to have been exonerated in departmental proceedings as the report of the enquiry officer was yet to be decided by the disciplinary authority – Further, exoneration in departmental proceeding ipso facto would not lead to quashing of a criminal prosecution – Prevention of Corruption Act,1988 – ss. 7/13 – Service Law – Disciplinary Proceedings.

For demand and acceptance of illegal gratification, criminal prosecution u/s.7/13 of Prevention of Corruption

Act, as well as departmental proceedings were initiated against the respondent-accused.

The enquiry officer, after conducting the departmental inquiry, in its report observed that charges against the accused was not proved due to lack of evidence on record. Due to pendency of the criminal case, no action was taken on the report.

The respondent-accused filed writ petition before High Court praying for concluding the departmental proceedings. High Court dismissed the petition observing that keeping the departmental proceedings in abeyance was not unjustified.

Thereafter, the respondent-accused filed petition u/s. 482 Cr.P.C. praying for quashing the criminal proceedings u/s. 7/13 of Prevention of Corruption Act on the ground that since the accused had been exonerated in the disciplinary proceedings, criminal proceedings deserved to be quashed on that ground alone. High Court quashed the criminal proceedings. Thereafter the disciplinary authority exonerated the accused of the charges subject to the condition that if appellate court passed an order contrary to the order of the High Court, the matter would be reopened.

State filed appeal to this Court. The Division Bench of this Court, finding a conflict in the decision of two Division Benches of this Court on the question whether criminal proceedings against an accused, notwithstanding his exoneration on the identical charge in the departmental proceeding could continue, referred the matter to three Judges Bench of this Court.

The appellant-State *interalia* contended that the assumption of the High Court that the accused had been exonerated in the disciplinary proceedings was

unfounded on facts because the report of the enquiry officer was not the final verdict and the same was yet to be considered by the disciplinary authority.

Allowing the appeal, the Court

HELD: 1. The order of the High Court is unsustainable, both on facts and law. Though the inquiry officer has submitted its report and found the allegation to have not been proved but, that is not the end of the matter. It is well settled that the disciplinary authority is not bound by the conclusion of the inquiry officer and, after giving a tentative reason for disagreement and providing the delinquent employee an opportunity of hearing, can differ with the conclusion and record a finding of guilt and punish the delinquent employee. In the present case, before the said stage reached, the accused filed an application u/s. 482 Cr.P.C. for terminating the criminal proceedings and the High Court fell into error in quashing the said proceedings on the premise that the accused has been exonerated in the departmental proceeding. As the order of the High Court is founded on an erroneous premise, the same cannot be allowed to stand. As the impugned order of the High Court suffers from an apparent illegality, the same deserves to be set aside so also the order of the disciplinary authority founded on that and, in the light of the direction of the High Court, the departmental proceeding has to be reopened and kept in abeyance till the conclusion of the criminal case. [Paras 28, 14 and 16] [224-F; 217-B-D; 217-G-H; 218-A]

2.1. The decision in the case of P.S. Rajya* does not lay down any proposition that on exoneration of an employee in the departmental proceeding, the criminal prosecution on the identical charge or the evidence has to be quashed. It is well settled that the decision is an authority for what it actually decides and not what flows

from it. Mere fact that in P.S. Rajya* this Court quashed the prosecution when the accused was exonerated in the departmental proceeding would not mean that it was quashed on that ground. From the reading of the judgment, it is evident that the prosecution was not terminated on the ground of exoneration in the departmental proceeding but, on its peculiar facts. [Paras 22 and 23] [220-H; 221-A-B, G]

2.2. The High court quashed the prosecution on total misreading of the judgment in the case of P.S. Rajya*. Exoneration in departmental proceeding ipso facto would not lead to exoneration or acquittal in a criminal case. It is well settled that the standard of proof in departmental proceeding is lower than that of criminal prosecution. It is equally well settled that the departmental proceeding or for that matter criminal cases have to be decided only on the basis of evidence adduced therein. Truthfulness of the evidence in the criminal case can be judged only after the evidence is adduced therein and the criminal case can not be rejected on the basis of the evidence in the departmental proceeding or the report of the Inquiry Officer based on those evidence. [Para 26] [223-H; 224-A-C]

2.3. The exoneration in the departmental proceeding ipso facto would not result into the quashing of the criminal prosecution. However, if the prosecution against an accused is solely based on a finding in a proceeding and that finding is set aside by the superior authority in the hierarchy, the very foundation goes and the prosecution may be quashed. But that principle will not apply in the case of the departmental proceeding as the criminal trial and the departmental proceeding are held by two different entities. Further they are not in the same hierarchy. [Para 27] [224-D-F]

State v. M. Krishna Mohan **(2007) 14 SCC 667: 2007 (11) SCR 570;***Supdt. of Police (C.B.I.) v. Deepak Chowdhary* **(1995) 6 SCC 225:1995 (2) Suppl. SCR 818;** *Central Bureau of Investigation v. V.K. Bhutiani* **(2009) 10 SCC 674 – relied on.**

P.S. Rajya v. State of Bihar* **1996 (9) SCC 1: 1996 (2) Suppl. SCR 631 – distinguished.

State of Haryana v. Bhajan Lal **1992 Supp (1) SCC 335:1990 (3)Suppl. SCR 259 – referred to.**

Case Law Reference:

1990 (3) Suppl. SCR 259	**Referred to.**	**Para 20**
1996 (2) Suppl. SCR 631	**Distinguished.**	**Para 22**
2007 (11) SCR 570	**Relied on.**	**Para 24**
1995 (2) Suppl. SCR 818	**Relied on.**	**Para 24**
(2009) 10 SCC 674	**Relied on.**	**Para 25**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1334 of 2012.

From the Judgment & Order dated 25.8.2008 of the High Court of Delhi at New Delhi in Crl. MC No. 1833/2007.

J.S. Attry, Anjani Aiyagari, Gargi Khanna, B.V. Balram Das for the Appellant.

Chetan Sharma, Bake Bihari Sharma (for Asha Gopalan Nair) for the Respodent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Ajay Kumar Tyagi, at the relevant time, was working as a Junior Engineer with the Delhi Jal Board. Surinder Singh, a Constable with the Delhi Police applied to the Delhi Jal Board, hereinafter referred to as 'the Board', for water connection in the name of his wife

Sheela Devi. The application for grant of water connection was cleared by the Assistant Engineer and the file was sent to said Ajay Kumar Tyagi (hereinafter refered to as 'the accused').

2. Constable Surinder Singh lodged a report with the Anti Corruption Branch alleging that the accused demanded bribe of Rs. 2000/- for clearing the file and a sum of Rs. 1000/- was to be paid initially and the balance amount after the clearance of file. On the basis of the information lodged, a trap was laid and, according to the prosecution, the accused demanded and accepted the bribe of Rs. 1000/-. This led to registration of the first information report under Section 7/13 of the Prevention of Corruption Act.

3. After investigation, charge-sheet was submitted on 19th of September, 2002 and the accused was put on trial. Charges were framed by the Special Judge.

4. In respect of the same incident, a departmental proceeding was also initiated against the accused and the Article of Charges was served on him. In the departmental proceeding it was alleged that the accused "being a public servant in discharge of his official duties by corrupt and illegal means or otherwise, abusing his official position, demanded, accepted and obtained Rs. 1000/- (One Thousand) as illegal gratification other than legal remuneration from Sh. Surinder Singh S/o Shri Ram Bhajan r/o H.No. 432-A, Gali No. 2, 80 Sq. Yards, Village Mandoli, Delhi in consideration for giving a report on the water connection".

5. The enquiry officer conducted the departmental inquiry and submitted its report. The inquiry officer observed that "the evidence on record does not substantiate the charge of demand and acceptance of bribe" by the accused and, accordingly, recorded the finding that the charge against the accused has not been proved due to lack of evidence on record.

6. It seems that no action was taken on the report of the

inquiry officer due to pendency of the criminal case pending against the accused. Accordingly, he filed writ petition before the Delhi High Court inter alia praying for conclusion of the departmental proceeding. The submission made by the accused did not find favour with the High Court and by the judgment and order dated 2nd of February, 2007, it dismissed the writ petition inter alia observing as follows:

> "Hence, I do not find the action of the respondents in keeping the departmental proceedings in abeyance to be in any manner unjustified specially when the petitioner inspite of the pendency of the criminal case against him has not been suspended from service and is continuing to perform his duties."

7. Thereafter, the accused resorted to another remedy under Section 482 of the Code of Criminal Procedure and prayed for quashing of the first information report lodged against him under Section 7/13 of the Prevention of Corruption Act. The prayer for quashing of the first information report was founded on the ground that since the accused has been exonerated in the disciplinary proceeding by a detailed speaking order, the first information report deserves to be quashed on that ground alone. Reliance was placed on a decision of this Court in the case of *P.S. Rajya v. State of Bihar,* 1996 (9) SCC 1.

8. The High Court referred to the allegation made in the criminal case and the departmental proceeding and observed that "there is not even an iota of doubt that the charges framed in both the proceedings are the same". Accordingly, it quashed the criminal proceedings and while doing so, observed as follows :

> "Considering the foregoing discussion, I am of the view that if the departmental proceedings end in a finding in favour of the accused in respect of allegations which form basis for criminal proceedings then departmental adjudication

will remove very basis of criminal proceedings & in such situation continuance of criminal proceedings will be a futile exercise & an abuse of the process of Court. I find that the charge in the present case is based on the same allegations which were under consideration before the Enquiry Officer of the Jal Board. If the charge could not be proved in the departmental proceedings where the standard of proof was much lower it is very unlikely that the same charge could be proved in a criminal trial where the standard of proof is quite stringent comparatively. Thus, the prosecution of the petitioner in criminal proceedings would only result in his harassment."

9. Aggrieved by the same, the State has preferred this special leave petition.

Leave granted.

10. It is relevant here to state that after quashing of the criminal proceeding by the High Court, the disciplinary authority, by order dated 25th of March, 2009, exonerated the accused of the charges "subject to the condition that if any appeal is filed by the State and an order contrary to the impugned High Court order dated 25.08.2008 is received, the matter will be re-opened". The disciplinary authority had referred to the order of the High Court quashing the criminal prosecution and exonerated the accused on that ground alone.

11. When the matter came up for consideration before a Bench of this Court on 13th of September, 2010, finding conflict between two-Judge Bench decisions of this Court, it referred the matter for consideration by a larger Bench and, while doing so, observed as follows:

"The facts of the case are that the respondent has been accused of taking bribe and was caught in a trap case. We are not going into the merits of the dispute. However, it seems that there are two conflicting judgments

of two Judge Benches of this Court; (i) *P.S. Rajya vs. State of Bihar* reported in (1996) 9 SCC 1, in which a two Judge Bench held that if a person is exonerated in a departmental proceeding, no criminal proceedings can be launched or may continue against him on the same subject matter, (ii) *Kishan Singh Through Lrs. Vs. Gurpal Singh & Others* 2010 (8) SCALE 205, where another two Judge Bench has taken a contrary view. We are inclined to agree with the latter view since a crime is an offence against the State. A criminal case is tried by a Judge who is trained in law, while departmental proceeding is usually held by an officer of the department who may be untrained in law. However, we are not expressing any final opinion in the matter.

In view of these conflicting judgments, we are of the opinion that the matter has to be considered by a larger Bench."

This is how the matter is before us.

12. Mr. J.S. Attry, Sr. Advocate appearing on behalf of the appellant submits that the very assumption, on which the High Court had proceeded, that the accused has been exonerated in the disciplinary proceeding is unfounded on facts. He points out that the inquiry officer had submitted its finding and found the allegation to have not been proved but that would not mean that the accused has been exonerated in the disciplinary proceeding also. He points out that the report of the inquiry officer was yet to be considered and nothing prevented the disciplinary authority to disagree with the finding of the inquiry officer and punish the accused after following the due process of law. On this ground alone the order of the High Court is fit to be quashed, submits Mr. Attry.

13. Mr. Chetan Sharma, Sr. Advocate representing the respondent-accused, however, submits that at such a distance of time, the disciplinary authority is precluded from passing any

order and the disciplinary proceeding shall be deemed to have been ended in exoneration.

14. We have bestowed our consideration to the rival submissions and we find substance in the submission of Mr. Attry. True it is that the inquiry officer has submitted its report and found the allegation to have not been proved but, that is not the end of the matter. It is well settled that the disciplinary authority is not bound by the conclusion of the inquiry officer and, after giving a tentative reason for disagreement and providing the delinquent employee an opportunity of hearing, can differ with the conclusion and record a finding of guilt and punish the delinquent employee. In the present case, before the said stage reached, the accused filed an application under Section 482 of the Code of Criminal Procedure for terminating the criminal proceedings and the High Court fell into error in quashing the said proceedings on the premise that the accused has been exonerated in the departmental proceeding. As the order of the High Court is founded on an erroneous premise, the same cannot be allowed to stand.

15. It is worthwhile to mention here that in the writ petition filed by the accused himself seeking conclusion of the departmental proceeding, the High Court had observed that keeping the departmental proceeding in abeyance till the pendency of the criminal case is not unjustified, and that order has attained finality. Further, the order dated 25th of March, 2009 passed by the disciplinary authority exonerating the accused from the charges, is founded on the ground of quashing of the criminal proceedings by the High Court and in that, it has clearly been observed that if an order contrary to the High Court order is received, the matter will be re-opened.

16. As we have taken the view that the impugned order of the High Court suffers from an apparent illegality, the same deserves to be set aside so also the order of the disciplinary authority founded on that and, in the light of the direction of the

High Court, the departmental proceeding has to be reopened and kept in abeyance till the conclusion of the criminal case.

17. Now we proceed to consider the question of law referred to us, i.e., whether the prosecution against an accused, notwithstanding his exoneration on the identical charge in the departmental proceeding could continue or not!

18. Mr. Sharma, with vehemence, points out that this question has been settled and set at rest by this Court in the case of *P.S. Rajya* (Supra), which has held the field since 1996, hence at such a distance of time, it is inexpedient to reconsider its ratio and upset the same. Mr. Attry, however, submits that this Court in the aforesaid case has nowhere held that exoneration in the departmental proceeding would *ipso facto* terminate the criminal proceeding.

19. We have given our anxious consideration to the submissions advanced and in order to decipher the true ratio of the case, we have read the judgment relied on very closely. In this case, the allegations against the delinquent employee in the departmental proceeding and criminal case were one and the same, that is, possessing assets disproportionate to the known sources of income. The Central Bureau of Investigation, the prosecutor to assess the value of the assets relied on the valuation report given later on. This Court on fact found that "the value given as basis for the charge-sheet is not value given in the report subsequently given by the valuer." This would be evident from the following passage from paragraph 15 from the judgment:

> "**15**.....According to the learned counsel the Central Vigilance Commission has dealt with this aspect in its report elaborately and ultimately came to a conclusion that the subsequent valuation reports on which CBI placed reliance are of doubtful nature. The same view was taken by the Union Public Service Commission. Even otherwise

the value given as basis for the charge-sheet is not the value given in the report subsequently given by the valuers."

