HAMZA

v.

MUHAMMADKUTTY @ MANI & ORS.

(Criminal Appeal No. 268 of 2007 etc.)

JUNE 20, 2013

[A.K. PATNAIK AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 - s.302/34 - De0ath of woman in her matrimonial house by stab injury on neck - Initial prosecution of the family members of the in-laws of the deceased u/ss. 498A and 306 IPC - Acquittal in the case - Not challenged further - Complaint by brother of the deceased alleging murder of the deceased by 6 family members of her in-laws - Prosecution u/s. 302 and 201 r/w. s.34 IPC - Son of the deceased, who was 7 years of age at the time of incident, deposed as eye-witness - Trial court relying on the testimony of child witness, convicted 2 of the accused u/s.302/34 while acquitted other 4 accused - High Court reversed the order of conviction - On appeal, held: Order of High Court is not perverse or unreasonable so as to call for interference - Prosecution failed to prove its case beyond reasonable doubt - The child witness was tutored and his evidence was without adequate corroboration and hence did not inspire confidence - Order of acquittal upheld.

Witness - Child witness - Testimony - Corroboration of - Held: In absence of corroboration of oral testimony of child witness, his evidence cannot be relied on.

Medical Evidence - Appreciation of - Held: Medical evidence cannot be considered in isolation and must be taken in conjunction with all the circumstantial evidence on record - When the doctor expresses two views, the view favourable to the accused should be taken into account.

Constitution of India, 1950 - Art. 136 - Appeal under - Against order of acquittal - Scope of - Held: If the view taken by High Court is reasonable or plausible one on the evidence on record, Supreme Court should not reverse the order of acquittal passed by High Court, on the ground that it had different view.

The deceased in the present case, succumbed to the stab injuries on her neck. Initially four members of the family of her in-laws were prosecuted u/ss. 498A and 306 IPC.. They were acquitted of the charges and no appeal was preferred against the acquittal order.

After 2 years of the incident, PW-2 (brother of the deceased) lodged a complaint against A-1 to A-6 alleging that A-1 and A-2 killed the deceased by stabbing her and accused Nos. 3 to 6 caused disappearance of the evidence of murder. The accused persons were prosecuted u/ss.302 and 201 r/w. s.34 IPC. Trial court relying on the oral testimony of the child eye-witness (son of the deceased who was 7 years old at the time of the incident) convicted A-1 and A-2 for the offences u/s. 302/34 IPC. However, acquitted A-3 to A-6 of the offences u/ss.302 and 201 r/w. s.34 IPC. High Court acquitted A-1 and A-2 (respondents) disbelieving the evidence of the child witness. Hence the present appeal by the complainant.

Dismissing the appeal, the Court

HELD: 1.1. The view taken by the High Court that A-1 and A-2 were entitled to acquittal is not perverse or unreasonable on the evidence on record so as to call for interference under Article 136 of the Constitution. [Para 21] [888-E]

1.2. If the view taken by the High Court is reasonable or a possible one on the evidence o rt

will not reverse the judgment of acquittal of the High Court only on the ground that it had a different view of the evidence on record. Hence, the scope of the present appeal under Article 136 of the Constitution is limited to finding out whether the view taken by the High Court that on the evidence on record, the conviction of A-1 and A-2 for the offence under Section 302 read with Section 34 of the IPC was not sustainable was a perverse or unreasonable view so as to call for interference by this Court under Article 136 of the Constitution. [Para 14] [882-A-C]

State of Karnataka vs. Amajappa and Ors. **(2003) 9 SCC 468;** *State of Uttar Pradesh vs. Banne alias Baijnath and Others* **(2009) 4 SCC 271;** *State of Haryana vs. Shakuntla and Others* **(2012) 5 SCC 171: 2012 (5) SCR 276 - relied on.**

2.1. It appears from the evidence of PW-1 that he was not revealing the whole truth and avoided to answer uncomfortable questions which would have prejudiced the prosecution case. Thus, PW-1 was tutored and hence his evidence could not be relied on without adequate corroboration. [Para 16] [884-B-C]

Suresh vs. State of U.P. **(1981) 2 SCC 569: 1981 (3) SCR 259;** *State of Madhya Pradesh vs. Ramesh and Anr.* **(2011) 4 SCC 786: 2011 (5) SCR 1 - relied on.**

Promode Dey vs. State of West Bengal **(2012) 4 SCC 559: 2012 (3) SCR 887 - distinguished.**

The Proof of Guilt Glanville Williams, Third Edition, published by Stevens and Sons - referred to.

2.2. Under Section 157 of the Evidence Act, the testimony of PW-1 could be corroborated by his statements about the time of the incident. From the

evidence of PW-1 it appears that PW-1 did not tell anything about the incident to the police on the date of the incident, though the police had come to the house where the incident had taken place. Next day evening after her mother's body was buried, he went to the mother's house and told the whole incident he witnessed to his aunt 'S' and grandmother 'N' and the complainant. 'S' has not been examined as a witness to corroborate the testimony of PW-1. Maternal grandmother of PW-1, 'N' has also not been examined to corroborate the testimony of PW-1. [Para 17] [884-D, G-H; 885-A]

2.3. Even though the evidence of PW-2-complainant corroborates the testimony of PW-1, his evidence cannot be relied on to lend assurance that PW-1 was giving a true version of the incident. [Para 17] [885-E]

2.4. In the absence of any corroboration of the oral testimony of PW-1, the High Court was right in taking the view that it is unsafe to convict A-1 and A-2 only on the evidence of PW-1, who was a child witness and whose evidence did not inspire any confidence. [Para 17] [885-G-H]

2.5. The evidence of the medical experts cast a serious doubt on the reliability of the evidence of PW-1. PW-4, who conducted the postmortem examination of the body of the deceased and issued the postmortem certificate (Ex.P-12) has said "I cannot definitely say whether it is a case of suicide or homicide." DW-1, Professor and Head of the Department of Forensic Medicine and Police Surgeon, Medical College, has also opined in his medico-legal opinion Ex. D-1 "Under the circumstances, as per the medical evidence, the most likely manner of causation of injuries in this case is self infliction except for the fact that there is always a chance of any mechanical injury to be sustainable by homicidal manner." Thus, the aforesaid opinion [illegible]al

experts also do not lend assurance to the prosecution story that the death of the deceased was only homicidal. On the evidence of PW-1 read with the opinions of PW-4 and DW-1, the High Court could not have held that the prosecution has been able to prove beyond reasonable doubt that A-1 killed the deceased by stabbing her on the neck with the help of A-2. [Para 20] [887-C-G]

State of Tamil Nadu vs. P. Muniappan **(1998) 1 SCC 515: 1997 (6) Suppl. SCR 124 - distinguished.**

Modi's Medical Jurisprudence & Toxicology, 22nd Edition at page 387; 'The Proof of Guilt' by Glanville Williams, **Third Edition - referred to.**

2.6. When a doctor expresses two views, the one that is favourable to the accused might be taken into account, as a general proposition it may be true, but medical evidence could not be considered in isolation and must be taken into conjunction with all the circumstantial evidence on record. The present case is not a case where the only conclusion that could be drawn considering the entire evidence is that the death was homicidal and not suicidal. [Para 20] [887-H; 888-A, D]

Rameshwar vs. The State of Rajasthan **1952 SCR 377;** *Mohamed Sugal Esa Mamasan Rer Alalah vs. The King* **AIR (33) 1946 PC 3;** *State of U.P. vs. Ashok Dixit and Anr.* **(2000) 3 SCC 70: 2000 (1) SCR 855 - referred to.**

Case Law Reference:

1952 SCR 377	**referred to**	**Para 5**
AIR (33) 1946 PC 3	**referred to**	**Para 12**
2000 (1) SCR 855	**referred to**	**Para 12**
(2003) 9 SCC 468	**relied on**	**Para 14**
(2009) 4 SCC 271	**relied on**	**Para 14**

2012 (5) SCR 276	**relied on**	**Para 14**
2011 (5) SCR 1	**relied on**	**Para 16**
1998 (1) Suppl. SCR 40	**relied on**	**Para 18**
1981 (3) SCR 259	**distinguished**	**Para 19**
2012 (3) SCR 887	**distinguished**	**Para 19**
1997 (6) Suppl. SCR 124	**distinguished**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 268 of 2007.

From the Judgment & Order dated 23.09.2005 of the High Court of Kerala at Ernakulam in Crl. A.No. 1187 of 2005(B).

WITH

Crl. Appeal No. 1378 of 2007.

Basant, B.V. Deepak, Usha Nandini V., Biju P, Raman, Nishe Rajan Shonker (for T.T.K. Deepak & Co.) Jogy Scaria, K.K. Sudheesh, Romy Chacko, Varun Mudgal, R. Sathish, M.T. George for the appearing parties.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. These are appeals by way of special leave under Article 136 of the Constitution against the judgment dated 23.09.2005 of the Division Bench of the Kerala High Court in Criminal Appeal No. 1187 of 2005 (B).

Facts of the Case:

2. The facts very briefly are that on 26.02.1998 between 7.00 p.m. to 7.30 p.m. Suhara sustained stab injuries on her neck while she was in the house of her in-laws. She was initially taken to the Government hospital, Pattambi and was thereafter taken to Moulana Hospital, Perinthalmanna, where she succumbed to the injuries and died. On 27.02.1998, the Pattambi Police registered the First Information Report (FIR) on the statement given by one Saidalav[illegible]a,

that she had suspicion regarding the death of Suhara (hereinafter referred to as 'the deceased'). On 27.02.1998, postmortem was conducted on the body of the deceased by the Lecturer, Forensic Medicine and Assistant Police Surgeon, Medical College, Trichur. The local police then investigated into the case and came to the conclusion that it was a case of harassment and suicide and filed a charge-sheet against four members of the family of the in-laws of the deceased for offences under Sections 498-A and 306 of the Indian Penal Code (for short 'the IPC') but the accused persons were subsequently acquitted of the offences under Sections 498-A and 306 of the IPC and no appeal was filed by the State against the judgment of acquittal passed by the trial court. After two years of the incident, Hamza, the brother of the deceased, lodged a complaint before the Magistrate on 26.02.2000. In the complaint, Hamza stated that the deceased was married to Ishaq, who was employed abroad and the couple had two children, a boy Mohd. Faizal and a girl Fasila. Hamza alleged that in the beginning Ishaq was sending cash from abroad to his brother Muhammadkutty, but later on stopped sending cash to him and instead sent the cash to the deceased and as a result a quarrel started between the brothers of Ishaq and the deceased and on 26.02.1998 at 6.30 p.m. Hamsappa (Accused No.2 for short 'A-2'), brother of Ishaq, caught hold of the hands and legs of the deceased and Muhammadkutty (Accused No.1 for short 'A-1') killed her by stabbing her neck with a knife and stuffing clothes into her mouth. Ayisha (mother-in-law of the deceased), Asia (wife of Hamsappa), Pathummakutty (wife of Muhammadkutty) and Saju @ Sajitha (daughter of Muhammadkutty) (Accused No. 3 to Accused No.6 for short 'A-3 to A-6') changed the dress of the deceased and washed all the blood from the scene of occurrence and caused disappearance of the evidence of the murder. Accordingly, the aforesaid six accused persons committed offences punishable under Sections 302 and 201 read with Section 34 of the IPC. The complainant and his witnesses were examined by the Magistrate under Section 202 of the Code of Criminal

Procedure, 1973 (for short 'the Cr.P.C.'). The Magistrate took cognizance of the case and issued processes against all the six accused persons. After the accused persons entered appearance and were served with the copies of all the relevant documents, the Magistrate committed the case to the Sessions Court, Palakkad on 03.04.2001. The Sessions Court thereafter framed charges against the six accused persons under Sections 302 and 201 read with Section 34 of the IPC and conducted trial in Sessions Case No.447 of 2001.

3. At the trial, altogether six witnesses were examined and 17 documents were marked as exhibits on behalf of the prosecution. Mohd. Faizal, the son of the deceased, was examined as PW-1. He was about 7 years old on 26.02.1998 and he claimed to be a witness to the murder of the deceased. He deposed before the Court that on 26.02.1998 at 7.00 p.m when he, his mother and younger sister were lying in the bedroom for the purpose of sleeping, A-1 and A-2 came to the bedroom and A-1 took him to the sofa placed in the portico and when A-1 took his sister, the deceased cried and on hearing this, he looked into the room through a window and he saw A-2 catching hold of the hands of the deceased and A-1 pushing cloth into her mouth and stabbing on her neck with a knife. PW-1 further deposed that on seeing this he cried aloud and A-1 came out of the room, took him to the kitchen side and told him that he will also do the same thing to him if he divulged the incident to anybody. PW-1 further stated before the Court that there was light in the room at the time of the occurrence and he saw A-3 cleaning the bedroom and A-4 and A-6 changing the dress of his mother and his mother was thereafter taken to the hospital by family members and neighbours and later somebody telephoned to the house and intimated that his mother has expired. PW-1 also deposed that on the next day he slept in his maternal aunt's house and in the night he narrated the incident to his aunt and uncle (the complainant). He also stated that on the day of the burial of the deceased the police questioned him and he state s

mother was murdered and he also met the doctors of Trichur and told them that his mother was murdered. The complainant was also examined as PW-2, who inter alia stated before the Court that on the day next to the date of incident, PW-1 slept in his house with his aunt and told him and his other family members that the deceased was stabbed to death by A-1 with the help of A-2. The Lecturer in Forensic Medicine and Assistant Police Surgeon, Medical College Trichur, who conducted the autopsy on the dead body of the deceased on 27.02.1998 and issued a postmortem certificate Ex. P-12 was examined as PW-4 and he stated that the deceased died due to cut injuries on the neck and the injuries were more likely self inflicted, but the possibility of homicide could not be ruled out. In defence, the accused persons examined the Professor and Head of the Department of Forensic Medicine and Police Surgeon, Medical College, Trichur as DW-1, who had given a medico-legal opinion, which was marked as Ex. D-1. DW-1 has concluded in his opinion that the injuries on the neck of the deceased are consistent with the case of a suicide.

4. The trial court relied on the sole oral testimony of PW-1 and convicted A-1 and A-2 for the offence under Section 302 read with Section 34 of the IPC. The trial court, however, held that there was nothing to suggest that A-3 to A-6 shared the common intention of A-1 and A-2 to murder the deceased. The trial court further held that there was nothing also to show that A-3 to A-6 were aware that A-1 and A-2 had committed the murder and that they cleaned the room and changed the dress of the deceased with a view to cause disappearance of evidence to screen the offenders. The trial court accordingly acquitted A-3 to A-6 of the offences under Sections 302 and 201 read with Section 34 of the IPC. Aggrieved, A-1 and A-2 filed a Criminal Appeal No. 1187 of 2005 (B) before the High Court. The High Court held in the impugned judgment that the oral evidence of PW-1 did not inspire confidence and it was not safe to convict the accused persons on the sole testimony of the child witness. The High Court also held that the possibility

of suicide by the deceased could not be ruled out, rather the suicide by the deceased was more probable. The High Court held that in any event it is a case in which two views are possible, one in favour of the accused and the other against the accused and in such cases the view in favour of the accused must be preferred and therefore the accused persons were entitled to be acquitted. Accordingly, the High Court set aside the conviction and sentence under Section 302 read with Section 34 of the IPC imposed on A-1 and A-2 by the trial court and allowed the Criminal Appeal.

Contentions on behalf of the Appellants:

5. Mr. B.V. Deepak, learned counsel appearing for the appellant, Hamza, submitted that the High Court should not have disbelieved PW-1 merely because he was a child witness. He submitted that the Magistrate before committing the case for trial to the Sessions court had recorded the statement of PW-1 on 26.02.2000 only after being satisfied about his competency to testify. He cited the judgment of this Court in *Rameshwar* vs. *The State of Rajasthan* (1952 SCR 377) in which Vivian Bose, J. speaking for the Court has held that the rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge. He submitted that this Court has further held in the aforesaid case the tender years of the child, coupled with other circumstances appearing in the case, may render corroboration unnecessary but that is a question of fact in every case. He also cited *Suresh vs. State of U.P.* [(1981) 2 SCC 569] in which this Court relied on the evidence of a child witness to maintain the conviction of the accused servant for the murder of the mistress of the house and her son. He also relied on the recent decision in *Promode Dey* vs. *State of West Bengal* [(2012) 4 SCC 559] in which the testimony of a girl child was relie

maintain the conviction of the accused under Section 302 IPC.

6. Mr. Deepak submitted that the High Court was not right in coming to the conclusion that it was more probably a case of suicide than a case of homicide. He relied on the *post mortem* certificate Ex.P/12 to argue that the injuries mentioned therein could not have been self-inflicted. He referred to the findings of the trial court that the possibility of homicide should not be ruled out. He referred to *Modi's Medical Jurisprudence & Toxicology*, 22nd Edition at page 387 which states that homicidal wounds on the throat, when inflicted from the front by a right-handed person, are, as a rule horizontal and directed from right to left; but the reverse is the case if the assailant happens to be left-handed. He submitted that as the wounds on the throat of the deceased were horizontal, the death of the deceased was homicidal and not suicidal. He referred to the evidence of DW-1 who had admitted that homicide cannot be ruled out. He submitted that PW-4 has similarly deposed that the possibility of homicide could not have been ruled out. He submitted that thus the medical evidence was not in conflict with the ocular evidence of PW-1 and the ocular evidence of PW-1 can be relied upon to hold A-1 and A-2 guilty for the offence under Section 302, IPC read with Section 34, IPC.

7. Mr. Deepak submitted that the defence story that the deceased had committed suicide between 6.30 pm to 7.30 pm on 26.02.1998 is not at all credible and at any rate no evidence has been adduced on behalf of the defence that the deceased had earlier suicidal tendencies. He submitted that a young mother is not likely to commit suicide leaving behind two children to the mercy of her in-laws. He argued that in this case a miscarriage of justice has taken place from the acquittal of the guilty. He submitted that in view of the direct evidence of PW-1 that A-1 and A-2 had committed the murder of the deceased, the High Court ought to have maintained the conviction of A-1 and A-2 by the trial court.

8. Learned counsel appearing for the appellant-State in Criminal Appeal No.1378 of 2007, submitted that the consistent version of PW-1 that A-1 and A-2 had committed the murder of his mother should have been accepted by the High Court even though PW-1 was a child witness. He cited *State of Madhya Pradesh* vs. *Ramesh and Another* [(2011) 4 SCC 786] in which this Court has held that the deposition of a child witness may require corroboration but in case his deposition inspires confidence of the court and there is no embellishment or improvement therein the court may rely upon his evidence. He submitted that in the aforesaid case this Court has also held that only in case there is no evidence on record to show that the child has been tutored, the court can reject his statement partly or fully. He submitted that the High Court, therefore, should have come to a finding that PW-1 was tutored before it could reject the evidence of PW-1. He submitted that if the evidence of PW-1 is read, it will be clear that PW-1 has withstood a lengthy cross-examination and is a reliable witness and the High Court was not right in discarding his evidence as not reliable. He relied on the decision in *State of Tamil Nadu* vs. *P. Muniappan* [(1998) 1 SCC 515] in which the doctors took two views about the cause of death and the Court held that if the entire circumstantial evidence points to homicide only, and the medical evidence is not to the contrary, the death can be homicidal only. He submitted that in this case similarly as the evidence of PW-1 is clear that A-1 and A-2 had caused homicidal death of the deceased and the medical evidence of PW-4 and PW-1 did not rule out homicide, the High Court should have maintained the conviction of A-1 and A-2 under Section 302, IPC read with Section 34, IPC.

Contentions on behalf of the respondent-accused persons

9. Mr. Basant, senior counsel, appearing for the A-1 and A-2, on the other hand, submitted that the High Court was right in taking the view in the impugned judgm[illegible]e

to convict A-1 and A-2 on the sole uncorroborated testimony of PW-1, who was only 7 years old at the time of the incident. He submitted that Section 118 of the Indian Evidence Act, 1872 provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. He submitted that the requirements of Section 118 have not been satisfied in this case because before PW-1 who was of tender years was examined, the trial court has not put questions to him to find out his competence to testify as a witness. He submitted that the incident took place on 26.02.1998 and from 27.02.1998, PW-1 has remained in the custody of his maternal uncle, PW-2, who had animosity against all the accused persons. The result was that PW-1 implicated not only A-1 and A-2 but also A-3 to A-6 in the offences under Sections 201 and 302 read with Section 34 of the IPC. He submitted that there was no evidence that PW-1 revealed to any one on 26.02.1998 that A-1 and A-2 had committed the murder of the deceased and from the evidence of PW-1 it appears that for the first time PW-1 revealed to his maternal aunt, Sareena, that he saw A-1 and A-2 committing the murder of the deceased. He submitted that aunt Sareena, however, has not been examined by the prosecution before the Court to corroborate the testimony of PW-1 under Section 157 of the Indian Evidence Act, 1872, instead PW-2, who was the complainant and who had animosity against all the accused persons had been examined. He referred to Ex. P.10, a letter of the Superintendent of Police, Crime Branch, CID Palakkad, in which he has stated that during investigation by the Crime Branch, CID, PW-1 has stated that Muhammadkutty pushed cloth in the mouth of his mother and Hamsappa stabbed her with knife, but investigation disclosed that this was a tutored version concocted by his maternal grand parents and investigation revealed that Muhammadkutty and Hamsappa were not at all present in the scene at the time of occurrence.

10. Mr. Basant submitted that PW-1 has stated in his examination-in-chief that there is a window from the portico to the room where his mother was lying and through that window he looked inside and saw A-2 was catching hold of his mother's hands and A-1 pushed cloth into the mouth of his mother and stabbed the front of mother's neck with a knife and he has admitted in his cross-examination that he could not have seen the incident had the window not been opened and that is why he had opened the window, but prior to his evidence before court he has not stated anywhere that he saw the incident after opening the window. He submitted that he has also stated in his cross-examination that the window was used to be bolted before going to bed in the night. He submitted that on this inconsistent evidence of PW-1, it is extremely unsafe to convict the accused persons for the offence under Section 302 read with Section 34 of the IPC and for this reason the High Court has set aside the conviction of A-1 and A-2.

11. Mr. Basant submitted that from the evidence of PW-1 itself he can give three illustrations to show that PW-1: (i) He has stated in his evidence that he did not know about the marriage of Thatha 4 to 5 days prior to the incident, though Thatha was the daughter of his father's sister and the entire family had gone to attend the marriage; (ii) when the question was put to him whether A-2 accompanied when his mother was taken to the hospital, he stated that he does not remember, though, in fact, A-2 took the deceased to the hospital in his presence; (iii) when the question was put to him that there was a small reaper fixed from inside on account of which the window between the room in which the incident took place and the portico in which he was laid down because of which the window could not be opened, he stated that he does not remember.

12. Mr. Basant submitted that this is not a case where corroboration of sole testimony of PW-1 could not have been possible. He submitted that the police

not find A-1 and A-2 at the house when the incident took place and any neighbour could have been examined as to whether A-1 and A-2 were present at the house when the occurrence took place. He submitted that in the absence of any corroboration of the testimony of PW-1, it is not prudent for the Court to convict A-1 and A-2 on the sole uncorroborated testimony of PW-1. He relied on the decision of the *Privy Council* in *Mohamed Sugal Esa Mamasan Rer Alalah v. The King* [AIR (33) 1946 PC 3] and the decisions of this Court in *Rameshwar* vs. *The State of Rajasthan* (supra), *Panchhi and Others v. State of U.P.* [(1998) 7 SCC 177] and *State of U.P. v. Ashok Dixit and Another* [(2000) 3 SCC 70] for the proposition that as a rule of practical wisdom, evidence of a child witness must find adequate corroboration before it is relied on.

13. Finally, Mr. Basant submitted that this Court in exercise of its powers under Article 136 of the Constitution does not interfere with the judgment of acquittal of the High Court only because it has a different view on the evidence and it only interferes where the judgment of acquittal of the High Court is clearly unreasonable or perverse or manifestly illegal or grossly unjust. In support of this proposition, he cited the decisions of this Court in *State of Karnataka v. Amajappa and Others* [(2003) 9 SCC 468], *State of Uttar Pradesh v. Banne alias Baijnath and Others* [(2009) 4 SCC 271] and *State of Haryana v. Shakuntla and Others* [(2012) 5 SCC 171]. He submitted that since the view taken by the High Court in the impugned judgment is a possible view on the evidence, this Court should not interfere with the judgment of acquittal passed by the High Court.

Findings of the Court:

14. In this case, the High Court has acquitted A-1 and A-2 of the offence under Section 302 read with Section 34 of the IPC after considering the evidence on record. In *State of Karnataka v. Amajappa and Others*, *State of Uttar Pradesh*

v. Banne alias Baijnath and Others and *State of Haryana v. Shakuntla and Others* (supra), this Court has held that if the view taken by the High Court is reasonable or a possible one on the evidence on record, this Court will not reverse the judgment of acquittal of the High Court only on the ground that it had a different view of the evidence on record. Hence, the scope of this appeal under Article 136 of the Constitution is limited to finding out whether the view taken by the High Court that on the evidence on record, the conviction of A-1 and A-2 for the offence under Section 302 read with Section 34 of the IPC was not sustainable was a perverse or unreasonable view so as to call for interference by this Court under Article 136 of the Constitution.