20.Thereafter, this Court referred to its earlier decision in the case of *State of Haryana v. Bhajan Lal,* 1992 Supp (1) SCC 335, and reproduced the illustrations laid down for exercise of extraordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482 of the Code of Criminal Procedure for quashing the criminal prosecution. The categories of cases by way of illustrations, wherein power could be exercised either to prevent the abuse of the process of the court or otherwise to secure the ends of justice read as follows:

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are

so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

21. The aforesaid illustrations do not contemplate that on exoneration in the departmental proceeding, the criminal prosecution on the same charge or evidence is to be quashed. However, this Court quashed the prosecution on the peculiar facts of that case, finding that the said case can be brought under more than one head enumerated in the guidelines. This would be evident from paragraphs 21 and 22 of the judgment, which read as follows:

"21. The present case can be brought under more than one head given above without any difficulty.

22. The above discussion is sufficient to allow this appeal on the facts of this case."

22. Even at the cost of repetition, we hasten to add none of the heads in the case of *P.S. Rajya* (Supra) is in relation to the effect of exoneration in the departmental proceedings on criminal prosecution on identical charge. The decision in the

case of *P.S. Rajya* (Supra), therefore does not lay down any proposition that on exoneration of an employee in the departmental proceeding, the criminal prosecution on the identical charge or the evidence has to be quashed. It is well settled that the decision is an authority for what it actually decides and not what *flows* from it. Mere fact that in *P.S. Rajya* (Supra), this Court quashed the prosecution when the accused was exonerated in the departmental proceeding would not mean that it was quashed on that ground. This would be evident from paragraph 23 of the judgment, which reads as follows:

> **"23.** Even though all these facts including the Report of the Central Vigilance Commission were brought to the notice of the High Court, unfortunately, the High Court took a view that the issues raised had to be gone into in the final proceedings and the Report of the Central Vigilance Commission, exonerating the appellant of the same charge in departmental proceedings would not conclude the criminal case against the appellant. *We have already held that for the reasons given, on the peculiar facts of this case, the criminal proceedings initiated against the appellant cannot be pursued.* Therefore, we do not agree with the view taken by the High Court as stated above. These are the reasons for our order dated 27-3-1996 for allowing the appeal and quashing the impugned criminal proceedings and giving consequential reliefs."
>
> (underlining ours)

23. From the reading of the aforesaid passage of the judgment it is evident that the prosecution was not terminated on the ground of exoneration in the departmental proceeding but, on its peculiar facts.

24. It is worth mentioning that decision in *P.S. Rajya* (supra) came up for consideration before a two-Judge Bench of this Court earlier, in the case of *State v. M. Krishna Mohan,* (2007) 14 SCC 667. While answering an identical question i.e.

whether a person exonerated in the departmental enquiry would be entitled to acquittal in the criminal proceeding on that ground alone, this Court came to the conclusion that exoneration in departmental proceeding ipso fact would not lead to the acquittal of the accused in the criminal trial. This Court observed emphatically that decision in *P.S. Rajya* (supra) was rendered on peculiar facts obtaining therein. It is apt to reproduce paragraphs 32 and 33 of the said judgment in this connection:

> **"32.** Mr Nageswara Rao relied upon a decision of this Court in *P.S. Rajya* v. *State of Bihar [1996 (9) SCC 1]*. The fact situation obtaining therein was absolutely different. In that case, in the vigilance report, the delinquent officer was shown to be innocent. It was at that juncture, an application for quashing of the proceedings was filed before the High Court under Section 482 of the Code of Criminal Procedure which was allowed relying on *State of Haryana v. Bhajan Lal [1992 Supp. (1) SCC 335]* holding: (*P.S. Rajya case [1996 (9) SCC 1,* SCC p.9, para 23)]
>
> "*23*. Even though all these facts including the report of the Central Vigilance Commission were brought to the notice of the High Court, unfortunately, the High Court took a view that the issues raised had to be gone into in the final proceedings and the report of the Central Vigilance Commission, exonerating the appellant of the same charge in departmental proceedings would not conclude the criminal case against the appellant. *We have already held that for the reasons given, on the peculiar facts of this case, the criminal proceedings initiated against the appellant cannot be pursued*."

Ultimately this Court concluded as follows:

> **"33.** The said decision was, therefore, rendered on the facts obtaining therein and cannot be said to be an authority for the proposition that exoneration in

departmental proceeding *ipso facto* would lead to a judgment of acquittal in a criminal trial."

This point also fell for consideration before this Court in the case of *Supdt. of Police (C.B.I.) v. Deepak Chowdhary,* (1995) 6 SCC 225, where quashing was sought for on two grounds and one of the grounds urged was that the accused having been exonerated of the charge in the departmental proceeding, the prosecution is fit to be quashed. Said submission did not find favour with this Court and it rejected the same in the following words:

> **"6.** The second ground of departmental exoneration by the disciplinary authority is also not relevant. What is necessary and material is whether the facts collected during investigation would constitute the offence for which the sanction has been sought for."

25. Decision of this Court in the case of *Central Bureau of Investigation v. V.K. Bhutiani,* (2009) 10 SCC 674, also throws light on the question involved. In the said case, the accused against whom the criminal proceeding and the departmental proceeding were going on, was exonerated in the departmental proceeding by the Central Vigilance Commission. The accused challenged his prosecution before the High Court relying on the decision of this Court in the case of *P.S. Rajya* (supra) and the High Court quashed the prosecution. On a challenge by the Central Bureau of Investigation, the decision was reversed and after relying on the decision in the case of *M. Krishna Mohan* (supra), this Court came to the conclusion that the quashing of the prosecution was illegal and while doing so observed as follows:

> "In our opinion, the reliance of the High Court on the ruling of *P.S. Rajya* was totally uncalled for as the factual situation in that case was entirely different than the one prevalent here in this case."

26. Therefore, in our opinion, the High court quashed the

prosecution on total misreading of the judgment in the case of *P.S. Rajya* (Supra). In fact, there are precedents, to which we have referred to above speak eloquently a contrary view i.e. exoneration in departmental proceeding *ipso facto* would not lead to exoneration or acquittal in a criminal case. On principle also, this view commends us. It is well settled that the standard of proof in department proceeding is lower than that of criminal prosecution. It is equally well settled that the departmental proceeding or for that matter criminal cases have to be decided only on the basis of evidence adduced therein. Truthfulness of the evidence in the criminal case can be judged only after the evidence is adduced therein and the criminal case can not be rejected on the basis of the evidence in the departmental proceeding or the report of the Inquiry Officer based on those evidence.

27. We are, therefore, of the opinion that the exoneration in the departmental proceeding ipso facto would not result into the quashing of the criminal prosecution. We hasten to add, however, that if the prosecution against an accused is solely based on a finding in a proceeding and that finding is set aside by the superior authority in the hierarchy, the very foundation goes and the prosecution may be quashed. But that principle will not apply in the case of the departmental proceeding as the criminal trial and the departmental proceeding are held by two different entities. Further they are not in the same hierarchy.

28. For the reasons stated above, the order of the High Court is unsustainable, both on facts and law.

29. Accused shall appear before the trial court within four weeks from to-day. As the criminal proceeding is pending since long, the learned Judge in sesin of the trial shall make endeavour to dispose off the same expeditiously and avoid unnecessary and uncalled for adjournments.

30. In the result, the appeal is allowed, the order of the High Court is set aside with the direction aforesaid.

K.K.T. Appeal allowed.

GURGAON GRAMIN BANK
v.
SMT. KHAZANI & ANR.
(Civil Appeal No. 6261 of 2012)

SEPTEMBER 4, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Insurance – Purchase of buffalo after taking loan from Bank –Insurance of buffalo for Rs. 15000/- through Bank – Insurance claim not heeded to – Complaint before District Consumer Forum – Claim allowed with Rs. 3000/- cost – Bank approaching State Commission – Appeal rejected – Banks' revision petition before National Commission also rejected – On appeal, held: Courts jurisdiction not to be invoked for trivial matters unless serious questions of law of general importance or a question which affects large number of persons arise or the stakes are very high – In the instant case no important question of law is to be decided – The Gamin Bank should stand for the benefit of the gramins and not to drag them to various litigative forums – For an amount of Rs. 15000/- the Bank has spent on litigation more than Rs. 25,000/- – Appeal dismissed – Cost of Rs. 10000 imposed on the Bank to be paid to the claimant.

The first respondent took a loan from the appellant-Bank to purchase a buffalo and the same was insured for Rs. 15000/- with the second respondent-Insurance Company. On the death of the buffalo, when her insurance claim through the Bank was not heeded to, she filed a complaint before District Consumer Disputes Redressal Forum. The complaint was allowed. Bank's appeal to State Commission was dismissed. Bank approached National Commission, by filing Revision Petition, which was dismissed. Hence the present appeal was filed before this Court. On the query of this Court,

the Bank filed an affidavit stating that the amount spent on the dispute relating to this case by the Bank was Rs. 12,950/- .

Dismissing the appeal, the Court

HELD: 1. Unless, serious questions of law of general importance arise for consideration or a question which affects large number of persons or the stakes are very high, courts jurisdiction cannot be invoked for resolution of small and trivial matters. The manner in which those types of matters are being brought to courts even at the level of Supreme Court of India is disturbing. This case falls in that category. The issues raised before this Court are purely questions of facts examined by the three forums including the National Disputes Redressal Commission and there is no important question of law to be decided by the Supreme Court. These types of litigation should be discouraged and message should also go, otherwise for all trivial and silly matters people will rush to this court. [Paras 2 and 12] [228-B-C; 232-B]

2. Gramin Bank like the appellant should stand for the benefit of the *gramins* who sometimes avail of loan for buying buffaloes, to purchase agricultural implements, manure, seeds and so on. Repayment, to a large extent, depends upon the income which they get out of that. Crop failure, due to drought or natural calamities, disease to cattle or their death may cause difficulties to *gramins* to repay the amount. Rather than coming to their rescue, banks often drive them to litigation leading them to extreme penury. Assuming that the bank is right, but once an authority like District Forum takes a view, the bank should graciously accept it rather than going in for further litigation and even to the level of Supreme Court. Driving poor *gramins* to various litigative forums should be strongly deprecated because they have also to spend

large amounts for conducting litigation. This type of practice is condemnned unless the stake is very high or the matter affects large number of persons or affects a general policy of the Bank which has far reaching consequences. [Para 13] [232-C-F]

3. There is no error in the decisions taken by all fact-finding authorities including the National Disputes Redressal Commission. The appeal is accordingly dismissed with cost of Rs.10,000/- to be paid by the bank to the first respondent within a period of one month. The Bank has to spend altogether Rs.25,950/- for a claim of Rs.15,000/-, apart from to and fro travelling expenses of the Bank officials. [Para 14] [232-G-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6261 of 2012.

Form the Judgment & Order dated 25.11.2009 of the National Consumer Disputes Redressal Commission, New Delhi in Revision No. 4098/2009.

Anil Grover, Noopur Singhal, Arun Kumar Beriwal for the Appellant.

S.L. Gupta, M.S. Mangla, Mala Dubey, Ram Ashrey, Shalu Sharma, Chander Shekhar Ashri for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. Number of litigations in our country is on the rise, for small and trivial matters, people and sometimes Central and State Governments and their instrumentalities Banks, nationalized or private, come to courts may be due to ego clash or to save the Officers' skin. Judicial system is over-burdened, naturally causes delay in adjudication of disputes. Mediation centers opened in various parts of our country have, to some

extent, eased the burden of the courts but we are still in the tunnel and the light is far away. On more than one occasion, this court has reminded the Central Government, State Governments and other instrumentalities as well as to the various banking institutions to take earnest efforts to resolve the disputes at their end. At times, some give and take attitude should be adopted or both will sink. Unless, serious questions of law of general importance arise for consideration or a question which affects large number of persons or the stakes are very high, courts jurisdiction cannot be invoked for resolution of small and trivial matters. We are really disturbed by the manner in which those types of matters are being brought to courts even at the level of Supreme Court of India and this case falls in that category.

3. Jurisdiction of this Court is invoked by a Gramin Bank on an issue on which no question of law arises for consideration. Facts are as follows:

Smt. Khazani, the first respondent had availed of a loan from the appellant bank to purchase a buffalo and the same was insured for Rs.15000/- for a period from 06.02.2001 to 06.02.2004 vide Animal's tag No. NIA/03170 with the New India Assurance Company Ltd.– second respondent herein. Smt. Khazani had made payment of Rs.759/- as premium on 05.03.2001 vide receipt No. 170612. The buffalo unfortunately died on 27.12.2001. The post mortem was conducted by veterinary surgeon, Pataudi on 27.12.2001 vide PMR No.50.

4. Smt. Khazani lodged a claim for insurance money through the appellant bank and also supplied ear tag bearing No. NIA 03170 to the bank for forwarding the same to the insurance company. Since no steps had been taken either by the bank or by the insurance company, Smt. Khazani sent a notice on 30.07.2003 to the bank as well as to the insurance company, which yielded no results.

5. Smt. Khazani then filed a complaint bearing No.825 of

2004 before District Consumer Disputes Redressal Forum, Gurgaon. The complaint was allowed by the Forum vide its order dated 26.07.2007 with cost stating as follows:

> "We, therefore, allow this complaint and direct Opposite Party No.2 to pay the insurance money of the buffalo in question to the complainant together with interest at the rate of 9% p.a. from the date of death of buffalo till actual payment is made. Opposite Party No.2 is also burdened to pay Rs.3,000/- to the complainant on account of cost of litigation and compensation for the harassment caused by Opposite Party No.2 to the complainant. Order of this Forum be complied within one month".

6. The bank, dissatisfied with the order by the District Forum, filed Appeal No.2404/2007 before State Consumer Disputes Redressal Commission, Haryana, Panchkula. Rejecting the appeal, the appellate forum held as follows:

> "Admittedly, the complainant had got her buffalo insured with the opposite party no.1 with Tag bearing No.NIA03170. The post mortem report Annexure C-2 which was conducted by the vet. surgeon is a cogent proof with respect to the death of buffalo and in the said report the vet. surgeon had mentioned the Tag number of buffalo as 03170. However, the opposite party No.1 insurance company has denied having received of any Tag with the claim form submitted by the complainant. As per noting given by the field officer of the opposite party No.1, the buffalo was lying dead and there was no Tag in the ear of the dead buffalo. Thus, the burden shift on the opposite party No.2 that the Tag was not sent to the appellant – opposite Party No.1 for settling the claim in respect of the buffalo."

7. The matter did not end there. The bank again moved the National Consumer Disputes Redressal Commission, New Delhi against the order dated 21.07.2009 passed by the State

Commission, Haryana by filing a Revision Petition No. 4098 of 2009. The National Commission dismissed the Revision on 25.11.2009 stating as follows:

> "Finding recorded by the State Commission is a finding of fact, which cannot be interfered with in exercise of Revisional jurisdiction. Under Section 21 of the Consumer Protection Act, 1986, the National Commission, in revision, can interfere with the orders only if it appears that the Authority below has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity.
>
> We find no error/irregularity in the exercise of jurisdiction by the State Commission in its impugned order. Dismissed."