15. The evidence of PW-1 on which the trial court relied on to convict A-1 and A-2 is quoted hereinbelow:

> "On the evening at about 7 PM after having food myself along with my mother and younger sister were laying awake in the room intermediate to the portico and kitchen. By the time A-1 and A-2 came to the room. We were awake. A-1 took me and taken to the portico and laid me on the sofa in the portico. A-1 took my sister and entrusted to A-5. By that time A-5 was standing outside the room near the door. Mother made hue and cry when younger sister is taken away. There is a window between the portico and the room in which we were sleeping. I peep in to the room through the window. I could see that A-2 was with holding my mother's knees. A-2 sat on the cot in which mother was sleeping. A-1 gagged cloth in the mouth of the mother. With a knife A-1 stabbed on the neck of the mother. Blood oozed from the wound. On seeing that I cried aloud. A-1 came out of the room and took me towards the kitchen. A-1 threatened me that if you divulge this to anybody you too would be stabbed to death similarly. From there I returned to Thazvaram (portico). I then saw that A-4 and A-6 were changing [illegible] of

mother. By that time neighbors came there. Relatives and neighbors together took my mother to the hospital. I saw A-3 cleaning the room where mother slept. When a phone call received in the house of A-1, I came to know that mother is expired."

Thus, PW-1 has deposed that he was taken by A-1 from the room in which he, his younger sister and the deceased were sleeping to the portico and he peeped into the room through the window and saw that A-2 was holding his mother's knees and A-1 gagged cloth in the mouth of his mother and stabbed on the neck of his mother with a knife and blood oozed from the wound. The High Court noticed that PW-1 had said that if the window was not open he could not have seen the occurrence but PW-1 has admitted in his evidence that when they slept at night they used to close and bolt the doors and windows. The High Court further found that PW-1 had himself stated that prior to his deposition in Court, he had never told that he had seen the incident after opening the window panel. The High Court, therefore, did not accept this evidence of PW-1 to be true.

16. The High Court also found that PW-1 was only aged seven years on the date of the incident and he was examined in Court after lapse of seven years and after the incident he was under the care and guardianship of his mother's parents and the possibility of the parents of the mother tutoring PW-1 could not be ruled out. Even though the High Court has not recorded any clear finding that PW-1 had been tutored, we find that PW-1 has in fact avoided to answer some questions during cross-examination, which he could have easily answered. In cross-examination, questions were put to PW-1 whether he knew the name of the father's sister and whether that sister has a daughter by the name Thatha and whether Thatha's marriage took place 4-5 days prior to the incident and whether he knew that all the family members had gone for the marriage and PW-1 answered "*I don't know who is Thatha and which marriage is mentioned by you*." Again in cross-examination, questions

were put to him on whether the window through which he saw the incident is permanently fastened by using reapers and PW-1 answered "*I do not remember*." In cross-examination, a question was put to PW-1 whether A-2 accompanied while his mother was taken to the hospital and he answered "*I do not remember*". It, thus, appears from the evidence of PW-1 that he was not revealing the whole truth and avoided to answer uncomfortable questions which would have prejudiced the prosecution case. We, therefore, find that PW-1 was tutored and hence as per the decision of this Court in *State of Madhya Pradesh* vs. *Ramesh and Another* (supra) cited by learned counsel for the State, the evidence of PW-1 could not be relied on without adequate corroboration.

17. Under Section 157 of the Indian Evidence Act, the testimony of PW-1 could be corroborated by his statements about the time of when the incident took place. PW-1 has stated:

"Police came on that night itself. Police has not asked anything to me, I did not told anything about the incident. Next day evening mother's body buried. Thereafter I went to mother's house. On that night I slept there. I slept there with elder aunt Sareena. On that night I cried remembering mother's memory, I told the whole incident witnessed to aunty. My maternal grand mother Nabeesa and my uncle Hamzaka (mother's brother) then came there. They also heard what I said."

From the aforesaid evidence of PW-1 it appears that PW-1 did not tell anything about the incident to the police on the date of the incident, though the police had come to the house where the incident had taken place. Next day evening after her mother's body was buried, he went to the mother's house and slept there with the elder aunt Sareena and on that night he cried remembering his mother and told the whole incident he witnessed to his aunt Sareena. Sareena has not been examined as a witness to corroborate t[illegible]l.

PW-1 has also said that his maternal grandmother, Nabeesa and his uncle Hamza then came there and they also heard what he said. Maternal grandmother of PW-1, Nabeesa has also not been examined to corroborate the testimony of PW-1. Only Hamza has been examined as PW-2 who has said that his mother and wife Sareena were told by PW-1 that his mother was murdered by A-1 by stabbing while A-2 held her. PW-2, however, has said that the husband of the deceased used to send money in the name of A-1 and A-2 and the deceased informed her husband that she has not received money and thereafter the husband of the deceased sent money in the name of the deceased and he had learnt all this from the deceased. From the evidence of PW-2 it is very clear that PW-2 had developed animosity towards A-1 and A-2 on account of what the deceased had told him about A-1 and A-2. Moreover, he has not been able to explain in cross-examination as to why when the incident took place on 26.02.1998, he filed the complaint before the Magistrate two years after on 26.02.2000 if the police had treated the case as one of suicide and not of homicide. Hence, even though the evidence of PW-2 corroborates the testimony of PW-1 his evidence cannot be relied on to lend assurance that PW-1 was giving a true version of the incident. From the deposition of PW-3 and Ex. P-11 (the scene plan of the house in which the incident took place), it appears that there were two windows in the room in which the incident took place, one window opening towards the portico and the other window towards the road. Hence, even if the window opening towards the road was closed, people on the road or the neighbours around the house must have come to know about the incident, but none among the people from the road or from amongst the neighbours around the house have been examined on behalf of the prosecution to corroborate the evidence of PW-1. In the absence of any corroboration of the oral testimony of PW-1, the High Court was right in taking the view that it is unsafe to convict A-1 and A-2 only on the evidence of PW-1, who was a child witness and whose evidence did not inspire any confidence.

18. Learned counsel for the State is right that the consistent version of PW-1 is that A-1 and A-2 have committed murder of the deceased. But the High Court has rightly relied on the observations of this Court in *Suresh* vs. *State of U.P.* (supra) that children mix up what they see and what they like to imagine to have seen. Glanville Williams says in his book '*The Proof of Guilt'*, Third Edition, published by Stevens & Sons:

> "Children are suggestible and sometimes given to living in a world of make-believe. They are egocentric, and only slowly learn the duty of speaking the truth."

Hence, the proposition laid down by Courts that as a rule of practical wisdom, evidence of child witness must find adequate corroboration [*Panchhi* vs. *State of U.P.* (supra)].

19. In *Suresh* vs. *State of U.P.* (supra) cited by Mr. Deepak, the evidence of child witness Sunil was corroborated by the conduct of the accused and from pattern of crime committed by him and hence this Court maintained the conviction of the accused servant for the murder of the mistress of the house Geeta and her son Anil on the basis of evidence of a child witness, Sunil, as corroborated by other evidence. This Court specifically observed that if the case was to rest solely on Sunil's uncorroborated testimony, the Court might have found it difficult to sustain the conviction of the accused, but there was unimpeachable and most eloquent materials on record which lent an unfailing assurance that Sunil is a witness of truth and not a witness of imagination as most children of that age generally are. Similarly, in *Promode Dey* vs. *State of West Bengal* (supra) cited by Mr. Deepak, the Court found that soon after the incident on 23.02.2002, the girl child had told her grand mother and her father that it was the accused who had killed the deceased and her grandmother and father had deposed before the Court in their evidence that they had been told by this child witness that the accused had killed the deceased with a *dao*. The evidence of this child witness was also corroborated by the fact that the blood stained *dao* [illegible]e

very day of the incident from a jungle by the side of the house of the accused. The evidence of the girl child that the accused had killed her mother by striking on her head, back, fingers and throat with a *dao* was thus believed by the Court because her evidence was adequately corroborated. In this case, as we have found, the evidence of PW-1 is not adequately corroborated.

20. Rather, as has been held by the High Court in the impugned judgment, the evidence of the medical experts cast a serious doubt on the reliability of the evidence of PW-1. PW-4, Lecturer in Forensic Medicine and Assistant Police Surgeon, Medical College Trichur, who conducted the *postmortem* examination of the body of the deceased and issued the *postmortem* certificate (Ex.P-12) has said "*I cannot definitely say whether it is a case of suicide or homicide*." DW-1, Professor and Head of the Department of Forensic Medicine and Police Surgeon, Medical College, Trichur, has also opined in his medico-legal opinion Ex. D-1 "Under the circumstances, as per the medical evidence, the most likely manner of causation of injuries in this case is self infliction except for the fact that there is always a chance of any mechanical injury to be sustainable by homicidal manner." Thus, the aforesaid opinions of the two medical experts also do not lend assurance to the prosecution story that the death of the deceased was only homicidal. The opinion at page 387 of Modi's Medical Jurisprudence & Toxicology, Twenty-Second Edition, to which reference was made by Mr. Deepak, learned counsel for the appellant-Hamza, does not materially conflict with the expert opinions of PW-4 and DW-1. On the evidence of PW-1 read with the opinions of PW-4 and DW-1, the High Court could not have held that the prosecution has been able to prove beyond reasonable doubt that A-1 killed the deceased by stabbing her on the neck with the help of A-2. In *State of T.N. v. P. Muniappan* (supra) cited by learned counsel for the State, the High Court had observed that when a doctor expresses two views, the one that is favourable to the accused might be taken

into account and this Court held that as a general proposition it may be true, but medical evidence could not be considered in isolation and must be taken into conjunction with all the circumstantial evidence on record. In that case, this Court found that seven circumstances led to only one conclusion that it is the respondent who was guilty and accordingly held that as the entire circumstantial evidence points to homicide only and the medical evidence is not to the contrary, the respondent was guilty of the offence under Section 302 IPC and set aside the acquittal of the respondent by the High Court and restored the judgment of conviction of the trial court. In this case, the police itself had investigated and filed a charge-sheet under Sections 498-A and 306 of the IPC against four members of the in-laws of the family of the deceased and found that it is a case of suicide. Thus, this is not a case where the only conclusion that could be drawn considering the entire evidence is that the death was homicidal and not suicidal. The decision of this Court in *State of Tamil Nadu v. P. Muniappan* (supra), therefore, has no application to the present case.

21. We, therefore, do not find that the view taken by the High Court that A-1 and A-2 were entitled to acquittal is perverse or unreasonable on the evidence on record so as to call for our interference under Article 136 of the Constitution and we accordingly dismiss the appeals.

K.K.T. Appeals dismissed.

HARIVADAN BABUBHAI PATEL
v.
STATE OF GUJARAT
(Criminal Appeal No. 1044 of 2010)

JULY 01, 2013

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

Penal Code, 1860:

ss. 342, 346, 302, 120B and 201r/w. s. 34 - Prosecution under - Of 4 accused persons - Circumstantial evidence - Conviction of two accused and acquittal of two accused by trial court - High Court further acquitted another accused and convicted the appellant-accused - On appeal, held: The evidence on record are cogent, credible and meet the test of circumstantial evidence - Hence, the appellant-accused rightly convicted - However, since no other accused has been convicted, the appellant-accused could not have been convicted u/s. 120B - Conviction of the appellant confirmed except u/s. 120B.

s. 120B - Conviction of one accused, while other accused persons acquitted - Held: Conviction u/s. 120 B cannot be sustained when the other accused persons are acquitted.

Evidence - Circumstantial evidence - Failure of accused to give any explanation or giving false answer u/s. 313 Cr.P.C, can be counted as providing a missing link for building chain of circumstances.

Criminal Trial - Non-examination of material witness - Effect of - Held: Non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record.

The appellant-accused (A-1), alongwith 3 other accused was prosecuted for the offences punishable u/ss. 342, 346, 302, 120B and 201 r/w. s. 34 IPC. Trial court acquitted A-3 and A-4 and convicted A-1 and A-2 for all the charges. In appeal, High Court acquitted A-2, but sustained the conviction of the appellant. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1. The present case does not reveal that the absence of spontaneity in the lodgment of the FIR has created a coloured version. On the contrary, from the other circumstances which lend support to the prosecution story, it is difficult to disbelieve and discard the prosecution case solely on the ground that the FIR was lodged on 25.1.2006 though the deceased was taken by the accused persons some time on 23.1.2006. The explanation offered pertaining to the search of the deceased by the informant has been given credence to by the trial Judge as well as by the High Court and, adjudging the entire scenario of the prosecution case, the same deserves acceptation. [Para 12] [899-G; 900-A-B]

State of H.P. vs. Gian Chand **(2001) 6 SCC 71: 2001 (3) SCR 247;** *Ramdas and Ors. vs. State of Maharashtra* **(2007) 2 SCC 170;** *Kilakkatha Parambath Sasi and Ors. vs. State of Kerala* **AIR 2011 SC 1064: 2011 (2) SCR 540;** *Kanhaiya Lal and Ors. vs. State of Rajasthan* **2013 (6) SCALE 242 - relied on.**

2. There can be no shadow of doubt that the confession part is inadmissible in evidence. It is also not in dispute that the panch witnesses have turned hostile. But the factum of information related to the discovery of the dead body and other articles and the said information was within the special knowledge of the present appellant. Hence, the doctrine [illegible]y

subsequent events is attracted and, therefore, it can be held that recovery or discovery in the present case is a relevant fact or material which can be relied upon and has been correctly relied upon. [Paras 13 and 16] [900-D-E; 902-A]

A.N. Venkatesh and Anr. vs. State of Karnataka **(2005) 7 SCC 714;** *Prakash Chand vs. State (Delhi Admin.)* **AIR 1979 SC 400: 1979 (2) SCR 330;** *State of Maharashtra vs. Damu S/o Gopinath Shinde and Ors.* **(2000) 6 SCC 269: 2000 (3) SCR 880;** *State of Maharashtra vs. Suresh* **(2000) 1 SCC 471: 1999 (5) Suppl. SCR 215;** *State of Punjab vs. Gurnam Kaur and Ors.* **(2009) 11 SCC 225: 2009 (3) SCR 1195;** *Aftab Ahmad Anasari vs. State of Uttaranchal* **(2010) 2 SCC 583: 2010 (1) SCR 1027;** *Bhagwan Dass vs. State (NCT) of Delhi* **AIR 2011 SC 1863: 2011 (6) SCR 330;** *Manu Sharma vs. State* **AIR 2010 SC 2352: 2010 (4) SCR 103;** *Rumi Bora Dutta vs. State of Assam* **2013 (7) SCALE 535 - relied on.**

3. It is evident from the material on record that the deceased was taken away in a Maruti car. The appellant has been identified by PW-13, and PW-15, and their evidence remains totally embedded in all material particulars. It has been proven by the prosecution that the Maruti car belonged to the appellant. There has been no explanation offered by the accused in this regard, though such incriminating materials were put to him. It is also evident from the testimony of PW-16, the doctor who had conducted the autopsy on 28.1.2006 about 10.00 a.m., that the injuries found on the dead body were approximately four days old. Thus, the plea of long gap between the last seen and the time of death melts into insignificance inasmuch as the time the deceased was seen in the company of A-1 and the time of death was not long and the said fact has been duly established by the medical evidence and there is no reason to discredit the same. From the testimony of PW-14, wife of the deceased

also, it is evincible that she had talked on telephone to both the accused persons. Thus, the circumstance pertaining to the theory of last seen deserves acceptance. [Para 17] [902-D-H; 903-A]

4.1. Non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution. The court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined. [Para 18] [903-D-F]

4.2. In the present case, it was A-1 who had announced that he was taking the deceased to the house of 'G'. On a search being conducted, nothing has been found from the house of 'G'. There has been no cross-examination of the Investigating Officer about the non-examination of 'G'. On the contrary, it was A-1 who had led to the discovery of the dead body and other articles. Thus, when the other evidence on record are cogent, credible and meet the test of circumstantial evidence, there is no justification to come to hold that the prosecution has deliberately withheld a witness that creates a concavity in the concept of fair trial. [Para 21] [905-B-D]

State of H.P. vs. Gian Chand **(2001) 6 SCC 71: 2001 (3) SCR 247;** *Takhaji Hiraji vs. Thakore k* *g*

and Ors. **(2001) 6 SCC 145;** *Dahari and Ors. vs. State of Uttar Pradesh* **(2012) 10 SCC 256: 2012 (8) SCR 1219;** *Sharad Birdhichand Sarda vs. State of Mararashtra* **(1984) 4 SCC 116: 1985 (1) SCR 88;** *State vs. Saravanan* **(2008) 17 SCC 587: 2008 (14) SCR 405;** *Sunil Kumar Sambhudayal Gupta vs. State of Maharashtra* **(2010) 13 SCC 657: 2010 (15) SCR 452;** *Jagroop Singh vs. State of Punjab* **(2012) 11 SCC 768 - relied on.**

5. Though all the incriminating circumstances which point to the guilt of the accused had been put to him, yet he chose not to give any explanation under Section 313 CrPC except choosing the mode of denial. It is well settled in law that when the attention of the accused is drawn to the said circumstances that inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for building the chain of circumstances. [Para 22] [905-E-F]

Maharashtra vs. Suresh **(2000) 1 SCC 471: 1999 (5) Suppl. SCR 215 - relied on.**

6. The appellant-accused cannot be acquitted on parity with A-2. The High Court has taken note of the fact that A-2 was not identified by any one in the test identification parade. It has also noticed number of material contradictions and omissions and, accordingly, acquitted A-2. So far as the appellant is concerned, all the circumstances lead towards his guilt. [Para 23] [906-B-C]

7. So far as conspiracy under Section 120B IPC is concerned, the High Court erred in not recording an order of acquittal under Section 120B IPC as no other accused had been found guilty. The conviction under Section 120B IPC cannot be sustained when the other accused persons have been acquitted, for an offence of conspiracy cannot survive if there is acquittal of the other

alleged co-conspirators. Thus, the conviction of the appellant under Section 120B is set aside. [Para 23] [906-D-E]

Fakhruddin vs. The State of Madhya Pradesh **AIR 1967 SC 1326 - relied on.**

Case Law Reference:

2001 (3) SCR 247	relied on	Paras 9, 18
(2007) 2 SCC 170	relied on	Para 10
2011 (2) SCR 540	relied on	Para 11
2013 (6) SCALE 242	relied on	Para 11
(2005) 7 SCC 714	relied on	Para 13
1979 (2) SCR 330	relied on	Para 13
2000 (3) SCR 880	relied on	Para 14
1999 (5) Suppl. SCR 215	relied on	Para 15
2009 (3) SCR 1195	relied on	Para 15
2010 (1) SCR 1027	relied on	Para 15
2011 (6) SCR 330	relied on	Para 15
2010 (4) SCR 103	relied on	Para 15
2013 (7) SCALE 535	relied on	Para 15
(2001) 6 SCC 145	relied on	Para 19
2012 (8) SCR 1219	relied on	Para 20
1985 (1) SCR 88	relied on	Para 21
2008 (14) SCR 405	relied on	Para 21
2010 (15) SCR 452	relied on	Para 21
(2012) 11 SCC 768	relied on	Para 21
1999 (5) Suppl. SCR 215	relied on	Para 22

AIR 1967 SC 1326 relied on Para 23

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1044 of 2010.

From the Judgment and Order dated 20.04.2009 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 860 of 2007.

Rauf Rahim, Abhijit P. Medh, Brajesh Kumar for the Appellant.

Hemantika Wahi for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The appellant, A-1, along with Dipakbhai Zinabhai Patel, A-2, Raghubhai Chaganbhai Patel, A-3, and Babubhai Khushalbhai Patel, A-4, faced trial in Sessions Case No. 28 of 2006 in the Court of the learned Sessions Judge, Valsad, for the offences punishable under Sections 342, 346, 302, 120B and 201 read with Section 34 of the Indian Penal Code (for short "IPC"). The learned trial Judge acquitted A-3 and A-4 as he found them innocent and convicted A-1 and A-2 for all the offences and imposed rigorous imprisonment for life and fine of Rs.1,000, in default of payment of fine, to undergo further imprisonment for one month under Section 302 and separate sentences for the other offences with the stipulation that all the sentences shall run concurrently.

2. Grieved by the aforesaid conviction and sentence, the accused-appellant and A-2 preferred Criminal Appeal No. 860 of 2007 and the High Court, by the impugned judgment dated 20th April, 2009, acquitted A-2 but sustained the conviction of the appellant for all the offences. Hence, the present appeal by the accused-appellant, A-1.

3. Filtering the unnecessary details, the prosecution case is that on 23.1.2006, deceased, Ashokbhai Nanubhai,

accompanied by his brother-in-law, Kantibhai Manilal Patel, PW-13, had gone to Udwada R.S. Zanda Chowk on his scooter and went to a tea stall where the deceased was engaged in a conversation with one Durlabhbhai Kikubhai Bhandari,PW-15. Durlabhbhai took the deceased near the railway crossing where 3-4 persons were waiting in a Maruti car. As the prosecution story further gets unfurled, the deceased had discussion with them and, thereafter, those persons informed that they would take the deceased to the house of Gulia at Valsad and, accordingly, they took him in the Maruti car bearing No. GJ-15-K-9263. They had provided one mobile number stating that if there would be any delay in the return of the deceased, they could be contacted on that mobile number. The brother-in-law of the deceased supplied that mobile number to his sister Madhuben, PW-14, and went to Daman for his work and came back in the evening about 5.00 p.m. Thereafter, he enquired from his sister whether she had talked with the deceased on the given number or not and he was informed by her that the mobile phone was picked up by different persons who spoke differently and, at a later stage, it was switched off. Someone speaking on the mobile had also enquired from Madhuben whether she had gone to the police station. Coming to know about the situation, Kantibhai made enquiry and searched about the deceased for two days and when the deceased did not return, he lodged a complaint at Pardi Police Station on 25.1.2006 which was registered as C.R. No. 1-12/2006. After the criminal law was set in motion, the investigating agency examined the witnesses and after coming to know about the place where the accused persons had hidden themselves, the Investigating Officer arrested them and they confessed before the police that they had wrongfully confined the deceased and assaulted him. They also confessed that they had pressurized the deceased for returning the money as the money was paid to the passport agent, namely, Bharatbhai, who was introduced by the deceased, in the presence of one Ashokbhai alias Amratbhai. They also stated that they had assaulted the deceased on 23.1.2006 and when the

to the injuries, they buried the dead body in an agricultural farm. At the instance of the accused, the dead body of the deceased was taken out in the presence of the panch witnesses. Discovery panchnama was prepared in presence of the Executive Magistrate. After carrying out the seizure of footwear, clothes and jute old blanket, samples of the same were sent for forensic examination and thereafter, the dead body, after being identified by wife Madhuben, was initially sent to the Dungri Primary Health Centre for post mortem, but as the Medical Officer opined that it was to be done by a forensic expert, it was sent to Surat Civil Hospital Forensic Department. The identification of the accused persons was carried out by the Executive Magistrate. The Maruti car which was used for the offence was taken into possession. The investigating agency examined number of witnesses and, after completing the investigation, placed the charge-sheet before the competent court for all the offences in respect of A-1 to A-3 and as far as A-4 was concerned, he was charge-sheeted for the offence punishable under Section 201 IPC.

4. The accused persons pleaded innocence and false implication and claimed to be tried.

5. The prosecution, in support of its case, examined 19 witnesses and got number of documents including the FIR, discovery panchnama, panchnama of the seized articles, the FSL report and the serology report and panchnama of the test identification parade, exhibited. In the statement under Section 313 CrPC, the accused persons made a bald denial of every aspect and did not offer any explanation and chose not to adduce any evidence.

6. The learned trial Judge, on the basis of the material brought on record, found A-1 and A-2 guilty of all the offences and the High Court affirmed the conviction and sentence in respect of A-1 only as stated hereinbefore.

7. We have heard Mr. Rauf Rahim, learned counsel for the appellant and Ms. Hemantika Wahi, learned counsel for the respondent-State.

8. It is the undisputed position that the death was homicidal in nature and the case of the prosecution rests on the circumstantial evidence. Learned counsel for the appellant has assiduously endeavoured to point out certain loopholes and contended that because of the said dents, the prosecution version deserves to be discarded. Per contra, learned counsel for the respondent would support the analysis made in the judgment of the High Court and stand for its sustenance.

9. We shall deal with the challenges and the stance in oppugnation one by one. The first ground of attack is that there is delay in lodging of the FIR and in the absence of explanation, the case of the prosecution should be thrown overboard. On a perusal of the judgments, it is noticeable that the said aspect has been dealt with in great detail and the plea of delay has been negatived. It is urged before us that though the occurrence, as alleged, had taken place on 23.1.2006, yet the FIR was lodged only on 25.1.2006 indicating that efforts were being made to search for the deceased and the said effort is based on some kind of surmises which do not inspire confidence. On a close scrutiny, it is evident that as per the FIR and the evidence of the informant, PW-13, and Madhuben, PW-14, they had searched for the deceased and realizing that it was an exercise in futility, they went to the police station. It has been deposed by them that they had never apprehended that the deceased would be done to death though there was a previous quarrel pertaining to demand of money from the deceased as he had introduced the passport agent to A-1 who had paid more than rupees one lakh to obtain the necessary documents to go to United States of America. It has been clearly proven that the informant was engaged in search and he had not apprehended that the life spark of the deceased would be extinct. The issue is whether s

to be believed. In this context, we may refer with profit to the authority in *State of H.P. v. Gian Chand*[1] wherein a three-Judge Bench has opined that the delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay. If the explanation offered is satisfactory and there is no possibility of embellishment, the delay should not be treated as fatal to the case of the prosecution.