8. The bank, still not satisfied, thought of bringing Smt. Khazani to the Supreme Court and filed the present Special Leave Petition against the order of the National Commission. Luckily, they got notice on the Special Leave Petition and Smt. Khazani has been brought to this Court. May be due to the ill-luck of the bank, the matter is before us. When the matter came up for hearing on 09.07.2012, we asked the counsel for the bank as to how much amount they had spent till date on this dispute which relates to the death of a buffalo, stake of which is only 15,000/-. We passed an order on 09.07.2012 which reads as follows:

> "We find that the dispute is only with regard to Rs.15,000/- and the matter has still been brought to Supreme Court.
>
> Bank will file affidavit within four weeks with regard to the amount spent for this litigation.
>
> List after four weeks."

9. The Chief Manager of the bank in compliance with this

order filed an affidavit with regard to the amount spent for litigation so far in a chart form which is reproduced hereunder:

S. No.	Forum/Courts	Amount of Legal Fees	Misc. expenses	Total
1.	In District Forum	2,200/-	200/-	2,400/-
2.	In State Forum	1,750/-	300/-	2,050/-
3.	In Supreme Court of India	7,500/-	1000/-	8,500/-
Total				12,950/-

10. The Chief Manager stated in the affidavit that no bill was raised by the counsel for the bank for conducting the matter before the National Consumer Dispute Redressal Commission. We have not been told how much money has been spent by the bank officers for their to and fro journeys to the lawyers' office, to the District Forum, State Forum, National Commission and to the Supreme Court. For a paltry amount of Rs.15000/- , even according to the affidavit, bank has already spent a total amount of Rs.12,950/- leaving aside the time spent and other miscellaneous expenses spent by the officers of the bank for to and fro expenses etc. Further, it may be noted that the District Forum had awarded Rs.3,000/- towards cost of litigation and compensation for the harassment caused to Smt. Khazani. Adding this amount, the cost goes up to Rs.15,950/-. Remember, the buffalo had died 10 years back, but the litigation is not over, fight is still on for Rs.15,000/-.

11. Learned counsel appearing for the bank, Shri Amit Grover, submitted that though the amount involved is not very high but the claim was fake and on inspection by the insurance company, no tag was found on the dead body of the buffalo and hence the insurer was not bound to make good the loss,

consequently the bank had to proceed against Smt. Khazani.

12. We are of the view that issues raised before us are purely questions of facts examined by the three forums including the National Disputes Redressal Commission and we fail to see what is the important question of law to be decided by the Supreme Court. In our view, these types of litigation should be discouraged and message should also go, otherwise for all trivial and silly matters people will rush to this court.

13. Gramin Bank like the appellant should stand for the benefit of the *gramins* who sometimes avail of loan for buying buffaloes, to purchase agricultural implements, manure, seeds and so on. Repayment, to a large extent, depends upon the income which they get out of that. Crop failure, due to drought or natural calamities, disease to cattle or their death may cause difficulties to *gramins* to repay the amount. Rather than coming to their rescue, banks often drive them to litigation leading them extreme penury. Assuming that the bank is right, but once an authority like District Forum takes a view, the bank should graciously accept it rather than going in for further litigation and even to the level of Supreme Court. Driving poor *gramins* to various litigative forums should be strongly deprecated because they have also to spend large amounts for conducting litigation. We condemn this type of practice, unless the stake is very high or the matter affects large number of persons or affects a general policy of the Bank which has far reaching consequences.

14. We, in this case, find no error in the decisions taken by all fact finding authorities including the National Disputes Redressal Commission. The appeal is accordingly dismissed with cost of Rs.10,000/- to be paid by the bank to the first respondent within a period of one month.

Resultantly, the Bank now has to spend altogether Rs.25,950/- for a claim of Rs.15,000/-, apart from to and fro travelling expenses of the Bank officials. Let God save the *Gramins.*

K.K.T. Appeal dismissed.

M/S. MICRO HOTEL P. LTD.
v.
M/S. HOTEL TORRENTO LIMITED & ORS.
(Civil Appeal No. 6347 of 2012 etc.)

SEPTEMBER 6, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

State Financial Corporation Act, 1951 – s. 29 – Hotel project financed by State Financial Corporation and State Industrial Promotion and Investment Corporation – Loan agreement – Default – Demand Notice – Various offers by the Corporations to the borrower for One Time Settlement Scheme – Borrower failing to comply with the terms and conditions of the Scheme – Order of Division Bench of High Court giving benefit of One Time Settlement to the borrower failing which court giving liberty to the Financial Corporation to take action under the Act – Failure on the part of the borrower to comply with the order – Proceedings under s. 29 – Auction of the borrower's property – Sale of the property to auction-purchaser – Borrower approaching court – Division Bench of High Court offering afresh One Time Settlement Benefit to borrower and ordering dispossession of the auction-purchaser – On appeal, held: High Court by impugned judgment wrongly reopened a lis and issued illegal directions, overlooking the facts of the case and the binding judgment of co-ordinate Bench – The manner in which the Division Bench of High Court sat in judgment over the judgment of co-ordinate Bench is disapproved – Judicial Propriety.

Respondent No. 2 (State Financial Corporation) and respondent No. 5 (Industrial Promotion and Investment Corporation) jointly financed a hotel project launched by respondent No. 1. The parties entered into loan agreement. As there was default in payment of the loan, respondent No. 2 made demand. In 2006 respondents

introduced One Time Settlement (OTS) Scheme. The benefit of the Scheme was extended to respondent No. 1 waiving certain loan amount, subject to certain terms and conditions. Since respondent No. 1 did not comply with the terms and conditions, respondent Nos. 2 and 5 withdrew the OTS offer. In 2007, again another OTS Scheme was launched by respondent No. 2 and offer was made to avail the benefit thereof. As respondent No. 1 did not comply with the request, respondent No. 2 withdrew the offer and demanded the entire dues.

Respondent No. 1 filed writ petition before High Court seeking quashing of the demand notice and for direction to consider its claim under the OTS Scheme. The High Court disposed of the petition directing respondent No. 1 to deposit Rs. 50,00,000 each to each of the two Corporations (respondent Nos. 2 and 5) failing which, the Corporations were given liberty to take action under State Financial Corporation Act. As respondent No. 1 did not comply with the direction of the High Court, respondent No. 2 made a demand for the entire outstanding loan amount.

Respondent No. 2 issued seizure order of the property and the same was executed and possession thereof was taken over. Set-off price of the unit was fixed on the basis of valuation report. Thereafter sale notice was published in local as well as National newspapers. Even after that respondent No.2 made a demand of outstanding dues from respondent No. 1 so as to get the assets released. Respondent No. 1 instead of clearing the outstanding dues, preferred Review Petition and the same was dismissed by High Court. Thereafter the property was auctioned and the appellant, being the successful bidder was given possession of the property.

Thereupon, respondent No. 1 again filed writ petition seeking to quash the cancellation of OTS Scheme of 2007

and the sale to the auction-purchaser (appellant). High Court allowed the writ petition holding that the respondent No. 2 – Corporation did not follow the guidelines laid down in *Kerala Financial Corporation vs. Vincent Paul and Anr.* **(2011) 4 SCC 171; and that the off-set price of property was not valued before the conduct of auction; and that there was no due publication of auction. Hence the present appeals.**

Allowing the appeals, the Court

HELD: 1.1. The manner in which the Division Bench of the High Court has virtually sat in judgment over the judgment of another co-ordinate Bench is strongly disapproved. The Division Bench of the High Court overlooked some vital facts which have considerable bearing on the outcome of this dispute, consequently, reopened a *lis* which has attained finality, due to non-compliance of the various directions issued by the co-ordinate Bench of the High Court. Failure to comply with the various directions issued by the co-ordinate Bench in Writ Petition and the order passed in Review Petition was completely overlooked by the Division Bench. [Para 19] [247-B-D]

1.2. Duty is cast on all the parties who appear in a court of law to place the correct facts so that the court can draw correct inferences which enable it reach a logical, reasonable and just conclusion. Wrong facts lead a court to wrong reasoning and wrong conclusions. Duty is also cast on the court to take note of the facts which are correctly placed. Wrong appreciation of facts leads to wrong reasoning and wrong conclusions and justice will be the casualty. Deciding disputes involves, knowing the facts, knowing the law applicable to those facts and knowing the just way of applying the law to them. If any of the above mentioned ingredients is not satisfied, one gets a wrong verdict. A Judge has to reason out truth

from falsehood, good from evil which enables him to deduce inferences from facts or propositions. Facts are correctly stated in the instant case but the Division Bench wrongly understood those facts and wrongly applied the law, consequently, wrong inferences were drawn and ultimately reached wrong conclusions. [Para 20] [247-E-H]

2.1. The Division Bench, in the impugned judgment taking the view that the Corporations had not followed the guidelines laid down by this Court in **Vincent Paul case* is factually incorrect. The Corporation had issued the recall notice with a request to pay the entire outstanding dues within 30 days otherwise, failing which, it was stated that action u/s. 29 of State Financial Corporation Act would be initiated against the 1st respondent. Seizure order was issued by the Corporation and the entire assets of the unit were taken over under Section 29 of the Act after the expiry of 30 days from the date of notice. Even otherwise, the guidelines issued by this Court in *Vincent Paul case would operate only prospectively and that too depends upon the facts and circumstances of each case. [Para 26] [252-G-H; 253-A-C]

Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr. **(2002) 3 SCC 496: 2002 (1) SCR 621 – relied on.**

Mahesh Chandra v. Regional Manager,U.P. Financial Corporation and Ors. **(1993) 2 SCC 279: 1992 (1) SCR 616 ;** **Kerala FinancialCorporation v. Vincent Paul and Anr.* **(2011) 4 SCC 171: 2011 (3) SCR 862 – referred to.**

2.2. The High Court has committed an error in holding that off-set price of property was not valued before the conduct of auction and that there was no due publication of auction. Sale notice, it is seen, was published in a

vernacular paper and also in a widely circulated English newspaper and the Corporation had received nine offers and after protracting negotiations with all the bidders, the offer of the appellant was accepted being the highest. The Corporation before putting the appellant in possession again issued a notice to 1st respondent enquiring whether he would match the offer. 1st Respondent did not avail of that opportunity as well. It is under such circumstances that sale letter was issued to the appellant with a copy to all the Directors/Promoters/ Guarantors of 1st respondent company. The appellant paid the balance consideration and the Sale Memo was extended on that date and the property was also delivered. [Para 27] [253-E-H; 254-A]

2.3. There is no illegality in the procedure adopted by the Corporation, since 1st respondent had failed to comply with the directions issued by the co-ordinate Bench of the High Court in writ petition which gave liberty to the Corporations to proceed in accordance with Section 29 of the Act. The Division Bench of the High Court had overlooked those vital facts as well as the binding judgment of a co-ordinate Bench in writ petition and had wrongly reopened a *lis* and issued wrong and illegal directions. [Para 28] [254-B-C]

Case Law Reference:

2002 (1) SCR 621	**Relied on**	**Para 23**
1992 (1) SCR 616	**Referred to**	**Para 25**
2011 (3) SCR 862	**Referred to**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6347 of 2012.

From the Judgment & Order dated 25.10.2011 of the High Court of Orissa at Cuttack in Writ Petition (Civil)No. 17711 of 2010.

C.A.Sundaram, S. Aggarwal, Rohini Musa, Yogesh, V.K., Zafar Inayat, Suruchii Aggarwal, Shubhranshu Padhi, Nirnimesh Dube, Ashok Panigrahi, Surjit Bhaduri for the Appearing parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. Common questions arise for consideration in both these appeals and hence we are disposing of both the appeals by a common judgment.

3. We are, in these appeals, called upon to consider the question whether the Division Bench of the Orissa High Court was justified in directing Orissa State Financial Corporation (OSFC) and Industrial Promotion and Investment Corporation of Odisha Ltd. (IPICOL) to offer afresh the benefit of One-Time Settlement Scheme (OTS) to M/s Hotel Torrento Limited, 1st respondent herein, which had earlier been offered vide communications' dated 18.3.2006 and 3.4.2006, but was not availed off by complying with the terms and conditions stipulated therein. The further question is whether the High Court was right in ordering dispossession of the appellant (auction purchaser) and put 1st respondent back in possession.

4. This case has a chequered history, therefore, it is necessary to examine the facts at some length to appreciate the real controversy between the parties and to reach a proper and just decision, on facts as well as on law. OSFC, 2nd respondent herein, disbursed a term loan of Rs.51,27,200/- and loan in lieu of subsidy of Rs.23.30 lakhs to 1st respondent for establishing a hotel project at Janugarji, Balasore in the State of Odisha. The project was jointly financed by OSFC and IPICOL, for which 1st respondent had entered into a loan

agreement and mortgaged the title deeds and extended a registered lease deed dated 8.2.1988. Lease was valid for a period of 25 years with a renewable clause. There was default in repayment of the loan amount, which led OSFC issuing a demand notice to 1st respondent on 7.2.1991, followed by a recall notice dated 30.11.1991. The respondent was also served with a show cause notice dated 16.12.1994 followed by recall notices dated 4.1.1995 and 13.3.1996.

5. 1st respondent then filed a Writ Application No. 2513 of 1996 on 20.3.1996 before the High Court of Orissa to quash the recall notice dated 13.3.1996 and for rehabilitation. The High Court disposed of that writ application with a direction to respondents 2 and 5 (OSFC & IPICOL) to consider the request of 1st respondent for rehabilitation package. On 9.3.2006, an OTS scheme was introduced by OSFC and 1st respondent applied for settlement of its loan account under that scheme. On 18.3.2006, the benefit of the scheme was extended to 1st respondent by OSFC and agreed in principle to settle the term loan account on payment of Rs.1,16,21,200/- on or before 18.4.2006, subject to certain terms and conditions which were as follows:

1. The settlement amount shall either be paid in one lump sum on or before Dt. 18.04.06 (within 30 days of this settlement order) with 3% discount on the settlement amount.

OR

Installments as per the sequence mentioned below:

(a) Up front payment of Rs.23,61,400.00 (Rupees twenty three lakh sixty one thousand four hundred only) (i.e.25% of settlement amount less initial deposit) shall be paid along with the acceptance letter (format

enclosed herewith) on or before Dt. 16.04.06, within 30 days.

(b) The balance settlement amount of Rs.87,15,900.00 (75%) shall be paid on or before Dt. 15.06.06.

2. Any other expenses chargeable/incurred/debited in the loan accounts towards misc. expenses on L/A with effect from Dt. 11.07.05 (date of application) till the final settlement of loan accounts shall be paid by you along with the settlement amount.

3. It may be noted that (NDC) can only be issued in your favour after liquidation of all the loans availed.

4. You shall have to submit the consent/decree/ permission/withdrawal order (wherever applicable) before issue of No Due Certificate (NDC).

In case of failure on payment of the aforesaid amount within the stipulated dates, the one time settlement of dues considered in your favour including relief and concession thereon shall be withdrawn without further reference to you."

6. IPICOL also approved the request for OTS at Rs.45 lacs with waiver of Rs.1,88,21,099 subject to certain terms and conditions, which were as follows:

"(a) The OTS amount is Rs.45 lacs (Rupees forty-five lacs only) and the resultant sacrifice(s) by way of waiver is Rs.1,88,21,099 (Rupees one crore twelve lakhs seventeen thousand five hundred twenty nine only on account of funded interest and Rs.76,03,570/- (Rupees seventy six lakhs three thousand five hundred seventy only) on account of overdue interest.