10. In *Ramdas and others v. State of Maharashtra*[2], it has been ruled that when an FIR is lodged belatedly, it is a relevant fact of which the court must take notice of, but the said fact has to be considered in the light of other facts and circumstances of the case. It is obligatory on the part of the court to consider whether the delay in lodging the report adversely affects the case of the prosecution and it would depend upon the matter of appreciation of evidence in totality.

11. In *Kilakkatha Parambath Sasi and others v. State of Kerala*[3], it has been laid down that when an FIR has been lodged in a belated manner, inference can rightly follow that the prosecution story may not be true but equally on the other side, if it is found that there is no delay in the recording of the FIR, it does not mean that the prosecution story stands immeasurably strengthened. Similar view has also been expressed in *Kanhaiya Lal and others v. State of Rajasthan*[4].

12. Scrutinized on the anvil of the aforesaid enunciation of law, we are disposed to think that there had been no embellishment in the FIR and, in fact, there could not have been any possibility of embellishment. As we find, the case at hand does not reveal that the absence of spontaneity in the lodgment of the FIR has created a coloured version. On the contrary, from

1. (2001) 6 SCC 71.
2. (2007) SCC 170.
3. AIR 2011 SC 1064.
4. 2013 (6) SCALE 242.

the other circumstances which lend support to the prosecution story, it is difficult to disbelieve and discard the prosecution case solely on the ground that the FIR was lodged on 25.1.2006 though the deceased was taken by the accused persons some time on 23.1.2006. The explanation offered pertaining to the search of the deceased by the informant has been given credence to by the learned trial Judge as well as by the High Court and, in our considered opinion, adjudging the entire scenario of the prosecution case, the same deserves acceptation. Hence, the said submission is sans substance.

13. The next limb of attack relates to the confessions made by the accused persons and the issue of leading to discovery of articles. It is submitted that the confession part is absolutely inadmissible and that apart, when the panch witnesses had not supported the panchnama, the recovery or discovery of the seized articles cannot be utilized against the appellant. There can be no shadow of doubt that the confession part is inadmissible in evidence. It is also not in dispute that the panch witnesses have turned hostile but the facts remains that the place from where the dead body of the deceased and other items were recovered was within the special knowledge of the appellant. In this context, we may usefully refer to *A.N. Venkatesh and another v. State of Karnataka*[5] wherein it has been ruled that by virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer the place where the dead body of the kidnapped person was found would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act or not. In the said decision, reliance was placed on the principle laid down in *Prakash Chand v. State*

5. (2005) 7 SCC 714.

(Delhi Admin.)[6]. It is worth noting that in the said case, there was material on record that the accused had taken the Investigating Officer to the spot and pointed out the place where the dead body was buried and this Court treated the same as admissible piece of evidence under Section 8 as the conduct of the accused.

14. In *State of Maharashtra v. Damu S/o Gopinath Shinde and others*[7], it has been held as follows: -

> "It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in *Pulukuri Kottaya v. Emperor*[8] is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

15. Same principle has been laid down in *State of Maharashtra v. Suresh*[9], *State of Punjab v. Gurnam Kaur and others*[10], *Aftab Ahmad Anasari v. State of Uttaranchal*[11], *Bhagwan Dass v. State (NCT) of Delhi*[12], *Manu Sharma v. State*[13] and *Rumi Bora Dutta v. State of Assam*[14].

16. In the case at hand, the factum of information related to the discovery of the dead body and other articles and the said information was within the special knowledge of the

6. AIR 1979 SC 400.
7. (2000) 6 SC 269.
8. AIR 1947 PC 67.
9. (2000) 1 SCC 471.
10. (2009) 11 SCC 225.
11. (2010) 2 SCC 583.
12. AIR 2011 SC 1863.
13. AIR 2010 SC 2352.
14. Crl. A. 737 of 2006 decided on 24.05.2013.

present appellant. Hence, the doctrine of confirmation by subsequent events is attracted and, therefore, we have no hesitation in holding that recovery or discovery in the case at hand is a relevant fact or material which can be relied upon and has been correctly relied upon.

17. The next circumstance that has been seriously criticized by Mr. Rauf Rahim, learned counsel for the appellant, pertains to the last seen theory. It is submitted by him that as per the testimony of the informant, the appellant along with others had taken the deceased in a Maruti car, but there is no material evidence to suggest that the accused was in the company of the deceased for two days. The learned counsel would further submit that the last seen theory faces a hazard because of the time gap and, hence, should be totally discarded. It is evident from the material on record that the deceased was taken away from Zanda Chowk in a Maruti car. The appellant has been identified by Kantibhai, PW-13, and Durlabhbhai, PW-15, and their evidence remains totally embedded in all material particulars. It has been proven by the prosecution that the Maruti Zen car belongs to the appellant. There has been no explanation offered by the accused in this regard, though such incriminating materials were put to him. It is also worth noting here that from the testimony of Dr. Pandav Vinodchandra Prajapati, PW-16, who had conducted the autopsy on 28.1.2006 about 10.00 a.m., that the injuries found on the dead body were approximately four days old. Thus, the argument that there is long gap between the last seen and the time of death melts into insignificance inasmuch as the time the deceased was seen in the company of A-1 and the time of death is not long and the said fact has been duly established by the medical evidence and we see no reason to discredit the same. It is apt to note here that A-1 had said that they were taking the deceased to the house of Gulia but during investigation, nothing was found in the house of Gulia. On the contrary, from the testimony of Madhuben, PW-14, wife of the deceased, it is evincible that she had t o

both the accused persons. Thus, the circumstance pertaining to the theory of last seen deserves acceptance.

18. The next plank of submission is that Gulia to whose house the deceased was taken to has not been examined by the prosecution and non-examination of such a material witness makes the whole case of the prosecution unacceptable. The learned trial Judge, dealing with the said contention, has opined that during the test identification parade, Shaikh Gulamhusssain had not identified the accused persons and that is the reason the prosecution was of the view that the said witness would not support the case of the complainant and, accordingly, chose not to examine him. In *State of H.P. v. Gian Chand* (supra), it has been opined that non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution. The three-Judge Bench further proceeded to observe that the court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined.

19. In *Takhaji Hiraji v. Thakore Kubersing Chamansing and others*[15], the Court has opined thus: -

> "It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the

15. (2001) 6 SCC 145.

> prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself - whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."

20. In *Dahari and others v. State of Uttar Pradesh*[16], while discussing about the non-examination of material witness, the Court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the medical evidence and thetestimony of other reliable witnesses, no adverse inference could be drawn against the prosecution. Be it noted, the Court also took note of the fact that during the cross-examination of the Investigating Officer, none of the accused persons had

16. (2012) 10 SCC 256.

voiced their concerns or raised any apprehension regarding the non-examination of the material witness therein.

21. In the case at hand, it was A-1 who had announced that he was taking the deceased to the house of Gulia. On a search being conducted, nothing has been found from the house of Gulia. There has been no cross-examination of the Investigating Officer about the non-examination of Gulia. On the contrary, it was A-1 who had led to the discovery of the dead body and other articles. Thus, when the other evidence on record are cogent, credible and meet the test of circumstantial evidence laid down in *Sharad Birdhichand Sarda v. State of Mararashtra*[17] *State v. Saravanan*[18]*, Sunil Kumar Sambhudayal Gupta v. State of Maharashtra*[19] and further reiterated in *Jagroop Singh v. State of Punjab*[20]*,* there is no justification to come to hold that the prosecution has deliberately withheld a witness that creates a concavity in the concept of fair trial.

22. Another facet is required to be addressed to. Though all the incriminating circumstances which point to the guilt of the accused had been put to him, yet he chose not to give any explanation under Section 313 CrPC except choosing the mode of denial. It is well settled in law that when the attention of the accused is drawn to the said circumstances that inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for building the chain of circumstances. (See *State of Maharashtra v. Suresh*[21]). In the case at hand, though number of circumstances were put to the accused, yet he has made a bald denial and did not offer any

17. (1984) 4 SCC 116.

18. (2008) 17 SCC 587.

19. (2010) 13 SCC 657.

20. (2012) 11 SCC 768.

21. (2000) 1 SCC 471.

explanation whatsoever. Thus, it is also a circumstance that goes against him.

23. We will be failing in our duty if we do not note another submission of the learned counsel for the appellant. It is urged by him that A-2 stood on the same footing as the appellant and hence, the High Court should have acquitted him. It is also canvassed by him that A-2 has been acquitted of the charge of criminal conspiracy and, therefore, the appellant deserves to be acquitted. The High Court has taken note of the fact that A-2 was not identified by any one in the test identification parade. It has also noticed number of material contradictions and omissions and, accordingly, acquitted A-2. As far as the appellant is concerned, all the circumstances lead towards his guilt. As far as conspiracy under Section 120B is concerned, we are inclined to think that the High Court erred in not recording an order of acquittal under Section 120B as no other accused had been found guilty. The conviction under Section 120B cannot be sustained when the other accused persons have been acquitted, for an offence of conspiracy cannot survive if there is acquittal of the other alleged co-conspirators. It has been so laid down in *Fakhruddin v. The State of Madhya Pradesh*[22]. Thus, the conviction of the appellant under Section 120B is set aside.

24. Resultantly, the appeal fails except for the acquittal for the offence of conspiracy. However, as we have sustained the conviction under Section 302 IPC and all the sentences are directed to be concurrent, the acquittal for the offence punishable under Section 120B would not help the appellant. Therefore, the appeal stands dismissed, but the conviction and sentence under Section 120B IPC is set aside. The other convictions and sentences will stand.

K.K.T. Appeal partly allowed.

22. AIR 1967 SC 1326.

MAJENDRAN LANGESWARAN
v.
STATE (NCT OF DELHI) & ANR.
(Criminal Appeal No. 1300 of 2009)

JULY 1, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

Penal Code, 1860 - s.302 - Murder - Incident occurred on a ship while it was on the high seas - Allegation that appellant-helmsman killed another helmsman with a knife - Conviction of appellant based on circumstantial evidence - Justification - Held: On facts, not justified - There were many inconsistencies and infirmities in the prosecution version - The very fact that two blood-stained knives were found by the prosecution proves that the prosecution failed to give sufficient explanation as to who had assaulted the deceased by using another knife - Two other helmsmen present when appellant allegedly made confession before PW-6, not examined by the prosecution - Though deceased was alleged to have been assaulted as many as 14 times by a sharp-edged weapon and there was massive blood at the site of the offence, no blood had spilled on the appellant or his clothes - Moreover, nothing on record by way of explanation from the prosecution side as to why the clothes of the appellant were not seized - Vital piece of evidence regarding enmity of the appellant with his superiors and others was suppressed - Even the Investigating Officer failed to inspect the cabin where the dead body was found - No site plan was prepared by the Investigating Officer - Before arrival of the Investigating Agency officials, the place of occurrence including the cabin was completely washed and cleaned in such a way as if nothing had happened in the cabin and the place around it - Conclusion of the guilt of the appellant not fully established beyond all shadow of doubt as the circumstances not

conclusive in nature - Neither the chain of events was complete nor the circumstances lead to the conclusion that the offence was committed by the appellant and none else.

Evidence - Circumstantial evidence - Appreciation of - Conviction based on circumstantial evidence - Permissibility - Held: Conviction can be based solely on circumstantial evidence - But while dealing with conviction based on circumstantial evidence, the circumstances from which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts so established should also be consistent with only one hypothesis i.e. the guilt of the accused - Onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court - All circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else.

The accused-appellant and the deceased 'L' were helmsmen (crew members) on a ship sailing from South Africa to Japan via Singapore. The prosecution case was that while the ship was on the high seas, the appellant allegedly approached the IInd Officer (PW-6) with a blood-stained knife in his hand and his hands smearing in blood and allegedly confessed before him that he had killed 'L'. The entire prosecution case was based on circumstantial evidence as no one saw the murder having been committed by the appellant.

The trial court held the appellant guilty of committing the murder of 'L' taking note of an earlier incident of assault in which the appellant had sustained injuries at the hands of the deceased as motive on the part of the appellant for commission of crime, the extra- judicial confession made by him to PW-6 and presence of his fingerprints on the knife that was allegedly used as the weapon of offence. The appellant was convicted under Section 302 IPC and sentenced to i[illegible]e.

The High Court affirmed the judgment of conviction and sentence, and therefore the present appeal.

Allowing the appeal, the Court

HELD: 1.1. Conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence. While dealing with conviction based on circumstantial evidence, the circumstances from which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts so established should also be consistent with only one hypothesis i.e. the guilt of the accused, which would mean that the onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court. All circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else. [Paras 11, 21] [926-C-D; 932-F-G]

Hanumant Govind Nargundkar vs. State of M.P. **AIR 1952 SC 343: 1952 SCR 1091;** *Padala Veera Reddy vs. State of A.P.* **1989 Supp (2) SCC 706;** *C. Chenga Reddy & Ors. vs. State of A.P.* **(1996) 10 SCC 193: 1996 (3) Suppl. SCR 479;** *Ramreddy Rajesh Khanna Reddy vs. State of A.P.* **(2006) 10 SCC 172: 2006 (3) SCR 348;** *Sattatiya vs. State of Maharashtra* **(2008) 3 SCC 210;** *State of Goa vs. Pandurang Mohite* **(2008) 16 SCC 714: 2008 (17) SCR 176;** *G. Parshwanath vs. State of Karnataka* **(2010) 8 SCC 593: 2010 (10) SCR 377;** *Rajendra Pralhadrao Wasnik vs. State of Maharashtra* **(2012) 4 SCC 37: 2012 (2) SCR 225 and** *Brajendrasingh vs. State of M.P.* **(2012) 4 SCC 289: 2012 (3) SCR 599 - relied on.**

2.1. In the instant case, there are many inconsistencies and infirmities in the prosecution version. [Para 22] [933-A]

2.2. Both the accused and the deceased were good friends and both were staying in one cabin viz. Cabin No.25. However, before the occurrence, the accused was shifted to Cabin No.23 and therefore both the accused and the deceased were staying in separate cabin on the date of occurrence. [Para 23] [933-B-C]

2.3. The prosecution case is that the accused is alleged to have confessed before PW-6 about the commission of the offence and the blood-stained knife was handed over to PW-6 which was subsequently seized but no blood was noticeable on the clothes of the appellant which were found at the relevant time. The other helmsmen, namely, 'B' and 'T' who were present when the appellant is alleged to have made confession before PW-6, were not examined by the prosecution. [Para 25] [933-F-G]

2.4. The knife (Ex.P-3) was not shown to the doctor concerned who had conducted post mortem examination on the dead body of the deceased to find out whether the injuries could have been caused by that weapon. Surprisingly, another knife (Ex.2b) alleged to have been recovered from the boiler suit was also not shown to the doctor to ascertain whether the said knife was also used in the commission of the offence. [Para 26] [933-H; 934-A-B]

2.5. The evidence reveals that after the said incident, the appellant was tied up and kept on the bridge for at least 2 to 3 days before being shifted. The contention of the appellant's counsel was that the appellant was susceptible of being forced to hold the knife (Ex.P-3) so as to get his fingerprints on the knife which was never kept inside the fish room along with the dead body. Apart from the aforesaid, it appears from the post mortem report that there were about 14 stab wounds on the neck but there was no blood found on the dress of the appellant or on the scene of occu[illegible]e

deceased was alleged to have been assaulted as many as 14 times by a sharp-edged weapon and there was massive blood at the site of the offence, no blood had spilled on the appellant or his clothes. Moreover, there is nothing on record by way of explanation from the prosecution side as to why the clothes of the appellant were not seized. Further, the alleged knife (Ex.P-3) was not shown to the doctor who conducted the post mortem of the deceased to take his opinion as to whether it was Ex.P-3 alone which could have caused those injuries especially when another knife was found from the boiler suit. [Paras 27, 28] [934-B-F]

2.6. A very relevant piece of evidence which has been noticed by the High Court, but not given due consideration, is that apart from the blood-stained knife (Ex. P-3) and certain other items mentioned in the letter of Investigating Officer, one sealed cardboard parcel containing blue soaked boiler suit worn by the deceased at the time of incident was also sent to CFSL for examination and opinion. In the said sealed cardboard box, two Exhibits (2a and 2b) were found. Ex.2a was the dark blue coloured boiler suit and the Ex.2b was metallic blade fitted in a wooden handle like a knife. The length of the metallic blade is about 5.5 centimeter with one edge sharp and another blunt having a round tip at one end. None of the prosecution witnesses including the Investigating Officer, stated anything as to how and wherefrom the said knife (Ex.2b) was recovered and kept with the boiler suit in the same cardboard box. This knife (Ex.2b) also bore human blood-stained matching 'O' group of the deceased. As per the post mortem report, stab wounds on the neck and chest of the deceased might be by the use of the said weapon Ex.2b. The said knife (Ex.2b) was not subjected to examination to find out the presence of fingerprints, if any, of the appellant. The said knife (Ex.2b) was also not shown to the doctor (PW-

19) who conducted the post mortem examination on the body of the deceased, to seek his opinion if the same could have been possible weapon of offence. Even the opinion of the expert witness (PW-22) was not sought as to whether the cuts on the boiler suit could have been caused by that knife. [Para 29] [934-G-H; 935-A-D]

2.7. One more important aspect which has not been taken note of by the trial court and the High Court is that as per the prosecution case, the appellant was the trouble maker and instigated other crew members not to steer the ship manually unless the officers give it in writing about fulfillment of their demand of payment of long overdue overtime. This vital piece of evidence regarding the enmity of the appellant with the higher officials and others has been suppressed: instead, the prosecution tried to show that there was no enmity towards the appellant. [Para 30] [935-E-F]

2.8. Admittedly, after the alleged incident, the Master of the ship got the scene of offence cleaned like a vision and nothing was kept intact in and around the cabin where the offence was committed. Even the Investigating Officer failed to inspect the cabin. No site plan was prepared by the Investigating Officer. Before the arrival of the Investigating Agency officials, the place of occurrence including cabin was completely washed and cleaned in such a way as if nothing had happened in the cabin and the place around it. [Para 31] [935-G-H; 936-A]

3. On consideration of all the relevant facts and vital piece of evidence, it can safely be concluded that the offence committed by the appellant has not been fully established beyond all reasonable doubts. The very fact that two blood-stained knives were found by the prosecution proves that the prosecution failed to give sufficient explanation as to who had assaulted the deceased by using another knife (Ex

committed grave error in holding that in view of the findings arrived at by the trial court that offence was committed by using the knife (Ex.P-3), the presence of another knife (Ex.2b) with blood-stains will not demolish the case of the prosecution. From the circumstances, the conclusion of the guilt of the appellant has not been fully established beyond all shadow of doubt as the circumstances are not conclusive in nature -- neither the chain of events is complete nor the circumstances lead to the conclusion that the offence was committed by the appellant and none else. Hence, the impugned judgment of the High Court affirming the judgment of conviction passed by the trial court cannot be sustained in law. [Para 32] [936-B-E]

Case Law Reference:

1952 SCR 1091	**relied on**	**Para 12**
1989 Supp (2) SCC 706	**relied on**	**Para 13**
1996 (3) Suppl. SCR 479	**relied on**	**Para 14**
2006 (3) SCR 348	**relied on**	**Para 15**
(2008) 3 SCC 210	**relied on**	**Para 16**
2008 (17) SCR 176	**relied on**	**Para 17**
2010 (10) SCR 377	**relied on**	**Para 18**
2012 (2) SCR 225	**relied on**	**Para 19**
2012 (3) SCR 599	**relied on**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1300 of 2009.

From the Judgment and Order dated 25.07.2008 of the High Court of Delhi at New Delhi in Criminal Appeal No. 820 of 2002.

G. Tushar Rao, Promila, D.S.U. Krishna Jee, S. Thananjayan for the Appellant.

Mukul Gupta, Attrey, Anjali Chauhan, B.V. Balram Das, Arvind Kumar Sharma for the Respondents.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. This appeal by special leave is directed against the judgment and order dated 25th July, 2008 passed by the High Court of Delhi in Criminal Appeal No. 820 of 2002 whereby the judgment and order dated 9th August, 2002 passed by learned Additional Sessions Judge, New Delhi in Sessions Case No. 45 of 2001 convicting the accused-appellant under Section 302 of the Indian Penal Code, 1860 (for short, "IPC") and sentencing him to imprisonment for life and a fine of Rs. 100/- and in default of payment of fine, rigorous imprisonment for one day was maintained and the said appeal dismissed.

2. The prosecution version in a nutshell is that the Cargo Ship Motor Vessel "Lok Prem" owned by the Shipping Corporation of India was chartered by a private company of South Africa on 6th November, 1996 for carrying Chrome Alloy. The accused-appellant and the deceased L. Shivaraman along with other were helmsmen/seamen (crew members) on the said ship. When the ship was sailing from South Africa to Japan *via* Singapore, the auto pilot went out of order which could not be repaired for non-availability of technicians on board and thus requiring the crew on board to manually steer the ship. The accused and one M.Y. Talgharkar showed reluctance to steer the ship manually and insisted for repair of auto pilot and payment of their long overdue overtime. The ship was taken to Singapore to make the auto pilot functional but the same could not be got repaired. The accused and said Talgharkar are alleged to have instigated other crew members to insist and obtain it in writing from the Captain/Master of the ship (PW-5 Radha Krishan Ambady) that the ship

at Japan, otherwise they (crew members) shall not allow the moving of the ship from Singapore. When the Captain of the ship reported the matter to the Shipping Corporation of India, the General Secretary of the Union (NSUI) directed the crew members to perform their duties in obedience to lawful commands of the Captain. On 30th November, 1996, an altercation is stated to have taken place between the accused and the deceased L. Shivaraman. As the accused had sustained some cut injuries on his hands, he reported the matter to the officials. On 1st December, 1996 when the ship was on high seas, the appellant took off from his duty as helmsman on the ground of pain in his hands due to cut injuries and another helmsman Baria was asked to do the duty as replacement. As the accused and the deceased were staying in Cabin No. 25, the accused was temporarily shifted from that cabin to Cabin No. 23 due to the above incident of assault. At about 1510 hours, the accused allegedly approached IInd Officer Kalyan Singh (PW-6) with a blood-stained knife in his hand and his hands smearing in blood and is alleged to have confessed before him that he had killed L. Shivaraman. On being asked by Kalyan Singh (PW-6), the appellant handed over the blood-stained knife to him which he placed in a cloth piece without touching the same. Kalyan Singh (PW-6) then intimated the Captain and other officers. The body of L. Shivaraman was found lying in Cabin No. 23 in such a way that half of it was inside the cabin and half of it outside. The officials of Shipping Corporation of India were informed. On incident being reported, pursuant to an instruction from concerned quarter, the ship was diverted to Hongkong. On being so directed by the Captain of the ship (PW-5), Kalyan Singh (PW-6) got the body of the deceased cleaned up for being preserved in the fish room with the help of Manjeet Singh Bhupal (PW-4) and Chief Officer V.V. Muralidharan (PW-18) took photographs. The blood-stained knife was kept in the safe custody of PW-5. The accused was then apprehended, tied and disarmed before being shifted to the hospital on board. Since the ship was having Indian Flag, as per the International Treaty of which India was a signatory,

the act of the accused was subject to Indian laws. Accordingly, a case bearing R.C. No. 10(S) of 1996 was registered by the Central Bureau of Investigation (CBI) against the accused on 6th December, 1996. On reaching Hongkong, the body of deceased was handed over to Hongkong Police for *post mortem* examination. Two CBI officers reached Hongkong on 7th December, 1996. The investigation of the case was conducted by Anil Kumar Ohri, Dy. Superintendent of Police, C.B.I. (PW-23). The Investigation Officer (I.O.) visited the ship and recorded the statements of witnesses under Section 161 of the Code of Criminal Procedure (for short, "Cr.P.C."). The blood-stained knife (Ex. P-3) and deceased's boiler suit (Ex. 2a) as also relevant papers from the Hongkong police were taken into his possession by the I.O. The *post mortem* examination on the dead body was conducted by Dr. Lal Sai Chak (PW-19). The accused was arrested and brought to Delhi where he was medico legally examined by a doctor. The specimen fingerprints and signature of the accused were obtained. The knife and the specimen fingerprints were then sent to Central Forensic Science Laboratory (CFSL) for comparison. The fingerprints of the accused had tallied with the fingerprints appearing on the knife (Ex.P-3). The accused was charged under Section 302 IPC. In support of its case, the prosecution examined as many as 23 witnesses.

3. The trial court *vide* judgment and order dated 9th August, 2002 held the appellant guilty of committing the murder of L. Shivaraman taking note of the incident of assault of 30th November, 1996 in which the appellant had sustained injuries at the hands of the deceased as motive on the part of the appellant for commission of crime, the extra- judicial confession made by him to Kalyan Singh (PW-6) and presence of his fingerprints on the knife that was allegedly used as the weapon of offence.