(b) The OTS amount shall be paid within a period of 1 year from the date of this letter as per the schedule given below:

Rs.6,75,000 towards 25% of upfront payment (including initial payment made by you) within 30 days and balance 75% amounting to Rs.33,75,000/- within a period of 1 year in 4 quarterly installments, carrying simple interest @ 14% p.a. on reducing balance.

(c) The above OTS is subject to cancellation, if it is found that you have provided incorrect details and information or suppression of any material facts for getting the sanction of OTS. The decision of IPICOL is final in this regard.

(d) In case of non payment, IPICOL shall have the right of requital."

7. We notice that despite of waiver of Rs.2,26,85,800 and Rs.1,88,21,099 by OSFC and IPICOL respectively, 1st respondent did not comply with the terms and conditions of the OTS scheme, consequently, OSFC and IPICOL informed 1st respondent that they had withdrawn OTS offer.

8. We find, on 31.3.2007, yet another OTS scheme of 2007 was launched by OSFC and, again, an offer was made to 1st respondent to avail of the benefit of that scheme. OSFC, on 4.10.2007, requested 1st respondent to pay the settlement amount of Rs.1,16,21,200 with delayed payment of interest within 10 days. 1st respondent did not comply with that request as well, consequently, OSFC, on 28.12.2007, withdrew the offer and advised 1st respondent to pay the entire dues as per the agreement, failing which 1st respondent was informed that recovery proceedings would be initiated for realization of the dues. Later, OSFC sent a demand notice dated 22.8.2008 stating that the total loan outstanding as on 31.12.2007 was

Rs.4,52,94,691 and 1st respondent was called upon to pay the amount, failing which it was informed that recovery proceedings would be initiated.

9. 1st respondent then, on 10.09.2008, filed a Writ Petition No. 13376 of 2008 before the Orissa High Court to quash the demand notice dated 22.08.2008 and for a direction to consider its claim under the OTS scheme. On 31.10.2008, OSFC had, however, issued a notice recalling the entire amount along with interest and informed 1st respondent that in case of failure to make payment, further action would be taken under Section 29 of the State Financial Corporation Act (SFC Act). Writ Petition came up for hearing before the Orissa High Court on 4.12.2008, and the Court directed OSFC to maintain status-quo and on 7.4.2010, the Court passed an ad-interim order directing 1st respondent to inform as to whether they were willing to deposit the amount or Rs.1 Crore for consideration of their claim under OTS. On 26.11.2008, IPICOL also made a request to OSFC to initiate proceedings under Section 29 of SFC Act and to take over the assets of the unit.

10. Writ Petition No. 13376 of 2008 came up for final hearing on 21.4.2010, and the Court enquired whether 1st respondent was willing to pay Rs.1 Crore, as suggested by the Court on 4.12.2008. The Court was informed that a petition had been filed on 21.4.2010 along with a bank draft of Rs.17,50,000 drawn in favour of the Registrar, Orissa High Court. 1st respondent had also made a request to the Court for time up to 26.2.1010 so as to pay the amount of Rs.1 Crore. The Court ordered the return of the draft to the 1st respondent since the amount was due to both OSFC and IPICOL. The Court was informed by OSFC that 1st respondent had not availed of the earlier proposal for OTS and no new OTS scheme was available, still the Court passed the following order:

"The learned counsel for the Corporations submits that the earlier proposal for one-time settlement had been considered by both the Corporations and the matter had

been settled. But the petitioner did not pay the amount for which it had to be cancelled and, at present there is no scheme for one-time settlement.

Be that as it may, the Petitioner having defaulted in payment of huge amount we dispose of the writ petition directing that the petitioner may deposit a sum of Rs.50,00,000/- (Rupees fifty lakhs) each before each of the two Corporations by 20.6.2010 and applications shall be filed before both the Corporation for settlement of the dues. If any such application is filed the same shall be considered on its own merit by both the Corporations either separately or jointly *provided there is any scheme available for such settlement by the Corporations.*

In the event, the Petitioner fails to deposit the aforesaid amount by 20.6.2010, both the Corporations shall be at liberty to take such action as permissible under law under the State Financial Corporation Act."

(emphasis added)

11. 1st respondent did not comply with even the above mentioned order. OSFC then issued a registered notice dated 8.7.2010 to 1st respondent pointing that since it had failed to comply with the above mentioned order of the Court, OSFC would be at liability to initiate proceeding under the SFC Act. The 1st respondent was, therefore, asked to liquidate the entire outstanding amount as on 30.6.2010, failing which 1st respondent was informed that OSFC would be initiating action under Section 29 of SFC Act. Later, OSFC issued a seizure order dated 2.8.2010 of the property and that order was executed on 15.9.2010 and the possession of the unit was taken over "as is where is" basis.

12. OSFC, during seizure, got prepared a valuation report dated 17.09.2010 from its panel valuer. Based upon that valuation report, off-set price of the unit was fixed at

Rs.1,75,45,000. Later, the sale notice was published in the Daily newspapers, Samaj and the New Indian Express on 18.9.2010. On 21.9.2010, again, OSFC issued a notice to 1st respondent to clear the outstanding dues with up to date interest of Rs.6,18,62,238/- collected up to 30.6.2010 before Default-cum-Disposal Advisory Committee (DDAC) on 29.9.2010 so also to get the assets released. 1st respondent was informed of the sale notice published in the daily newspapers requesting to clear up the dues before the DDAC meeting scheduled to be held on 29.9.2010. 1st respondent was also informed that in the event of non-payment of dues, it could still match or better the highest bid price. 1st respondent, however, did not take any steps to clear the outstanding dues, but preferred a Review Petition No. 99 of 2010 for reviewing the order passed by the Orissa High Court on 21.4.2010 in Writ Petition No. 13376 of 2008. The Court rejected the review petition on 22.9.2010. The Court, after noticing that 1st respondent had not deposited any amount in pursuance to its order dated 21.4.2010, held as follows:

"Apart from the above, from the conduct of the petitioner, we find that the petitioner did not pay any amount when the account was settled under the scheme earlier and waited for another demand notice. Even in the writ petition though the petitioner was directed to deposit Rs.50,00,000/- (Rupees fifty lakhs) each with the two Corporations, the same was not complied with. In course of hearing of this review petition, the petitioner has offered only Rs.40,00,000/- (Rupees forty lakhs) to be deposited with the two Corporations against the outstanding dues of more than seven crore. *We are, therefore, of the view that the petitioner has no intention to clear the dues of the two Corporations which had financed for establishing a hotel. In the meantime possession of the said hotel has been taken by OSFC under section 29 of the State Financial Corporation Act and the same has been advertised for sale.* The sale notice, a copy whereof was produced

before us shows that the loanee can appear before the DDAC on the date fixed i.e. 29th of September, 2010 for the purpose of getting release the seized asset."

(emphasis added)

13. 1st respondent then submitted a proposal to DDAC, which was considered by DDAC on 29.9.2010 and the order was communicated to the 1st respondent.

14. DDAC, in pursuance to the auction notification in the newspapers, received altogether 9 bids and, after negotiations with the auctioneers, the offer of the appellant was found to be the highest at Rs.774 lacs, which was accordingly accepted OSFC delivered the possession of the land, building and machinery/furniture and fixtures to the appellant vide possession letter dated 11.10.2010.

15. 1st respondent, as already stated, then approached the Orissa High Court and filed the present writ petition No. 17711 of 2010 to quash the cancellation of the OTS dated 28.12.2007, sale letter dated 1.10.2010 and also for other consequential reliefs, which were granted by the Division Bench of the Orissa High Court, the operative portion of which reads as follows:

"For the reasons stated supra the writ petition is allowed. Rule issued. The letters dated 28.12.2007 and 1.10.2010 (Annexure-5 & Annexure-8 series) cancelling the proposal for OTS and rejecting the representation dated 29.9.2010, the public sale notice dated 19.9.2010 (Annexure-6), the sale letter dated 1.10.2010 (Annexure-8 series), the sale agreement dated 11.10.2010 (Annexure-A/5) and the alleged delivery of possession are hereby quashed. The Orissa State Financial Corporation and IPICOL are directed to place fresh demand with the petitioner, within four weeks from the date of receipt of this order, with regard to the amount of OTS offered in the communications

dated 18.3.2006 and 3.4.2006 of the OSFC and IPICOL along with interest at the rate of 9% on the said amount from that date till the date of payment or at the rate of interest, stipulated under the OTS Scheme, 2007 in case of similarly placed persons. The petitioner is directed to make payment within six weeks thereof. Thereafter the possession of the property shall be delivered to the petitioner within a reasonable time. If the petitioner fails to deposit the amount, as directed, the OSFC and IPICOL are at liberty to proceed in the matter in accordance with law."

16. Shri C.A. Sundram, learned senior counsel appearing for the appellant (auction purchaser) submitted that the High Court has completely misread and misunderstood the facts of the case which resulted in incorrect reasoning, leading to wrong conclusions. Learned senior counsel also submitted that the judgment in writ petition No. 13376 of 2008 as well as the order in Review Petition No. 99 of 2010 had attained finality and, consequently, the orders dated 28.12.2007 and 01.10.2010 cancelling the proposal for OTS cannot be questioned. Learned senior counsel also pointed out that the conditions stipulated in the above mentioned orders were also not complied with by 1st respondent, consequently, the only course open to 1st respondent was to pay the entire amount demanded by OSFC and IPICOL. The 1st respondent did not pay the amount demanded, hence, Section 29 of SFC Act was rightly invoked.

17. Ms. Shubhranshu Padhi, learned counsel appearing for the appellant in SLP(C) No. 1125 of 2012 fully supported the arguments advanced by the learned senior counsel Shri C.A. Sundaram and explained the various steps taken by OSFC which resulted in invoking Section 29 of SFC Act.

18. Shri Ashok Panigrahi, learned counsel appearing on behalf of the respondent, however, supported the judgment of the Hon'ble Court and submitted that there is no justification in interfering with the judgment of the Hon'ble Court, since the

conditions laid down in OTS Scheme were onerous and that procedures were not followed for the sale of the mortgaged properties.

19. We express our strong disapproval of the manner in which the Division Bench of the High Court has virtually sat in judgment over the judgment of another co-ordinate Bench. We are of the view that the Division Bench of the High Court overlooked some vital facts which have considerable bearing on the outcome of this dispute, consequently, reopened a lis which has attained finality, due to non-compliance of the various directions issued by the co-ordinate Bench of the High Court. Failure to comply with the various directions issued by the co-ordinate Bench in Writ Petition No. 13376 of 2008 and the order passed in Review Petition No. 99 of 2010 was completely overlooked by the Division Bench.

Appreciation of Facts

20. Litigations in courts are won or lost mainly on facts more on law. Duty is cast on all the parties who appear in a court of law to place the correct facts so that the court can draw correct inferences which enable it reach a logical, reasonable and just conclusion. Wrong facts lead a Court to wrong reasoning and wrong conclusions. Duty is also cast on the Court to take note of the facts which are correctly placed. Wrong appreciation of facts leads to wrong reasoning and wrong conclusions and justice will be the casualty. Deciding disputes involves, according to Dias on Jurisprudence, knowing the facts, knowing the law applicable to those facts and knowing the just way of applying the law to them. If any of the above mentioned ingredients is not satisfied, one gets a wrong verdict. A Judge has to reason out truth from falsehood, good from evil which enables him to deduce inferences from facts or propositions. Facts are correctly stated in the instant case but the Division Bench wrongly understood those facts and wrongly applied the law, consequently, wrong inferences were drawn and ultimately reached wrong conclusions.

21. Following are the facts and conclusions overlooked by the Division Bench:

(1) OSFC introduced an OTS scheme in the year 2006 and 1st respondent had applied for settlement of its loan account under that scheme. On 18.03.2006, the benefit of the scheme was extended to 1st respondent and OSFC agreed in principle to settle the term loan account on payment of Rs.1,16,21,200/-, subject to certain conditions. IPICOL also approved the request of 1st respondent for OTS at Rs.45 lacs with waiver of Rs.1,88,21,099/-, subject to certain conditions.

(2) OSFC and IPICOL, therefore, waived an amount of Rs.2,26,85,800/- and Rs.1,88,21,099 and gave the benefit of the OTS scheme to 1st respondent, subject to few other conditions like period of payment, interest etc.

(3) The 1st respondent had failed to comply with those conditions imposed, consequently, OSFC and IPICOL had to withdraw the benefits extended under the OTS scheme.

(4) OSFC lodged another OTS scheme in the year 2007. Opportunity was given to 1st respondent again to avail of the benefit of that scheme. OSFC on 04.10.2007 requested 1st respondent to pay the settlement amount of Rs.1,16,21,200/- with delayed payment of interest within 10 days. The benefit of the said scheme was not availed of by 1st respondent, consequently OSFC on 28.12.2007 withdrew that offer as well and advised 1st respondent to pay the entire dues as per the agreement, failing which it was informed that recovery proceedings would be initiated.

(5) 1st respondent filed a Writ Petition No.13376 of 2008 to quash the demand notice dated 22.08.2008 where it was pointed out by OSFC that 1st respondent had not availed of all the benefits of the OTS scheme extended by the Corporation, consequently they had to cancel the said scheme. Further, it was also stated that in spite of public notification and their intimation and frequent requests, 1st respondent did not apply for the OTS 2007 Scheme.

(6) When Writ Petition came up for hearing on 07.04.2010, the Court had enquired whether 1st respondent would be still willing to deposit the amount of Rs. 1 crore for consideration of their claim under OTS. The matter again came up for hearing before the Division Bench on 21.04.2010 on which the Court disposed of the writ petition directing 1st respondent to deposit Rs.50,00,000/- each before each of the two Corporations by 20.6.2010, failing which it was ordered that the Corporations would be at liberty to take such action as permissible under law under the State Financial Corporation Act.

(7) OSFC issued a loan recall notice to 1st respondent on 8.7.2011, since it did not comply with the directions in WP No. 13376 of 2008 with a request to pay the entire outstanding amounts within 30 days, failing which the 1st respondent was informed that action would be taken under Section 29 of SFC Act.

(8) OSFC issued a seizure order on 02.08.2010 and during seizure, a valuation report dated 17.09.2010 was prepared. Based upon the valuation report, off-set price of the unit was fixed at Rs.1,75,45,000/-. Sale notice was published in the Daily newspapers

"Samaj" and the "New Indian Express" on 18.09.2010. On 21.09.2010, again OSFC issued a notice to 1st respondent to clear the outstanding dues with up-to-date interest of Rs.6,18,62,238/-.

(9) Review Petition No. 99 of 2010 filed by 1st respondent in writ petition No. 13376 of 2008 came up for hearing before the Division Bench on 22.9.2010. While dismissing the Review Petition, the Bench found that 1st respondent had no intention to clear the dues of the Corporations which had financed for establishing a hotel. The court also noticed that the mortgaged properties were taken over by OSFC invoking Section 29 of SFC Act and advertised for sale.

(10) 1st Respondent filed a representation before DDAC on 29.9.2010 which was rejected and the order of rejection was communicated vide letter dated 1.10.2010 and 1st respondent was informed that the assets were already taken over under Section 29 of SFC Act on 15.9.2010 and was put to public auction, with due intimation.

(11) Auction was concluded as per rules and ultimately, the appellant was found to be the highest bidder at Rs.774,00,000 which was accepted and sale letter dated 1.10.2010 was issued to the appellant, who had paid the entire amount by 11.10.2010.

(12) Sale Memo, Agreement to Sale was executed with the appellant on 11.10.2010 and possession was handed over to the appellant on that date.

(13) 1st respondent then on 11.10.2010 filed the present WRIT Petition No. 17711 of 2010.

22. We are of the view that the above mentioned facts had considerable bearing for rendering a just and proper judgment

in writ petition No. 17711 of 2010, but those vital facts were completely overlooked by the Division Bench and it had also ignored the binding judgment of the co-ordinate Bench rendered in writ petition No. 13376 of 2008 and the order passed in Review Petition No. 99 of 2010 and the steps taken by the Corporations as permitted by the Division Bench.

23. A 3-Judge Bench of this Court in *Haryana Financial Corporation and Another v. Jagdamba Oil Mills and Another*, (2002) 3 SCC 496 while dealing with the scope of Section 29 of SFC Act held as follows:

> "6. The Corporation as an instrumentality of the State deals with public money. There can be no doubt that the approach has to be public oriented. It can operate effectively if there is regular realization of the instalments. While the Corporation is expected to act fairly in the matter of disbursement of the loans, there is corresponding duty cast upon the borrowers to repay the instalments in time, unless prevented by unsurmountable difficulties. Regular payment is the rule and non-payment due to extenuating circumstances is the exception. If the repayments are not received as per the scheduled time frame, it will disturb the equilibrium of the financial arrangements of the Corporations. They do not have at their disposal unlimited funds. They have to cater to the needs of the intended borrowers with the available finance. Non-payment of the instalment by a defaulter may stand on the way of a deserving borrower getting financial assistance."

24. The Court again reminded of the fact that the fairness required of the Corporations could not be carried to the extent of disabling them from recovering what is due to them and held as follows:

> "13. …….The Corporation is an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge. As

> such in the discharge of its functions, it is free to act according to its own light. The views it forms and decisions it takes are on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations. Unless its action is mala fide, even a wrong decision by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however, more prudent, commercial or businesslike it may, for the decision of the Corporation……"

25. The Court while explaining and over-ruling *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation and Others*, (1993) 2 SCC 279 held as follows:

> "Indulgence shown to chronic defaulter would amount to flogging a dead horse without any conceivable result being expected. As the facts in the present case show not even a minimal portion of the principal amount has been repaid. That is a factor which should not have been lost sight by the courts below. It is one thing to assist the borrower who has intention to repay, but is prevented by insurmountable difficulties in meeting the commitments. That has to be established by adducing material. In the case at hand factual aspects have not even been dealt with, and solely relying on the decision in Mahesh Chandra's cases (supra), the matter has been decided."

26. We are of the view that the principles laid down by this Court in the above judgments apply to the case on hand, if the facts are properly appreciated. The Division Bench, in the impugned judgment, took the view that the Corporations had not followed the guidelines laid down by this Court in *Kerala Financial Corporation v. Vincent Paul and Another*, (2011) 4 SCC 171. In our view, this is factually incorrect. This Court, in the above judgment, indicated that the authority concerned should serve to the borrower a notice of 30 days for sale of immovable assets. In this case, Corporation had issued the

recall notice dated 08.07.2010 with a request to pay the entire outstanding dues within 30 days otherwise, failing which, it was stated that action under section 29 of SFC Act would be initiated against the 1st respondent. Seizure order was issued by the Corporation and the entire assets of the unit were taken over under Section 29 of the Act on 15.09.2010 which was after the expiry of 30 days from the date of notice dated 08.07.2010. Therefore the guidelines laid down in the above referred judgment have also been complied with. Even otherwise, the guidelines issued by this Court in *Vincent Paul* case would operate only prospectively and that too depends upon the facts and circumstances of each case.

27. We have found that the procedure laid down under Section 29 of SFC Act has been followed by the Corporations. The independent valuer submitted his report on 17.09.2010 and the off-set price of the unit was fixed after getting it valued by an independent valuer. It was based upon the valuation report that the off-set price of the unit was fixed at Rs.1,77,45,000/- on 17.09.2010. Sale notice was published in the News Papers on 18.09.2010 and the auction was conducted on 29.09.2010. In our view, the High Court has committed an error in holding that off-set price of property was not valued before the conduct of auction and that there was no due publication of auction. Sale notice, it is seen, was published in the "Samaj" a vernacular paper and also in the "New India Express" a widely circulated English newspaper on 18.09.2010 and the Corporation had received nine offers and after protracting negotiations with all the bidders, the offer of the appellant was accepted being the highest. The Corporation before putting the appellant in possession again issued a notice dated 21.9.2010 to 1st respondent enquiring whether he would match the offer. 1st Respondent did not avail of that opportunity as well. It is under such circumstances that sale letter dated 1.10.2010 was issued to the appellant with a copy to all the Directors/Promoters/ Guarantors of 1st respondent company. The appellant paid the balance consideration of Rs.5,65,20,000 on 11.10.2010 and

the Sale Memo was extended on that date and the property was also delivered.

28. We find no illegality in the procedure adopted by the Corporation, since 1st respondent had failed to comply with the directions issued by the co-ordinate Bench of the Orissa High Court in writ petition No. 13376 of 2008, which gave liberty to the Corporations to proceed in accordance with Section 29 of SFC Act. We are of the view that the Division Bench of the High Court had overlooked those vital facts as well as the binding judgment of a co-ordinate Bench in writ petition No. 13376 of 2008 and had wrongly reopened a lis and issued wrong and illegal directions.

29. In the said circumstances, we are inclined to allow both the appeals and set aside the judgment of the Division Bench of the Orissa High Court. However, in the facts and circumstances of the case, there will be no order as to costs.

K.K.T. Appeals allowed.

SHYAM BABU
v.
STATE OF U.P.
(Criminal Appeal No. 434 of 2006)

SEPTEMBER 7, 2012

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860 – ss. 148, 307 and 302 r/w 149 – Prosecution under – Five deaths and injury to one – Caused by fire-shots from 7 accused – Acquittal by trial court – High Court convicting 3 accused and the appeal abated against 4 of the accused due to their death – During pendency of appeal to Supreme Court, appeal abated against 2 of the three surviving accused – Held: In view of the evidence of the three eye-witnesses (one of whom was injured); medical evidence and FSL report, prosecution established its case – Accused liable to be convicted – The sole accused cannot be exonerated from conviction because the other accused died due to natural death and because there was delay of 25 years in disposal of appeal by High Court.

Appeal – Appeal against acquittal – Held: Appellate court to interfere with acquittal order only on being satisfied that the view taken by trial court was perverse and unreasonable resulting in miscarriage of justice.

Witness – Related witness – Evidentiary value of – Held: There is no bar in law on examining related persons as witnesses – If statements of witnesses who are related to the affected parties is credible, reliable, trustworthy and corroborated by other witnesses, court not to reject their evidence.

Appellant-accused, alongwith others was prosecuted u/ss. 147, 148, 149, 307 and 302 IPC for having caused

five deaths and for causing injury to 1 person. As per prosecution, the death and injuries were caused due to firing by the accused persons. Post-mortem report and the evidence of the doctor who conducted autopsy on dead bodies, revealed that the death was caused due to shock and hemorrhage as a result of ante mortem injuries. FSL opined that the blood-stained clothes of the deceased and blood-smeared earth contained human blood. There were three eye-witnesses viz. PWs. 1, 3 and 6.

Trial court acquitted all the seven accused of all the charges. High Court, in appeal, set aside the acquittal order holding that prosecution established the case against all the accused. Since 4 of the accused died their natural death during the pendency of the appeal and the case against them abated, High court convicted the remaining three accused.

During pendency of the appeal to this Court, two out of the three surviving accused died and the case abated against them.

The sole accused (appellant) contended that High Court was not justified in modifying the acquittal into conviction; that since the prosecution witnesses were related to deceased persons, their evidence could not have been relied upon; that since prosecution against 6 out of the 7 accused stood abated, the sole accused should be exonerated from the conviction and sentence; and that he should be discharged from the commission of offence on the ground that there was delay of 25 years in disposal of the appeal, by High Court.

Dismissing the appeal, the Court

HELD: 1. It is true that it would not be possible for the appellate Court to interfere with the order of acquittal

passed by the trial court without rendering specific finding, namely, that the decision of the trial court is perverse or unreasonable resulting in miscarriage of justice. At the same time, it cannot be denied that the appellate court while entertaining an appeal against the judgment of acquittal by the trial court is entitled to re-appreciate the evidence and come to an independent conclusion. In doing so, the appellate court should consider every material on record and the reasons given by the trial court in support of its order of acquittal and should interfere only on being satisfied that the view taken by the trial court is perverse and unreasonable resulting in miscarriage of justice. If two views are possible on a set of evidence, then the appellate court need not substitute its own view in preference to the view of the trial court which has recorded an order of acquittal. [Para 9] [264-E-H]

2. PW-1, PW-3 and PW-6 have appeared as eye-witnesses to the occurrence. PW-1, son of on of the deceased has categorically narrated all the facts of the occurrence. The other eye-witnesses relied on by the prosecution and accepted by the High Court were PW-3 - injured person and PW-6, who corroborated the entire statement of PW-1 in all material aspects. A perusal of the cross-examination of these three eye-witnesses clearly shows that all of them were subjected to lengthy cross-examination but as rightly observed by the High Court, nothing tangible could be brought on record to impair their credibility. After going through their evidence, this Court fully concurs with the conclusion arrived at by the High Court and hold that the trial Judge committed an error in discarding the testimony of all the three eye-witnesses doubting their presence at the scene of occurrence. [Paras 10 and 11] [265-B, 266-C-F]

3.1. The version of an eye-witness cannot be discarded by the court merely on the ground that such

eye-witness happened to be a relative or friend of the deceased. Where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the court to discard the statement of such related or friendly witnesses. There is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend etc. [Para 14] [266-H; 267-A-C]

Mano Dutt and Anr. vs. State of Uttar Pradesh **(2012) 4 SCC 79;** *Dayal Singh and Ors. vs. State of Uttaranchal* **2012 (7) SCALE 165 – relied on.**

3.2. In the instant case, PW-1 is closely related to all the deceased. It is also true that PW-3, the injured witness, is the real brother of two of the deceased. PW-6 has also admitted in his cross-examination that he has some land in joint khata with the victims but their testimony cannot be discarded on the ground of relationship alone as they appeared to be honest and truthful witnesses and their testimony has not been impaired in their cross-examination. Among these three eye-witnesses, PW-3 is an injured witness and his evidence stands on higher pedestal. There is no reason to either disbelieve his version or his presence at the place of occurrence. The High Court was justified on relying upon their evidence. [Para 15] [267-E-H; 268-A]

4. The appellant-accused cannot be exonerated from the conviction and sentence, in view of the clinching evidence led by the prosecution. Due to gruesome incident, 5 persons lost their lives and one person sustained injuries. Even otherwise, the present appellant along with others was convicted by the High Court under Sections 148, 307 & 302 read with Section 149 IPC, hence he cannot be exonerated. Taking note of all these aspects and considering the gruesome murders, there is no reason to exonerate the present sole appellant-accused merely because the other co-accused died due to natural death. [Para 16] [268-B-E]

5. The Limitation Act, 1963 does not apply to criminal proceedings unless there is express and specific provision to that effect. It is also settled law that a criminal offence is considered as a wrong against the State and the Society even though it is committed against an individual. In the case on hand, merely because the High Court had taken nearly 25 years to dispose of the appeal, the present appellant cannot be exonerated on the ground of delay. [Paras 17 and 18] [268-G-H; 269-C]

Abdul Rehman Antulay vs. R.S. Nayak **(1992) 1 SCC 225: 1991 (3)Suppl. SCR 325 ;** *Kartar Singh vs. State of Punjab* **(1994) 3 SCC 569: 1994 (2) SCR 375 ;** *P. Ramachandra Rao vs. State of Karnataka* **(2002) 4 SCC 578 – followed.**

Case Law Reference:

(2012) 4 SCC 79	**Relied on**	**Para 14**
2012 (7) Scale 165	**Relied on**	**Para 14**
1991 (3) Suppl. SCR 325	**Followed**	**Para 17**
1994 (2) SCR 375	**Followed**	**Para 17**
(2002) 4 SCC 578	**Followed**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 434 of 2006.

From the Judgment & Order dated 13.1.2006 of the High Court of Judicature at Allahabad in Government Appeal No. 159 of 1981.

V.K. Shukla, A.K. Tripathi, K.K. Mohan for the Appellant.

Gaurav Bhatia, AAG, Ardhendumauli Kumar Prasad, Gautam Talukdar, Manoj Dwivedi for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal has been preferred against the final judgment and order dated 13.01.2006 passed by the High Court of Judicature at Allahabad in Government Appeal No. 159 of 1981 whereby the Division Bench of the High Court allowed the appeal filed by the State and set aside the order of acquittal of accused persons dated 08.09.1980 passed by the First Additional Sessions Judge, Etawah in Sessions Trial No. 77 of 1979.

2. The facts and circumstances giving rise to this appeal are as under:

(a) Moolu Singh and Kunji were real brothers. Prayag Singh, Pahunchi Lal and Lalta Prasad were sons of Moolu Singh. Badan Singh and Gaya Prasad were sons of Kunji. Ratan Singh is the son of Prayag Singh and Nathu Ram and Rajendra Singh were sons of Pahunchi Lal. Jaswant Singh was the son of Badan Singh and Ujagar Singh was the son of Gaya Prasad.

(b) On 21.12.1978, at about 9.00 a.m. one Nathu Ram-the Complainant and his father Pahunchi Lal were ploughing their field situated at Har Balapur P.S. Bharthana. At that time, the Complainant's uncle - Gaya Prasad along with his son Ujagar Singh were sowing their field which was nearer to the field of

the Complainant. At some distance, his uncle - Prayag Singh along with his son Ratan Singh were also ploughing their field.

(c) There was a water channel passing towards north of their fields and Mahipal Singh-the accused was irrigating his field through that channel. Since water was overflowing in the channel and entering into the sowed field of the Complainant's uncle-Gaya Prasad, he asked Mahipal Singh to repair the same. On this issue, an altercation took place between Mahipal Singh and Gaya Prasad. The accused Mahipal Singh left the place saying that he would see him.

(d) In the meanwhile, Lalta Prasad, first cousin of Gaya Prasad and his nephew Jaswant Singh also reached there. At about 11.00 a.m., Nathu Ram and his father Pahunchi Lal resumed ploughing their field. At that time, accused Mahipal Singh and his brothers Shyam Babu and Tej Ram armed with guns, Indal having rifle and Bhabhooti with lathi along with their father Ramjit with spear and Babu Ram – son of Bhabhooti with countrymade pistol reached there. Mahipal Singh, standing near Gaya Prasad, told his associates that he was behaving in an arrogant manner and asked them to make an assault on him. Thereupon, Shyam Babu and Mahipal Singh fired at Gaya Prasad with their respective guns thereby causing injuries to him. On seeing this, Ujagar Singh– son of Gaya Prasad, rushed to save his father and he also sustained pellet injuries by Tej Ram. At that time, Prayag Singh, Pahunchi Lal, Lalta Prasad and Jaswant Singh rushed to the scene of occurrence. Then Ramjit and Bhabhooti shouted that they should also be killed and immediately Indal fired at Jaswant Singh and Prayag Singh using rifle and Babu Ram and Mahipal Singh fired at Pahunchi Lal and Lalta Prasad with country made pistol and gun respectively. All of them fell down in the field of Badan Singh except Prayag Singh, who received injuries. On hearing the hue and cry, Rajendra Singh brother of Nathu Ram and several other persons rushed to the spot and challenged the accused persons. On seeing them, all the accused persons fled away.