4. Before the High Court while assailing the conviction and sentence by the trial court, it was con[illegible]s

sufficient opportunity to force the appellant to hold the knife (Ex.P-3) to get his fingerprints thereon; that no blood was noticeable on the clothes of the appellant; that the clothes of the appellant which he was wearing at the relevant time were not seized to establish that the same carried blood stains of the deceased; two other helmsmen Baria and Talgharkar who were present when the appellant made confession before Kalyan Singh (PW-6) were not examined by the prosecution; that the weapon of offence i.e. knife (Ex.P-3) was not shown to the doctor concerned who had conducted *post mortem* examination on the dead body of the deceased to find out whether the injuries could have been caused by that weapon; that all the injuries could not have been caused by the said weapon of offence which had one blunt edge and the other sharp; that more than one weapon was used to cause injuries on the person of the deceased by referring to existence of another knife (Ex. 2b) in the parcel which contained deceased's boiler suit (Ex. 2a) which had also been sent to CFSL; that no fingerprints were lifted from the second knife nor the same was referred to the expert for matching with the cuts on the boiler suit; and that the second knife was also not shown to the doctor conducting *post mortem* on the body of the deceased to ascertain if the same could have been used as a possible weapon of offence. As regards alleged extra-judicial confession, the depositions of Captain Radha Krishan Ambady (PW-5) and Kalyan Singh (PW-6) were referred to and variance in words allegedly used by the appellant while making the same was demonstrated; absence of any mention of such a confession in the Official Log Book was also pleaded; and it was contended that the I.O. did not detect any blood in Cabin No. 23 as the scene of crime had also been cleaned and on account of such tampering the crime could not be connected with the appellant. It was contended that it was on account of officers on board including Captain of the ship being unhappy with and inimical towards the appellant that he was falsely implicated. It was contended that the previous day incident of assault could not be reckoned as motive for fatal assault on the

deceased on the following day and such motive alone in the absence of necessary links in the circumstantial evidence would not be suffice to record conviction against the appellant.

5. After appreciation of the evidence of prosecution witnesses and the documents exhibited therein, the High Court came to the conclusion that the prosecution has established the guilt of the appellant in the commission of the offence and accordingly dismissed the appeal affirming the judgment and order of conviction and sentence passed by the trial court. Hence, this appeal by special leave.

6. Mr. G.Tushar Rao, learned counsel appearing for the appellant has assailed the impugned judgment and order of conviction and sentence as being illegal and contrary to facts and evidence on record. Learned counsel submitted that the conviction is based on circumstantial evidence and a chain with regard to the circumstances leading to the guilt of the appellant has not at all been established. Counsel submitted that it is settled law that extra-judicial confession is a weak type of evidence and needs corroboration in a case dependent wholly on circumstantial evidence and in such cases the exact words used by the accused have to be reproduced, but in this case even PW-6 before whom the appellant is alleged to have made confession has not been able to reproduce the exact words and there are material contradictions in the statements of prosecution witnesses. It is contended by the counsel that the manner in which the alleged weapon of offence i.e. knife Ex.P-3 was seized and sealed is not proper and the probability of tampering with the knife cannot be ruled out. Counsel submitted that circumstances and the evidence on record indicate that the appellant was susceptible to being forced to hold the knife so as to get his fingerprints on the knife. It is surprising, counsel submitted, that there are about 14 stab wounds both minor and major on the neck and torso as per *post mortem* report, but there was no blood noticeable on the appellant nor did any of the witnesses noticed blood either

appellant or the bridge or the alleyway from the scene of occurrence to the bridge nor were the clothes of the appellant were ever seized by the Captain/Master of the ship (PW-5), IInd Officer (PW-6), the Chief Officer (PW-18), Senior Inspector Hongkong Police (PW-20) or the Investigating Officer of CBI (PW-23) and, therefore, the chain in the prosecution case of circumstantial evidence gets fatally broken due to this aspect. It is submitted by the counsel that from the evidence it is clear that at the time when the appellant is alleged to have confessed to Kalyan Singh (PW-6), there were two helmsmen, namely, Baria and Talgharkar and as per the evidence of the prosecution witnesses, they also could have heard the appellant, but these two persons were not examined at all which goes to show that the prosecution tried to hide something. It is contended that the knife Ex. P-3 (weapon of offence) was not shown to the doctor (PW-19) who conducted the *post mortem* of the deceased on 6th December, 1996 in Hongkong to take his opinion as to whether it could be Ex.P-3 alone which could have caused the injuries on the body of the deceased and in the absence of such examination, the weapon remains unconnected to the injuries on the deceased. Counsel contended that the injuries on the deceased were not consistent with the weapon (Ex.P-3) and that too in the absence of the opinion of the doctor who conducted *post mortem* and was not shown the alleged weapon of offence. The counsel contended that from the evidence on record it is clear that there was more than one weapon containing the blood of the deceased as apart from Ex.P-3 knife, there was another knife about which there is no mention nor any plausible reason as to wherefrom it came and why no one bothered about it. The counsel submitted that the doubt created by this circumstance has neither been looked into, considered or removed by the prosecution at all and this being a case purely based on circumstantial evidence, the benefit of doubt ought to be extended to the appellant. The prosecution, counsel submitted, is expected and is duty bound to eliminate every element of suspicion in every circumstance relied upon by it so as to enable the courts to come to the

hypothesis consistent with the guilt of the accused and simultaneously inconsistent with the innocence of the accused person. It is contended that the Captain of the ship got the scene of offence cleaned and no site plan of the scene of occurrence prepared.

7. Mr. Mukul Gupta, learned senior counsel appearing for the respondent-CBI, on the other hand, submitted that the trial court and the High Court have dealt with the issue of extra-judicial confession being legally maintainable. The prosecution has also been able to prove that the same was without any inducement, threat or promise which factor the appellant has not been able to discard from any of the witness. The prosecution has been able to prove the motive to commit such a crime. Similarly, the recovery of knife, CFSL report and *post mortem* report clearly indicate that the injuries were from a single blade weapon. Even though there is no eye-witness to the actual crime, yet the prosecution has been able to bring home the guilt of the accused under Section 302 IPC by proving the complete chain of circumstances beyond reasonable doubt. The appellant neither in cross-examination of various witnesses nor in any explanation in his statement under Section 313 Cr.P.C. has been able to make a dent in the entire evidence. The counsel submitted that even in a case of circumstantial evidence, the evidence has to be appreciated as a whole and not in pieces, one bit here and one bit there.

8. We have considered the arguments advanced by the counsel on either side and have also gone through the findings recorded by the trial court as also by the High Court.

9. Admittedly, the entire case is based on the circumstantial evidence as no one has seen the murder having been committed by the accused-appellant. Although the trial court has not given much weightage to the confession alleged to have been made by the accused-appellant before PW-5, PW-6 and PW-20, but the High Court based the conviction on the basis of extra-judicial confession als[illegible]e

dealing with the confession alleged to have been made by the accused, observed as under:

"52. Now in the present case the prosecution is relying on the confession of the accused before Kalyan Singh (PW-6), the repetition confession before Sh. R.K. Ambady (PW-5) and the confession allegedly made by the accused before Inspector Wai (PW-20).

53. So far as the confession before R.K. Ambady (PW-5) is concerned, I am not inclined to accept the same. PW-5 claims to have gone on the bridge. The accused had confessed before him that he had killed Shiva Raman and will kill the other persons whosoever comes before him (Hum Shivaraman Ko Khalash Kiya Aur Koi Ayega To Usko Bhi Khalash Karenga) However, this particular claim of PW-5 is conspicuous by its absence from the official logbook entry Ex.PW5/D which had been made on 2.12.96. However, there is no reference of this particular confession i.e. before PW-5.

54. So far as the confession before Inspector Wai (PW 20) is concerned, the same cannot be looked into in view of the law laid down in State vs. Ranjan Raja Ram 1991 (1) CCC 134. This particular judgment has been relied on by counsel for the accused and it had been argued that since the facts of the present case were identical, therefore, the accused in the present case deserves acquittal. I have carefully gone through the judgment State vs. Ranjan Raja Ram (supra). In that case the extra judicial confession was made before a person who had just joined the ship on 2.6.78 and the occurrence had taken place on 9th/10th June 1978. He was a stranger to the accused. It was the prosecution case (in that case) the accused had kept on telling his having committed the murder to every one. It was not believed by the court. In para 26 of the judgment it was mentioned that the name of PW in that case had come for the first time on 15.7.78. Therefore, that

case is distinguishable so far as confession made by the present accused before Sh. Kalyan Singh (PW6) is concerned. What is a confession? What is the law on the subject? Whether conviction can be based on extra judicial confession?"

10. On the contentions of the accused-appellant, the High Court while dismissing the appeal of the accused by the impugned judgment held as under:

"13. ……. One cannot lose sight of the fact that according to Kalyan Singh (Pw-6), on reaching the bridge of the ship, the appellant had first told him that he had killed Shivraman and then repeated the same in Hindi also by uttering, ?KHALAS KAR DIYA?. The statement so made in Hindi was only in continuation to the confession initially made by him wherein he had specifically named Shivraman. Thus, the words ?KHALAS KAR DIYA? Uttered by the appellant in Hindi are to be read in the context of his initial confession naming Shivraman. No real variance in the content of confession initially made and the one repeated in Hindi is thus brought out.

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15. …. The omission to mention the exact words in the log book entry dated 2.12.1996 vide Ex. PW-5/D in the circumstances cannot make the testimony of Kalyan Singh (PW-6) in regard to confession by the appellant uncreditworthy. The log book entry (Ex.PW-5/D) does carry a mention that the information regarding commission of the murder of Shivraman by the appellant was given over phone by Shri Kalyan Singh (PW-6) from which it is evident that Shri Kalyan Singh (PW-6) had, before passing on the information to the said effect, come to know that it was the appellant who had committed the crime. …… The presence of the appellant at the bridge near Kalyan Singh (PW-6) before Shri Radha Krishan

Murlidharan (PW-20) reached there and handing over of bloodstained knife collected from the appellant by Kalyan Singh (PW-6) lend sufficient corroboration to the appellant having approached Kalyan Singh (PW-6) at the bridge and making confessional statement to him, as deposed by Shri Kalyan Sijngh (PW-6). The stand of the appellant that Shri Kalyan Singh (PW-6) had joined hands with Shri Radha Krishan Ambady (PW-5) and others on board being inimical to him is difficult to accept, given the nature of friendly relationship he enjoyed with Kalyan Singh (PW-6). The learned trial court would, thus, appear to have committed no error in reaching the conclusion that the extra judicial confession made by the appellant, as deposed in the court, was voluntary and a truthful one and could, thus, constitute an incriminating piece of evidence to find his culpability in the commission of the crime.

16. Non-examination of two seamen, namely, Baria and Thalgharkar, who were manually steering the ship at the relevant time when the appellant made his confessional statement before Kalyan Singh (PW-6) cannot be a ground to discard an otherwise unimpeached testimony of Kalyan Singh (PW-6) in regard to confession made to him by the appellant. Acceptance of testimony of a particular witness in regard to an extra judicial confession is not dependent on corroboration by other witnesses, if otherwise creditworthy. …… The appellant and Talgharkar thus shared a comradely bond and in such a situation looking for a support from Talgharkar to PW Kalyan Singh's deposition on extra judicial confession by the appellant would be expecting too much from him.

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20. ….. Since the clothes which the appellant was wearing at the relevant time were not taken into possession to prove the existence of bloodstains, if any, thereon and as none of the witnesses testifies about presence of

bloodstains on his clothes, the conclusion that follows is that there were no bloodstains on his clothes when the appellant approached Kalyan Singh (PW-6) at the bridge to confess his guilty. This fact could have been of considerable significance in adjudging the culpability of the appellant had the effect of the same been not offset by the strong incriminating evidence which constitute the basis for convicting the appellant. … The clothes of the appellant, as noticed earlier, were not soaked in deceased's blood nor there is any evidence of his feet or footwear, if any, the appellant was wearing, having got smeared in deceased's blood before his proceeding to the bridge and in such circumstances, no blood could be expected to have fallen down in the alleyway from the scene of the crime to the bridge.

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23. Apart from the bloodstained knife Ex.P.3 and certain other items, as mentioned in the letter (Ex. PW-21/2) of the investigating officer, one sealed cardboard parcel 'containing a blue coloured soaked boiler suit' worn by deceased at the time of incident marked as 'B' was also sent to CFSL for examination and opinion. Such sealed cardboard box was, on opening, found to contain two Exhibits 2a and 2b vide CFSL report Ex.PW-22/1. Ex.2a was the dark blue coloured boiler suit and Ex.2b was a metallic blade fitted in a wooden handle like a knife. The length of the metallic blade is about 5.5 centimeters with one edge sharp and another blunt having a round tip at one end. None of the prosecution witnesses, including the investigating officer, stated anything as to how and wherefrom the said knife Ex.2b was recovered and kept with the boiler suit in the same cardboard box. This knife Ex.2b, like knife Ex.P-3, also bore human bloodstains matching 'O' group of the deceased. Existence of knife Ex.2b was made a basis, by lea

appellant, to argue that the same could have been used to cause stab wounds on the neck and chest of the deceased, as noted in the postmortem report (Ex.PW-19/A). Countering the argument related to nature of weapon of offence used in commission of the crime, as raised by the learned counsel for the appellant, learned counsel for CBI contended that even though the prosecution witnesses kept silent as to how the knife Ex.2b came to be sealed in the cardboard box containing the boiler suit (Ex.2a), in view of sufficient evidence on record proving beyond doubt commission of the crime by the appellant with the knife Ex.P-3, there is no real basis to support the contention that knife Ex.2b could also be a possible weapon of offence.