Due to fatal injuries, Ujagar Singh, Jaswant Singh, Gaya Prasad, Pahunchi Lal and Lalta Prasad died on the spot and Prayag Singh received grievous injuries.

(e) On the same day, i.e., on 21.12.1978, an FIR was lodged by the Complainant - Nathu Ram, son of Pahunchi Lal, at P.S. Bharthana, Etawah against the above-mentioned 7 persons under Sections 147, 148, 149, 307 and 302 of the Indian Penal Code, 1860 (in short 'the IPC').

(f) On 06.03.1979, after filing of charge sheet, the case was committed to the Court of Sessions and numbered as Sessions Trial No. 77 of 1979. The First Additional Sessions Judge, Etawah, by judgment dated 08.09.1980, acquitted all the 7 accused persons holding that the prosecution has failed to prove beyond reasonable doubt the guilt of the accused persons in the case against them.

(g) Being aggrieved, the State filed Government Appeal No. 159 of 1981 before the High Court. Pending appeal in the High Court, 4 accused persons, viz., Ramjit, Mahipal Singh, Indal and Bhabhooti died due to natural death and the case against them stood abated.

(h) On 13.01.2006, the High Court allowed the appeal filed by the State and convicted the remaining 3 accused persons, viz., Shyam Babu, Babu Ram and Tej Ram under Sections 148, 307 and 302 read with Section 149 of IPC and sentenced them to undergo rigorous imprisonment under various heads mentioned above including life sentence and all the sentences were to run concurrently.

(i) Being aggrieved by the judgment of the High Court, the remaining 3 accused persons preferred an appeal before this Court under Section 379 of the Code of Criminal Procedure, 1973 (in short 'the Code'). During the pendency of the appeal, 2 accused persons, viz., Tej Ram and Babu Ram died and appeal against them stood abated and only one accused,

Shyam Babu is before this Court facing conviction and sentence.

3. Heard Mr. V.K. Shukla, learned counsel for the appellant-accused and Mr. Ardhendumauli Kumar Prasad, learned counsel for the respondent-State.

Discussion

4. The incident relates to death of 5 persons and causing injury to 1 person. According to the prosecution, all the 5 persons were shot dead and one person sustained injuries due to firing by the accused persons. It is revealed from the post mortem reports and the evidence of the Doctor, who conducted autopsy on the dead bodies that death was caused due to shock and hemorrhage as a result of ante mortem injuries about one day ago.

5. On receipt of the complaint, the Investigating Officer rushed to the spot and collected the blood stained clothes of all the 5 deceased and also collected the samples of blood stained earth near the place where dead bodies of all the 5 were lying and the same were sent to Forensic Science Laboratory (FSL) for opinion which opined that the samples were found to be containing human blood.

6. After filing of charge-sheet against all the accused, the prosecution examined several witnesses. Among them, Nathu Ram (PW-1), Prayag Singh, injured witness (PW-3) and Mukut Singh (PW-6) were the persons who actually witnessed the occurrence. In other words, PWs-1, 3 and 6 are eye-witnesses to the occurrence. The trial Judge, after noting certain discrepancies and their relationship with the deceased persons, disbelieved their version and, ultimately, acquitted all the accused persons. On the other hand, the High Court, being the appellate Court, analysed all the materials, more particularly, the evidence of eye witnesses, medical evidence, FSL Report etc., and arrived at a categorical conclusion that the

prosecution has established the case against all the accused persons.

7.Inasmuch as 4 accused died during the pendency of the appeal before the High Court, the High Court convicted the remaining 3 accused, namely, Shyam Babu, Tej Ram and Babu Ram. Even during the pendency of the present appeal, 2 accused persons died, namely, Tej Ram and Babu Ram and as on date, we are concerned with only one accused, namely, Shyam Babu – the present appellant.

Power of the High Court in an appeal against acquittal :

8. Mr. V.K. Shukla, learned counsel for the appellant, submitted that in view of the acquittal of the accused persons by the trial Court, the High Court was not justified in interfering with the decision of the trial Court and modifying the acquittal into conviction.

9. It is true that it would not be possible for the appellate Court to interfere with the order of acquittal passed by the trial Court without rendering specific finding, namely, that the decision of the trial Court is perverse or unreasonable resulting in miscarriage of justice. At the same time, it cannot be denied that the appellate Court while entertaining an appeal against the judgment of acquittal by the trial Court is entitled to re-appreciate the evidence and come to an independent conclusion. We are conscious of the fact that in doing so, the appellate Court should consider every material on record and the reasons given by the trial Court in support of its order of acquittal and should interfere only on being satisfied that the view taken by the trial Court is perverse and unreasonable resulting in miscarriage of justice. We also reiterate that if two views are possible on a set of evidence, then the appellate Court need not substitute its own view in preference to the view of the trial Court which has recorded an order of acquittal.

Reasoning on merits

10. Keeping the above principles in mind, let us consider the evidence led by the prosecution and the ultimate decision of the High Court. We have already mentioned that Nathu Ram (PW-1), Prayag Singh (PW-3) and Mukut Singh (PW-6) have appeared as eye-witnesses to the occurrence. PW-1, son of deceased Pahunchi Lal, has categorically narrated all the facts of the occurrence. According to him, at about 9 or 9.30 a.m., on the fateful day, he and his father were ploughing the field of Badan Singh which they had taken on 'batai' and his uncle Gaya Prasad and his son Ujagar Singh were sowing crop in their field. He further deposed that his uncle Prayag Singh and his son Ratan Singh were ploughing their field situated at a distance of 40-50 footsteps from the field in which they were working. Mahipal Singh was irrigating his field through water channel abutting the field of Gaya Prasad and since the water was overflowing and entering into the filed of Gaya Prasad, he asked Mahipal Singh to repair the same which resulted in an altercation between them and, thereafter, Mahipal Singh went away saying that he would teach him a lesson. By that time, Lalta Prasad and Jaswant Singh also reached there and all of them were sitting in the field of Badan Singh. He further narrated that at about 11 a.m., when he and his father resumed ploughing their field, at that time, Shyam Babu (present appellant-accused) and Tej Ram with guns, Indal with rifle and Bhabhooti with lathi along with their father Ramjit with spear (ballam) and Babu Ram-son of Bhabhooti with country made pistol reached there. Mahipal Singh pointing at Gaya Prasad started shouting that he was speaking much and should be killed and, immediately thereafter, Shyam Babu and Mahipal Singh fired at Gaya Prasad using guns. When Ujagar Singh rushed towards his father to rescue him, he also received pellet injuries by Tej Ram. He further stated that immediately Pahunchi Lal, Prayag Singh, Lalta Prasad and Jaswant Singh also rushed to the scene of occurrence and then Ramjit and Bhabhooti shouted that they should also be killed. Thereafter, Indal and

Babu Ram fired at Jaswant Singh and Pahunchi Lal with their respective weapons. The accused persons also fired at Lalta Prasad and Prayag Singh with their weapons. Ramjit and Bhabhooti also gave blows to the injured with their respective weapons. On sustaining fatal injuries, Pahunchi Lal, Ujagar Singh, Lalta Prasad, Gaya Prasad and Jaswant Singh died on the spot and Prayag Singh received firearm injuries at his back. He also stated that thereafter at about 12.00 noon he went to the police station Bharthana, Etawah situated at a distance of 8 miles from his village and made a written complaint about the occurrence.

11. The other eye-witnesses relied on by the prosecution and accepted by the High Court were Prayag Singh (PW-3) - injured person and Mukut Singh (PW-6), who corroborated the entire statement of Nathu Ram (PW-1) in all material aspects.

12. A perusal of the cross-examination of these three eye-witnesses clearly shows that all of them were subjected to lengthy cross-examination but as rightly observed by the High Court, nothing tangible could be brought on record to impair their credibility. We were also taken through their evidence. We fully concur with the conclusion arrived at by the High Court and hold that the trial Judge committed an error in discarding the testimony of all the three eye-witnesses doubting their presence at the scene of occurrence.

Evidentiary value of related witnesses :

13.Mr. V.K. Shukla, learned counsel for the appellant submitted that since most of the prosecution witnesses are related to the deceased persons, the same cannot be relied on. We are unable to accept the said contention.

14. This Court has repeatedly held that the version of an eye-witness cannot be discarded by the Court merely on the ground that such eye-witness happened to be a relative or friend of the deceased. It is also stated that where the presence

of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the Court to discard the statement of such related or friendly witnesses. To put it clear, there is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend etc. These principles have been reiterated in *Mano Dutt and Another vs. State of Uttar Pradesh,* (2012) 4 SCC 79 and *Dayal Singh and Others vs. State of Uttaranchal,* 2012 (7) Scale 165.

15. In the case on hand, Nathu Ram (PW-1) is closely related to all the deceased as he is the son of the deceased Pahunchi Lal and nephew of deceased Lalta Prasad. It is also true that Prayag Singh (PW-3), the injured witness, is the real brother of the deceased Pahunchi Lal and Lalta Prasad. Mukut Singh (PW-6) has also admitted in his cross-examination that he has some land in joint khata with the victims but their testimony cannot be discarded on the ground of relationship alone as they appeared to be honest and truthful witnesses and their testimony has not been impaired in their cross-examination. We have already referred to the lengthy cross-examination of all these persons and nothing has come out to impair their credibility. We have also observed that among these three eye-witnesses, PW-3 is an injured witness and his evidence stands on higher pedestal. There is no reason to either disbelieve his version or his presence at the place of occurrence. On the other hand, we agree with their statement and hold that the High Court was justified on relying upon their

evidence.

Only surviving accused – effect :

16. Finally, Mr. V.K. Shukla pointed out that inasmuch as the present appellant alone is the remaining accused since out of 7, other 6 accused persons died due to natural death, he may be exonerated from the conviction and sentence. In view of the clinching evidence led by the prosecution, we are unable to accept his submission. We should not forget that due to gruesome incident, 5 persons lost their lives and one person sustained injuries. It is also brought in evidence that Shyam Babu, appellant herein and Tej Ram used guns and the third one Babu Ram used country made pistol for the said diabolical act of shooting. It is undisputed fact that 5 persons died and 1 person sustained injuries by use of such weapons. Even otherwise, the present appellant along with others was convicted by the High Court under Sections 148, 307 & 302 read with Section 149 IPC, hence he cannot be exonerated. Taking note of all these aspects and considering the gruesome murders, there is no reason to exonerate the present sole appellant-accused merely because the other co-accused died due to natural death.

Delay in disposal of appeal

17. It was argued by the learned counsel for the appellant that considering the fact that though the appeal was filed before the High Court at Allahabad in the year 1981, the same was disposed of by the High Court only on 13.01.2006, i.e., after a gap of 25 years and, the sole appellant be discharged from the commission of offence on the ground of delay. We are unable to accept the said contention. This Court, in a series of decisions, held that the Limitation Act, 1963 does not apply to criminal proceedings unless there is express and specific provision to that effect. It is also settled law that a criminal offence is considered as a wrong against the State and the Society even though it is committed against an individual. After

considering various decisions including the decision of the Constitution Bench of this Court in *Abdul Rehman Antulay vs. R.S. Nayak,* (1992) 1 SCC 225 and *Kartar Singh vs. State of Punjab* (1994) 3 SCC 569 and a decision rendered by seven learned Judges of this Court in *P. Ramachandra Rao vs. State of Karnataka* (2002) 4 SCC 578, recently on 17.08.2012, a Bench of two Judges of this Court in *Ranjan Dwivedi etc. vs. C.B.I., Through the Director General (Writ Petition* (Crl.) No. 200 of 2001) rejected similar argument based on delay either at the stage of trial or thereafter.

18. In the case on hand, merely because the High Court had taken nearly 25 years to dispose of the appeal, the present appellant cannot be exonerated on the ground of delay. As stated earlier, it is not a case of single murder but due to firing and gunshot, five persons died and one injured. Accordingly, we reject the said contention.

19. In the light of the above discussion, we are unable to accept the reasoning of the trial Court and submissions made by the learned counsel for the appellant. On the other hand, we fully agree with the conclusion arrived at by the High Court. Consequently, the appeal fails and the same is dismissed.

K.K.T. Appeal dismissed.

VILAS PANDURANG PAWAR & ANR.
v.
STATE OF MAHARASHTRA & ORS.
(SLP (Crl.) No. 6432 of 2012)

SEPTEMBER 10, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Code of Criminal Procedure, 1973 – s. 438 – Anticipatory bail – Entitlement – To the accused charged with offences under IPC with provisions under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Held: s. 18 of the Act creates a bar invoking s. 438 – When an offence is registered under provisions of the Act, no court shall entertain anticipatory bail, unless it prima facie finds that such an offence is not made out – In view of the averments in the complaint in the present case, s. 18 is applicable – Hence, accused not entitled to anticipatory bail – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – ss. 3(1) and 18 – Penal Code, 1860 – Bail.

The question for consideration in the present petition was whether an accused charged with various offences under IPC along with the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is entitled for anticipatory bail under Section 438 Cr.P.C.

Dismissing the petition, the Court

HELD: 1. Section 18 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 creates a bar for invoking Section 438 Cr.P.C. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence u/s. 3(1) of the Act has been p*rima facie* made out. In other words, if

there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail. When an offence is registered against a person under the provisions of the Act, no Court shall entertain application for anticipatory bail, unless it *prima facie* finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail u/s. 438 Cr.P.C., the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence. [Paras 8 and 9] [276-E-H; 277-A-B]

2. In the complaint, the complainant has specifically averred that she and her family members were insulted by the petitioners by mentioning her caste and also assaulted them by saying *"Beat the Mahar so that, they should not live in the village."* In the light of the specific averments in the complaint made by the complainant-respondent No.3, Section 18 of the Act is applicable to the case on hand and in view of the same, the petitioners are not entitled to anticipatory bail u/s. 438 Cr.P.C. [Paras 6 and 12] [274-A-B; 277-F-G]

Dr. R.K. Sangwan and Anr. vs. State **2009 (112) DRJ 473(DB);** *Ramesh Prasad Bhanja and Ors. vs. State of Orissa* **1996 Cri. L.J. 2743 – referred to.**

Case Law Reference:

2009 (112) DRJ 473(DB) Referred to Para 10

1996 Cri. L.J. 2743 Referred to Para 10

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Crl.) No. 6432 of 2012.

From the Judgment & Order dated 19.07.2012 of the High Court of Bombay Bench at Aurangabad in Criminal Application No. 3012 of 2012.

Dilip Annasaheb Taur, Anil Kumar for the Appellants.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. The short question to be decided in this petition is whether an accused charged with various offences under the Indian Penal Code, 1860 (in short 'IPC') along with the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short 'the SC/ST Act') is entitled for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 (in short 'the Code').

2. In the complaint filed by Savita Madhav Akhade – Respondent No.3 herein, it has been alleged that she has been residing with her family members at Khandeshwari, Taluq Karjat, Ahmednagar, Maharashtra and earning their livelihood from agricultural work. It is further alleged that the complainant is having an agricultural land adjacent to the agricultural land of one Balu Bhanudas Pawar and Arun Bhanudas Pawar. On 15.06.2012, the complainant allowed the rain water, which was accumulated, to flow into the field of Balu Bhanudas Pawar. When the complainant and her husband was standing on S.T. stand for going to Karjat, at that time, Balu Bhanudas Pawar came there and abused them on caste on account of the rain water flowing from the agricultural land of the complainant to his land. The complainant has also alleged that after their return to home, the petitioner along with other co-accused persons gathered at their house and they again abused them on their caste and assaulted the complainant and her family members

by using sticks, stones, fighters etc. Thereafter, on the same day, an FIR was registered being No. 139/2012 at Karjat P.S., Ahmednagar, Maharashtra.

3. The petitioners along with other co-accused filed an application for anticipatory bail under Section 438 of the Code being Criminal Miscellaneous Application No. 712 of 2012 before the Court of Sessions Judge, Ahmednagar. By order dated 04.07.2012, the Additional Sessions Judge rejected their application for anticipatory bail.

4. Aggrieved by the order of Sessions Judge, the petitioners filed Criminal Application No. 3012 of 2012 before the High Court of Bombay, Bench at Aurangabad. By impugned judgment and order dated 19.07.2012, the High Court, while rejecting the anticipatory bail application of the present petitioners, allowed the anticipatory bail to 13 accused out of 15. Being aggrieved, the petitioners approached this court by filing special leave petition under Article 136 of the Constitution of India.

5. Heard Mr. Dilip Annasaheb Taur, learned counsel for the petitioners.

6. Taking note of the fact that the complaint not only refers to various offences under IPC but also under Section 3(1)(x) of the SC/ST Act, we posed a question to the counsel by drawing his attention to Section 18 of the SC/ST Act as to how the petitioners are entitled to anticipatory bail. It is useful to reproduce Section 18 of the SC/ST Act which reads as under:

> **"18. Section 438 of the Code not to apply to persons committing an offence under the Act.-** Nothing in section 438 of the code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

A reading of the above provision makes it clear that Section 438 of the Code is not applicable to persons committing an

offence under the SC/ST Act. In the complaint, the complainant has specifically averred that she and her family members were insulted by the petitioners by mentioning her caste and also assaulted them by saying *"Beat the Mahar so that, they should not live in the village."*

7. In order to understand the grievance of the Complainant and the claim of the petitioners, it is useful to extract the complaint dated 15.06.2012.

> *"COMPLAINT*
>
> I. Sau. Savita Madhav Akhade, Age-45 years, Occu. Household, R/o Takali-Khandeshwari. Tq. Karjat, (Caste-Hindu Mahar)
>
> I am giving in writing the complaint in the Police Station that, I am residing on the above place with hushand – Madhav, my sons Ramesh, Umesh jointly. My husband is in service in the Beed district. Near my house, Dadasaheb Paraji Akhade, Sadashiv Paraji Akhade and Deelip Paraji Akhade are residing with their families and doing the agricultural work. There is my agricultural land in Khandeshwari area. Near my agricultural land, there is agricultural land of Balu Bhanudas Pawar and Arun Bhanudas Pawar and they are cultivating their lands. On 15.06.2012, we allowed the rain water to flow the lower side and that flow is running from previously.
>
> Today on dated 15.06.2012 at about 7.00 O'Clock, my husband stood on Takali-Khandeshwari S.T. stand for going to Karjat, at that time, Balu Bhanudas Pawar came there and said my husband that, "Mahardya", I will not be allowed your water to come in my field and started beating him. After that, the people, who gathered along with Shivaji Anna Thombe has rescued the quarrel. After that, my husband came at home. After we came at home, while I was fetching the water from water tank, the TATA ACC

belongs to Vilas Pawar in that all the people, namely, Balu Bhanudas Pawar, Vilas Pandurang Pawar, Ravi Dada Pawar, Arun Bhanudas, Pawar, Shrirang Pawar, Deepak Bhagade, Parmeshwar Indrajit Phadtare, Sudhir Chhagan Phadtare, Satish Namdeo Kirdat, Raghunath Tukaram Savant, Vitthal Raghunath Savant, Sandeep Raghunath Savant, Aba Kaka Phadtare, Dattatray Namdeo Pawar, Nephew of Balu Pawar, all R/o Takali Khandeshwari (Pawar Vasti) came there and said that, beat the Mahar so that, they should not live in the village, they are behaving arrogantly, saying that, they started beating with the weapons in hand like sticks, stones, fighters. In that quarrel, I myself, Dada Paraji Akhade, Sadashiv Paraji Akhade, Kundlik Gaikwad, Ramesh Akhade, Umesh Akhade, Rahul Akhade, Asru Akhade, Deelip Akhade are beaten at the hands of these people, so also, Nanda Deelip Akhade, Chhabubai Dadasaheb Akhade including myself were snatched on corner and beaten by these people. Thereafter, Vilas Pandurang Pawar told to Raghunath Tukaram Savant to help them. Thereafter, we phoned to police and the quarrel is stopped after the Police came on the spot.

Therefore, on 15.06.2012, near about 7.00 to 7.30 A.M. the persons namely, Balu Bhanudas Pawar, Vilas Pandurang Pawar, Ravi Dada Pawar, Arun Bhanudas Pawar, Shrirang Pawar, Deepak Bhagade, Parmeshwar Indrajit Phadtare, Sudhir Chhagan Phadtare, Satish Namdeo Kirdat, Raghunath Tukaram Savant, Vitthal Raghunath Savant, Sandeep Raghunath Savant, Aba Kaka Phadtare, Dattatray Namdeo Pawar, Nephew of Balu Pawar, name is not known, all R/o Takali Khandeshwari have gathered unlawful assembly and assaulted the complainant and her relatives by means of sticks, stones, fighters and also abused on caste by saying, "Beat the Mahar so that, they should not live in the village", on the ground that, the rain water is allowed to flow in the filed of

Balu Bhanudas Pawar. I and others have sustained injuries. We want to go in Hospital.

My complaint is read over to me and it is true as stated by me.

Before	Hence, written
Sd/-	Date: 15/06/12
Police Station Officer, Karjat Police Station.	
Sent to:	Hon'ble JMFC Karjat.
	Sd/-
Police Station Officer Karjat Police Station."	

A perusal of the complaint shows that the petitioners and other accused persons abused the complainant and her husband by calling their caste (Mahar) and assaulted them for their action of letting rain water to their field.

8. Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.

9. The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out.

Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.

10. Learned counsel appearing for the petitioners, relying on the decisions of the Delhi High Court in *Dr. R.K. Sangwan & Anr. vs. State,* 2009 (112) DRJ 473 (DB) and in Crl. M.C. No. 3866/2008 and Crl. M.C. No. 1222/2009 titled M.A. Rashid vs. Gopal Chandra decided on 23.03.2012 and a decision of the Orissa High Court in *Ramesh Prasad Bhanja & Ors. vs. State of Orissa,* 1996 Cri. L.J. 2743, submitted that in spite of the specific bar under Section 438 of the Code, the Courts have granted anticipatory bail to the accused who were charged under Section 3(1) of the SC/ST Act.

11. In view of the specific statutory bar provided under Section 18 of the SC/ST Act, the above decisions relied on by the petitioners cannot be taken as a precedent and as discussed above, it depends upon the nature of the averments made in the complaint.

12. In view of the above discussion and in the light of the specific averments in the complaint made by the complainant-respondent No.3 herein, we are of the view that Section 18 of the SC/ST Act is applicable to the case on hand and in view of the same, the petitioners are not entitled to anticipatory bail under Section 438 of the Code. Accordingly, the special leave petition is dismissed. However, it is made clear that the present conclusion is confined only to the disposal of this petition and the trial Court is free to decide the case on merits.

K.K.T. SLP dismissed.

M/S. REAL ESTATE AGENCIES
v.
GOVT. OF GOA & ORS.
(Civil Appeal No. 6383 of 2012)

SEPTEMBER 10, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Constitution of India, 1950:

Art.226 – Writ petition seeking interference of High Court in proposed developmental work at the instance of State Government and Municipal Corporation on the land claimed by petitioner – Dismissed by High Court on the ground of alternative efficacious remedy, i.e. a suit for injunction – Held: Writ Court exercising jurisdiction under Art. 226 is fully empowered to interdict the State or its instrumentalities from embarking upon a course of action to detriment of the rights of the citizens, though, in the exercise of jurisdiction in the domain of public law such a restraint order may not be issued against a private individual – In the instant case, order of High Court does not contain any reference to the relevant circumstances in which it had passed the impugned order nor does it contain any reasons why the petitioner was relegated to the remedy of initiating a civil action – The manner of reaching the decision and the reasons therefor are sacrosanct to the judicial proceedings – Judgments/Orders.

Art. 226 – Writ petition involving title to the subject land – Held: There is no universal rule or principle of law which debars the Writ Court from entertaining adjudications involving disputed questions of fact – In the instant case, petitioner, claimed title to the land in question on the basis of the deed of Indenture, the orders of the High Court in a Civil Suit and the LPA as well as the proceedings of acquisition in respect of an area acquired out of the land in question – State

Government did not claim any title to the land – Claim of Municipal Corporation, that the land had vested in it was not substantiated – High Court ought not to have disposed of the writ petition at the stage and in the manner it had so done and, instead, ought to have satisfied itself that there was actually a serious dispute between the parties on the question of ownership or title – Only in that event, High Court would have been justified to relegate the petitioner to the civil court to seek its remedies by way of a suit – Impugned order passed by High Court is not tenable in law – Alternative remedy.

Jurisprudence:

Ownership – Petitioner – developer after developing a residential colony, stated to have been transferred the open land to be developed as "open space" – Developer failed to develop the land as "open space" – Held: Land in question being earmarked as "open space", the normal attributes of legal ownership of the land have ceased insofar as petitioner is concerned who is holding the land as a trustee on behalf of residents and other members of public – Petitioner cannot transfer the land nor can it use the same in any other manner except by keeping it as an open space – In the circumstances, taking into account the nature of the developmental works that were proposed and the fact that a part of the work may have been executed in the meantime, respondents are permitted to complete the remaining work on the land with liberty to the petitioner to raise and establish a claim before the appropriate forum for such loss and compensation, if any, to which it may be entitled in law.

The appellant filed a writ petition before the High Court challenging the Government Order dated 30.6.2010 proposing to undertake the developmental works on the land in question admeasuring 19250 sq.m., which, according to the appellant was transferred to it under a registered deed dated 16.11.1977, after completing the developmental work of the residential colony developed

by it, and was meant to be kept open as "vacant space". The petitioner claimed the right, title and interest in the subject land and asserted that it had exclusive right to develop the same. It was the case of the petitioner that the G.O. dated 30.6.2010 required that tenders in respect of developmental work on the land would not be issued unless the land itself was acquired, however, without initiating any acquisition proceedings tender was floated and respondent No.4 was awarded work order and the works on the land were undertaken w.e.f. 2.1.2011. The High Court refused the reliefs sought in the writ petition leaving the writ petitioner with the option of approaching the civil court. Aggrieved, the writ petitioner filed the appeal.

Disposing of the appeal, the Court

HELD: 1.1. The order of the High Court does not contain any reference to the relevant circumstances in which it had passed the impugned order nor does it contain any reasons why the petitioner was relegated to the remedy of initiating a civil action. Time and again this Court has emphasized that such a course of action by a court cannot lead to a legally acceptable conclusion inasmuch as the manner of reaching the decision and the reasons therefor are sacrosanct to the judicial process. [Para 7] [288-F-H]

1.2. A reading of the order of the High Court would show that its refusal to interdict the developmental works undertaken or about to be undertaken is on the ground that the petitioner has an efficacious alternative remedy, i.e. a suit for injunction. The Writ Court exercising jurisdiction under Art. 226 of the Constitution is fully empowered to interdict the State or its instrumentalities from embarking upon a course of action to detriment of the rights of the citizens, though, in the exercise of jurisdiction in the domain of public law such a restraint

order may not be issued against a private individual. [Para 8] [289-B-C]

1.3. There is no universal rule or principle of law which debars the Writ Court from entertaining adjudications involving disputed questions of fact. In fact, in the realm of legal theory, no question or issue would be beyond the adjudicatory jurisdiction under Art. 226, even if such adjudication would require taking of oral evidence. However, as a matter of prudence, the High Court under Art. 226 normally would not entertain a dispute which would require it to adjudicate contested questions and conflicting claims of the parties to determine the correct facts for due application of the law. [Para 9] [289-E-G]

ABL International Ltd. & Anr. V. Export Credit Guarantee Corporation of India Ltd. **2004 (3) SCC 553;** *Smt. Gunwant Kaur & Ors. v. Municipal Committee, Bhatinda & Ors,* **1969 (3) SCC 769 and** *Century Spg. & Mfg. Co. Ltd. v. Ulhasnagar Municipal Council* **1970 (2) SCR 854= 1970 (1) SCC 582 – relied on.**

1.4. The petitioner, in the instant case, claimed title to the land in question on the basis of the deed of Indenture dated 16.11.1977; the orders of the Bombay High Court in Suit No. 1/B/1981 and LPA No. 26 of 1983 as well as the proceedings of acquisition in respect of an area of about 625 sq. m. out of the open space in question. The State did not claim any title to the land but contended that by virtue of the judgment of this Court in *Pt. Chet Ram*[1] **the petitioner had ceased to hold the normal attributes of ownership of immovable property in respect of the land in question and its position was more akin to that of a trustee holding the land for the benefit of the public at large. The Housing Society (respondent No.5),**

1. *Pt. Chet Ram Vahist vs. Municipal Corporation of Delhi* 1994 (5) Suppl. Scr 180.

on the other hand, claimed easementary right of enjoyment of the open space. [Para 10] [292-F-H; 293-A]

1.5 It is only the Municipal Corporation, Panaji (respondent No.2), which claimed that the land had vested in it. How and in what manner such vesting had occurred, however, has not been stated in support of the claim of the Corporation. There is complete silence in this regard. In such circumstances, it was incumbent on the High Court to undertake a deeper probe in the matter in order to find out whether the claim of the Corporation had any substance or had been so raised merely to relegate the petitioner to a more "lengthy, dilatory and expensive process" that is inherent in a civil suit. The High Court ought not to have disposed of the writ petition at the stage and in the manner it had so done and, instead, ought to have satisfied itself that there was actually a serious dispute between the parties on the question of ownership or title. Only in that event, the High Court would have been justified to relegate the petitioner to the civil court to seek its remedies by way of a suit. [Para 10] [293-B-D]

1.6 Therefore, the impugned order dated 18.08.2011 passed by the High Court is not tenable in law. [Para 11] [293-E]

2. There is also no manner of doubt that the land in question being earmarked as open space and the said fact having been affirmed by the High Court in Civil Suit No. 1/B/1981 and LPA No. 26 of 1983, the normal attributes of legal ownership of the land have ceased insofar as the petitioner is concerned which is holding the land as a trustee on behalf of the residents and other members of the public. The petitioner cannot transfer the land nor can it use the same in any other manner except by keeping it as an open space. Keeping in mind the very limited rights of the petitioner that are disclosed at this

stage by the materials on record and taking into account the nature of the developmental works that were proposed and the fact that a part of the work may have been executed in the meantime, the respondents should be permitted to complete the remaining work on the land and the petitioner should be left with the option of raising and establishing a claim before the appropriate forum for such loss and compensation, if any, to which it may be entitled in law. [Para 12-13] [293-H; 294-A-E]

Pt. Chet Ram Vashist vs. Municipal Corporation of Delhi **1994 (5) Suppl. SCR 180 = (1995) 1 SCC 47 – relied on.**

Case Law Reference:

1994 (5) Suppl. SCR 180	**relied on**	**Para 5**
2004 (3) SCC 553	**relied on**	**Para 9**
1969 (3) SCC 769	**relied on**	**Para 9**
1970 (2) SCR 854	**relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6383 of 2012.

From the Judgment and Order dated 18.8.2011 of the High Court of Judicature of Bombay at Goa (Panaji Bench) in Writ Petition No. 98 of 2011.

Krishnan Venugopal, R.V. Pai, Aniruddha P. Mayee, Bina Pai, Charudatta for the Appellant.

Siddharth Bhatnagar, Malvika Trivedi, Pawan Kr. Bansal, T. Mahipal for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. This appeal has been filed to challenge the order dated

18th August, 2011 passed by the High Court of Bombay (Panaji Bench) in Writ Petition No.98/11 by which the reliefs sought in the writ petition have been refused and the writ petitioner has been left with the option of approaching the civil court for the redressal of his grievances.

3. The facts in brief may be noted at the very outset:

(i) The petitioner herein (writ petitioner before the High Court) is a registered partnership firm which had developed a residential colony in Miramar, Goa, known as La Campala residential colony. It is the case of the petitioner that after completion of the developmental work the residual land of the colony, including all open plots that were meant to be kept open as "vacant space", were transferred in favour of the petitioner under a registered deed dated 16th November, 1977. Such open spaces, according to the petitioner, included a piece of land measuring about 19250 sq.mtrs. bearing Chalta No.18 of PT Sheet No. 120, Miramar, Panaji, Goa (hereinafter referred to as 'the land in question'). The petitioner claims that the right, title and interest in the said open land undisputedly vested in the petitioner and the petitioner has exclusive right to develop the said open land which is to the knowledge of all concerned including the respondents in the present appeal.

(ii) In the writ petition filed, it was further claimed that sometime in the year 1981 the petitioner wanted to raise construction in an area of about 7,000 sq.mtrs. (consisting of 14 plots of 500 sq.mtrs. each) out of the aforesaid open space of 19250 sq.mtrs. According to the petitioner, such construction over the 7,000 sq.mtrs. of land would still have kept more than 12,000 sq.mtrs. as open space which area would have been within the prescriptions contained in the existing Municipal Rules and Regulations. However some of the purchasers of the plots who had constructed their buildings thereon and had formed a co-operative society i.e. Model Cooperative Housing Society, approached the Bombay High Court by way of a civil suit bearing No.1/B of 1981 claiming an easementary right in

respect of the entire vacant/open space of 19250 sq.mtrs. In the aforesaid suit, the Co-operative Society, as the plaintiff, contended that in the brochures published at the time of development of the housing colony it was represented that 19250 sq.mtrs. of open space will be available in order to ensure plenty of light and ventilation besides serving as a recreational ground for the children of the members of the Society. In these circumstances a decree of injunction was sought against the defendants in Suit No. 1/B of 1981 particularly the defendant No.9 i.e. the petitioner herein from raising any construction on the land in question. By judgment and order dated 29th April, 1983 the said suit was decreed. L.P.A. No. 26/83 filed by the present petitioner against the said judgment and order dated 29th April, 1983 was dismissed and the decree passed by the Learned Single Judge was affirmed. According to the petitioner, in the course of the aforesaid proceedings, no issue with regard to the title of the petitioner to the land in question was raised and it was accepted by all the contesting parties that the petitioner was the owner of the said land measuring 19250 sq.mtrs. In fact, the only issue in the suit was with regard to the right of the petitioner to raise constructions on the said land or on any part thereof.

(iii) It was the further case of the petitioner in the writ petition that an area of about 625 sq. mtrs. out of the open space in question was acquired under the provisions of the Land Acquisition Act, 1894 sometime in the year 1990 and in the said acquisition proceeding, the petitioner was treated as the absolute owner of the land. In fact, according to the petitioner, the compensation payable under the Award was paid to the petitioner who had also filed a Reference Application under Section 18 of the Act and had further carried the matter in an appeal to the High Court of Bombay.

4. According to the petitioner the aforesaid facts show and establish the undisputed title of the petitioner to the land in question. Certain activities were, however, undertaken on the

said land on 2nd January, 2011 and the inquiries made on behalf of the petitioner indicated that alongwith a project of beautification of the adjoining Miramar lake a project to develop the open land in question was proposed to be undertaken. Specifically, a jogging track, walk ways, recreational centres etc. were proposed. According to the petitioner, further inquiries revealed that such developmental work on the land was proposed to be undertaken at the instance of the respondent No. 3 who is the local Municipal Councilor and, in fact, a Government Order dated 30th June, 2010 had been passed in the matter by the Principal Chief Engineer, Public Works Department, Government of Goa. The petitioner had also averred in the writ petition filed, that the very first stipulation in the order dated 30th June, 2010 required that tenders in respect of the developmental work on the land shall not be issued unless the land itself is acquired. However, without initiating any proceeding to acquire the land, a tender was floated sometime in September, 2010 and the respondent No. 4 was awarded the Work Order sometime in December, 2010 requiring completion of the developmental works on the land within 180 days. It is pursuant thereto that the works on the land were undertaken w.e.f. 2nd January, 2011. As the aforesaid actions of the respondents were not only in violation of the Government Order dated 30th June, 2010 but also had the effect of depriving the petitioner of the ownership in the property in question, the petitioner filed the writ petition in question seeking interference of the High Court in the proposed developmental work which according to the petitioner had already commenced.

5. The respondents in the writ petition, including the Government of Goa and the Corporation of the city of Panaji apart from the Model Co-operative Housing Society, filed separate counter affidavits/written statements in the case. According to the State the open space in question was required to be kept free from any kind of construction under the planning laws in force and that the plot owners in the residential

colony have an easementary right on and over the open space which had been so declared by the High Court of Bombay in Civil Suit No.1/B/1981 and L.P.A. No.26/1983. Furthermore in terms of the judgments of the High Court in the aforesaid cases the petitioner was obliged to keep the open space so available and vacant at all times. In the affidavit filed the State had also contended that at no point of time the petitioner was interested in developing the open space and the same had become a dumping ground of garbage. In such a situation the Local Corporator of the Panaji Municipal Corporation was requested by the residents to intervene in the matter and develop the land into a recreational area. Initially the work was entrusted to the Goa State Infrastructure Development Corporation. Thereafter, the Goa State Urban Development Agency was entrusted with the responsibility. However, as both the aforesaid entities faced the problem of shortage of funds it was decided that the work will be carried out by the PWD, Goa. In the affidavit filed it was further stated that the open space was to be developed into (a) Children Playing area, (b) Joggers Track, (c) Water Harvesting Pond, (d) Multi-purpose court for cricket/football and (e) a Tennis court and an Amphitheatre. Such development which was to be to the benefit of all the residents, particularly the children and the elders, was estimated to cost around Rs.2.92 crores. It was specifically stated in the affidavit of the State, that the work had already commenced and almost 14% thereof had been completed.

In para 14 of the affidavit it was stated that in terms of the decision of this Court in *Chet Ram Vashist v. Municipal Corporation of Delhi*[1], the petitioner has ceased to be the legal owner of the land and its position was that of a trustee holding the land for the benefit of the members of the Housing Society and the public at large. The petitioner had no right to use the land for any developmental work or to transfer or sell the same; it was merely a trustee of the land holding the same for a

1. (1995) 1 SCC 47.

specific purpose i.e. beneficial utilization as an open space by the community at large. In a situation where the petitioner had done nothing to develop the open space for the public good, the Government had decided to step in and carry out the project for the benefit of the residents.

6. In the affidavit filed by the respondent No.2 – Commissioner of the Municipal Corporation, Panaji, a claim that the open space had vested in the Corporation had been raised whereas in the affidavit filed on behalf of respondent No. 5 i.e. Model Cooperative Housing Society, the details of the judgment in Civil Suit No. 1/B of 1981 had been mentioned under which the land in question is required to be maintained as an open space so to enable the residents to have free access to light and air apart from recreational facilities. In the affidavit filed by the respondent No. 5, the decision of this Court in *Chet Ram Vashist 's* case (supra) had also been relied upon to contend that the legal title of the petitioner in the said open space stood extinguished and petitioner is holding the land only as a trustee on behalf of the residents of the locality. As the petitioner had not discharged the duties cast upon it as a trustee and had utterly failed to develop the open space, the residents of the locality had approached the local Ward Councilor (respondent No.3) who had taken the initiative to develop the land in question.

7. The aforesaid detailed recital of the facts projected by the parties had become necessary as the order of the High Court assailed in the present SLP does not contain any reference to the relevant circumstances in which the High Court had passed the impugned order or the reasons why the petitioner was relegated to the remedy of initiating a civil action. Time and again this Court has emphasized that such a course of action by a Court cannot lead to a legally acceptable conclusion inasmuch as the manner of reaching the decision and the reasons therefor are sacrosanct to the judicial process. However, we do not wish to dilate the aforesaid aspect of the

matter any further in view of the clear and consistent insistence of this Court on the aforesaid fundamental requirement.

8. A reading of the order of the High Court would go to show that its refusal to interdict the developmental works undertaken or about to be undertaken is on the ground that the Petitioner has an efficacious alternative remedy, i.e. a suit for injunction. The Writ Court exercising jurisdiction under Article 226 of the Constitution is fully empowered to interdict the State or its instrumentalities from embarking upon a course of action to detriment of the rights of the citizens, though, in the exercise of jurisdiction in the domain of public law such a restraint order may not be issued against a private individual. This, of course, is not due to any inherent lack of jurisdiction but on the basis that the public law remedy should not be readily extended to settlement of private disputes between individuals. Even where such an order is sought against a public body the Writ Court may refuse to interfere, if in the process of determination disputed questions of fact or title would require to be adjudicated.

9. However, there is no universal rule or principle of law which debars the Writ Court from entertaining adjudications involving disputed questions of fact. In fact, in the realm of legal theory, no question or issue would be beyond the adjudicatory jurisdiction under Article 226, even if such adjudication would require taking of oral evidence. However, as a matter of prudence, the High Court under Article 226 of the Constitution, normally would not entertain a dispute which would require it to adjudicate contested questions and conflicting claims of the parties to determine the correct facts for due application of the law. In *ABL International Ltd. & Anr. V. Export Credit Guarantee Corporation of India Ltd.*[2], the precise position of the law in this regard has been explained in paragraphs 16, 17 and 19 of the Judgment in the course of which the earlier views of this Court in *Smt. Gunwant Kaur & Ors. v. Municipal*

2. [2004 (3) SCC 553].

Committee, Bhatinda & Ors.[3] and *Century Spg. & Mfg. Co. Ltd. v. Ulhasnagar Municipal Council*[4] has been referred to. The aforesaid paragraphs of the judgment in *ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd.* (supra) may, therefore, be usefully extracted below:

> "16. A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of *Gunwant Kaur v. Municipal Committee, Bhatinda* - 1969 (3) SCC 769 where dealing with such a situation of disputed questions of fact in a writ petition this Court held: (SCC p. 774, paras 14-16)
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> > "14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises

3. [1969 (3) SCC 769].

4. [1970 (1) SCC 582].

questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit."

17. The above judgment of *Gunwant Kaur* (supra) finds support from another judgment of this Court in the case of

Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council – 1970 (1) SCC 582 wherein this Court held: (SCC p. 587, para 13)

> "Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary."

xxx xxx xxx

19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur (supra) this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

10. The Petitioner in the present case claimed title to the land in question on the basis of the deed of Indenture dated 16.11.1977; the order of the Bombay High Court in Suit No. 1/B/1981 and LPA No. 26 of 1983 as well as the proceedings of acquisition in respect of an area of about 625 sq. m. out of the open space in question. The State did not claim any title to the land but had contended that by virtue of the judgment of this Court in *Pt. Chet Ram* (supra) the Petitioner had ceased to hold the normal attributes of ownership of immovable property in respect of the land in question and its position was

more akin to that of a trustee holding the land for the benefit of the public at large. The Housing Society (defendant No.5), on the other hand, claim easementary right of enjoyment of the open space. It is only the Municipal Corporation, Panaji (defendant No.2), who had claimed that the land has vested in it. How and in what manner such vesting had occurred, however, had not been stated in support of the claim of the Corporation. There is complete silence in this regard. In such circumstances, it was incumbent on the High Court to undertake a deeper probe in the matter in order to find out whether the claim of the Corporation had any substance or had been so raised merely to relegate the Petitioner to a more "lengthy, dilatory and expensive process" that is inherent in a civil suit. The High Court, in our considered view, ought not to have disposed of the Writ Petition at the stage and in the manner it had so done and, instead, ought to have satisfied itself that there was actually a serious dispute between the parties on the question of ownership or title. Only in that event, the High Court would have been justified to relegate the Petitioner to the Civil Court to seek his remedies by way of a suit.

11. On the view that we have taken, we have to conclude that the impugned order dated 18.08.2011 passed by the High Court is not tenable in law. However, having arrived at the aforesaid conclusion the next question that has to engage our attention is what would be the appropriate order in the facts and circumstances of the case?

12. In the counter affidavit filed before this Court, the Respondent claims that about 40% of the work has been completed and extension of time for completion of the remaining work, as per the terms of the Contract, is being processed. Though the Petitioner disputes the aforesaid position, it may be reasonable to assume that in absence of any interim order some progress in the execution of the developmental work has taken place during pendency of the present proceeding. There is also no manner of doubt that the land in question being

earmarked as open space and the said fact having been affirmed by the High Court in Civil Suit No. 1/B/1981 and LPA No. 26 of 1983, the normal attributes of legal ownership of the land have ceased insofar as the Petitioner is concerned who is holding the land as a Trustee on behalf of the residents and other members of the Public. The Petitioner cannot transfer the land or use the same in any other manner except by keeping it as an open space. The aforesaid position flows from the decision of this Court in *Pt. Chet Ram Vashist* (supra) wherein such a conclusion had been reached by this Court in a largely similar set of facts.

13. Keeping in mind the very limited rights of the Petitioner that are disclosed at this stage by the materials on record and taking into account the nature of the developmental works that were proposed and the fact that a part of the work may have been executed in the meantime, we are of the view that the Respondents should be permitted to complete the remaining work on the land and the petitioner should be left with the option of raising a claim before the appropriate forum for such loss and compensation, if any, to which he may be entitled to in law. Naturally, if any such claim of compensation is required to be founded on proof of title/ownership or any other such relevant fact(s), the Petitioner will have to establish the same. No part of the present order shall be construed to be an expression of any opinion of this Court with regard to the ownership or any other right or entitlement of the Petitioner which has to be proved in accordance with law.

14. Consequently, we dispose of the Civil Appeal in the above terms.

R.P. Appeal disposed of.