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25. The theory of more than one weapon being used in the commission of the crime, as propounded by learned counsel for the appellant, as noticed earlier, emanates from the nature of certain injuries on the body of the deceased and existence of knife Ex.2b with bloodstains thereon matching the blood group of the deceased. Learned counsel for the appellant contended that unlike knife Ex.P-3 the knife Ex.2b was not subjected to examination to find the presence of finger prints, if any, on its handle. The same was also not shown to Dr. Lal Sai Chak (PW-19), who conducted the postmortem examination on the body of the deceased to seek his opinion if the same could have been the possible weapon of offence, nor the opinion of the expert witness Shri C.K. Jain (PW-22) was sought in respect thereto if the cuts on the boiler suit could have been caused by that knife.

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28. Keeping in view the incriminating evidence available on record proving the guilt of the appellant beyond reasonable doubt, we find no reason to arrive at a finding

different from the one recorded by the learned trial court in regard to the complicity of the appellant in committing the murder of L. Shivaraman on board. Hence, the impugned conviction and sentence are maintained and the appeal is dismissed being bereft of merit."

11. Now, we have to consider whether the judgment of conviction passed by the trial court and affirmed by the High court can be sustained in law. As noticed above, the conviction is based on circumstantial evidence as no one has seen the accused committing murder of the deceased. While dealing with the said conviction based on circumstantial evidence, the circumstances from which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts so established should also be consistent with only one hypothesis i.e. the guilt of the accused, which would mean that the onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court.

12. In the case of *Hanumant Govind Nargundkar vs. State of M.P.,* AIR 1952 SC 343, this Court observed as under:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. …."

13. In the case of *Padala Veera R*

1989 Supp (2) SCC 706, this Court opined as under:

"10. Before adverting to the arguments advanced by the learned Counsel, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See *Gambhir* v. *State of Maharashtra,* (1982) 2 SCC 351)"

14. In the case of *C. Chenga Reddy & Ors. vs. State of A.P.,* (1996) 10 SCC 193, this Court while considering a case of conviction based on the circumstantial evidence, held as under:

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such

circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

15. In the case of *Ramreddy Rajesh Khanna Reddy vs. State of A.P.,* (2006) 10 SCC 172, this Court again considered the case of conviction based on circumstantial evidence and held as under:

"26. It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. (See *Anil Kumar Singh v. State of Bihar,* (2003) 9 SCC 67 *and Reddy Sampath Kumar v. State of A.P.,* (2005) 7 SCC 603)."

16. In the case of *Sattatiya vs. State of Maharashtra,* (2008) 3 SCC 210, this Court held as under:

"10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The court can draw an inference of guilt when all the incriminating facts and circumstances are found to be total[illegible]e

innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances."

This Court further observed in the aforesaid decision that:

"17. At this stage, we also deem it proper to observe that in exercise of power under Article 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court—*Bharat v. State of M.P.,* (2003) 3 SCC 106. In the light of the above, we shall now consider whether in the present case the prosecution succeeded in establishing the chain of circumstances leading to an inescapable conclusion that the appellant had committed the crime."

17. In the case of *State of Goa vs. Pandurang Mohite*, (2008) 16 SCC 714, this Court reiterated the settled law that where a conviction rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

18. It would be appropriate to consider some of the recent decisions of this Court in cases where conviction was based

on the circumstantial evidence. In the case of *G. Parshwanath vs. State of Karnataka,* (2010) 8 SCC 593, this Court elaborately dealt with the subject and held as under:

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accus[illegible]e

every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

19. In the case of *Rajendra Pralhadrao Wasnik vs. State of Maharashtra*, (2012) 4 SCC 37, while dealing with the case based on circumstantial evidence, this Court observed as under:

"12. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete as not to leave any substantial doubt in the mind of the court. Irresistibly, the evidence should lead to the conclusion which is inconsistent with the innocence of the accused and the only possibility is that the accused has committed the crime.

13. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only

when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person."

20. Last but not least, in the case of *Brajendrasingh vs. State of M.P.*, (2012) 4 SCC 289, this Court while reiterating the above principles further added that:

"28. Furthermore, the rule which needs to be observed by the court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. (Ref. *Dhananjoy Chatterjee v. State of W.B.,* (1994) 2 SCC 220; *Shivu v. High Court of Karnataka,* (2007) 4 SCC 713 *and Shivaji v. State of Maharashtra,* (2008) 15 SCC 269)"

21. As discussed hereinabove, there is no dispute with regard to the legal proposition that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence as laid down by this Court. In such a case, all circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else.

22. From the prosecution side, a number of witnesses have been examined to complete the chain of events and to prove the version given in the FIR and subsequent thereto. We have re-appreciated and analysed the evidence brought on record from the prosecution side. O e

evidence, we have found many inconsistencies and infirmities in the prosecution version as mentioned hereinafter.

23. Admittedly, there is no eye witness in this case despite the fact that the occurrence took place in the cargo ship and obviously some of the crew members were living and/or on duty around the ship. Both the accused and the deceased were good friends and both were staying in one cabin *viz*. Cabin No.25. Before the occurrence, the accused was shifted to Cabin No.23. Admittedly, therefore both the accused and the deceased were staying in separate cabin on the date of occurrence.

24. The accused-appellant and the deceased were helmsmen on the ship which was sailing from South Africa to Japan *via* Singapore. Since the auto-pilot went out of order and could not be repaired, the crew members were directed to manually steer the ship. The accused and one Talghakar showed reluctance to steer the ship manually and insisted for repair of the auto-pilot and payment of their long overdue overtime. The prosecution case is that the accused and the said Talghakar instigated other crew members to insist and obtain it in writing from the Captain (PW-5) that the ship would be got repaired at Japan otherwise they (crew members) shall not allow moving of the ship from Singapore.

25. The prosecution case is that the accused is alleged to have confessed before PW-6 about the commission of the offence and the blood-stained knife was handed over to PW-6 which was subsequently seized but no blood was noticeable on the clothes of the appellant which were found at the relevant time. The other helmsmen, namely, Baria and Talghakar who were present when the appellant is alleged to have made confession before PW-6, were not examined by the prosecution.

26. The knife (Ex.P-3) was not shown to the doctor concerned who had conducted *post mortem* examination on

the dead body of the deceased to find out whether the injuries could have been caused by that weapon. Surprisingly, another knife (Ex.2b) alleged to have been recovered from the boiler suit was also not shown to the doctor to ascertain whether the said knife was also used in the commission of the offence.

27. From the evidence, it reveals that after the said incident the appellant was tied up and kept on the bridge for at least 2 to 3 days before being shifted. The contention of the appellant's counsel was that the appellant was susceptible of being forced to hold the knife (Ex.P-3) so as to get his fingerprints on the knife which was never kept inside the fish room along with the dead body.

28. Apart from the aforesaid, it appears from the *post mortem* report that there were about 14 stab wounds on the neck but there was no blood found on the dress of the appellant or on the scene of occurrence. Though the deceased was alleged to have been assaulted as many as 14 times by a sharp-edged weapon and there was massive blood at the site of the offence, no blood had spilled on the appellant or his clothes. Moreover, there is nothing on record by way of explanation from the prosecution side as to why the clothes of the appellant were not seized. Further, the alleged knife (Ex.P-3) was not shown to the doctor who conducted the *post mortem* of the deceased in Honkong to take his opinion as to whether it was Ex.P-3 alone which could have caused those injuries especially when another knife was found from the boiler suit.

29. A very relevant piece of evidence which has been noticed by the High Court, but not given due consideration, is that apart from the blood-stained knife (Ex. P-3) and certain other items mentioned in the letter of Investigating Officer, one sealed cardboard parcel containing blue soaked boiler suit worn by the deceased at the time of incident was also sent to CFSL for examination and opinion. In the said sealed cardboard box, two Exhibits (2a and 2b) were found. Ex.2a was the dark blue coloured boiler suit and the Ex.2b was

a wooden handle like a knife. The length of the metallic blade is about 5.5 centimeter with one edge sharp and another blunt having a round tip at one end. None of the prosecution witnesses including the Investigating Officer, stated anything as to how and wherefrom the said knife (Ex.2b) was recovered and kept with the boiler suit in the same cardboard box. This knife (Ex.2b) also bore human blood-stained matching 'O' group of the deceased. As per the *post mortem* report, stab wounds on the neck and chest of the deceased might be by the use of the said weapon Ex.2b. The said knife (Ex.2b) was not subjected to examination to find out the presence of fingerprints, if any, of the appellant. The said knife (Ex.2b) was also not shown to the doctor (PW-19) who conducted the *post mortem* examination on the body of the deceased, to seek his opinion if the same could have been possible weapon of offence. Even the opinion of the expert witness (PW-22) was not sought as to whether the cuts on the boiler suit could have been caused by that knife.

30. One more important aspect which has not been taken note of by the trial court and the High Court is that as per the prosecution case, the appellant was the trouble maker and instigated other crew members not to steer the ship manually unless the officers give it in writing about fulfillment of their demand of payment of long overdue overtime. This vital piece of evidence regarding the enmity of the appellant with the higher officials and others has been suppressed: instead, the prosecution tried to show that there was no enmity towards the appellant.

31. Admittedly, after the alleged incident, the Master of the ship got the scene of offence cleaned like a vision and nothing was kept intact in and around the cabin where the offence was committed. Even the Investigating Officer failed to inspect the cabin. No site plan was prepared by the Investigating Officer. Before the arrival of the Investigating Agency officials, the place of occurrence including cabin was completely washed and

cleaned in such a way as if nothing had happened in the cabin and the place around it.

32. On consideration of all these relevant facts and vital piece of evidence, it can safely be concluded that the offence committed by the appellant has not been fully established beyond all reasonable doubts. The very fact that two blood-stained knives were found by the prosecution proves that the prosecution failed to give sufficient explanation as to who had assaulted the deceased by using another knife (Ex.2b). The High Court has committed grave error in holding that in view of the findings arrived at by the trial court that offence was committed by using the knife (Ex.P-3), the presence of another knife (Ex.2b) with blood-stains will not demolish the case of the prosecution. In our view, from the circumstances the conclusion of the guilt of the appellant herein has not been fully established beyond all shadow of doubt as the circumstances are not conclusive in nature — neither the chain of events is complete nor the circumstances lead to the conclusion that the offence was committed by the appellant and none else. Hence, the impugned judgment of the High Court affirming the judgment of conviction passed by the trial court cannot be sustained in law.

33. For the reasons aforestated, this appeal deserves to be allowed and the impugned judgment is liable to be set aside. This appeal is, accordingly, allowed and the judgments of the High Court and the trial court are set aside. The appellant is directed to be released forthwith if not required in any other case.

B.B.B. Appeal allowed.

DARSHAN GUPTA
v.
RADHIKA GUPTA
(Civil Appeal Nos. 6332-6333 of 2009)

JULY 1, 2013

[P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.]

Hindu Marriage Act, 1955 - ss.13(1)(ia) and (iii) - Plea under, of appellant-husband for dissolution of marriage - Held: Not tenable, since appellant-husband failed to prove the ingredients of either clause (ia) or clause (iii) of s.13(1) - The husband failed to establish, that he was subjected to cruelty at the hands of the wife - On the issue of alleged aggressive and abnormal behavior of the wife, no material evidence before the Court - Such alleged behavior could have easily been established through attendants of respondent-wife, but such witnesses were withheld, despite being easily available to appellant-husband - PW4, the expert witness produced by appellant-husband admitted that while examining respondent-wife, he did not observe any signs of aggressiveness in her - Interaction of PW4 with respondent-wife in the court-hall when PW4 appeared to depose in the matter demonstrated that the behavior of respondent-wife was far from erratic - Also, the appellant was not able to prove, that his wife was suffering from any incurable unsoundness of mind and/or mental disorder - Respondent-wife merely suffered from cognitive deficiency which was acquired by her during her second pregnancy - Besides, she was found to have substantially improved from her cognitive deficiency, during the course of her treatment - Appellant-husband failed to establish, that the mental unsoundness of mind or mental disorder of respondent-wife was of such degree, that he could not be expected to live with her - Further, appellant husband cannot be permitted to use his own fault to his advantage -

He did not heed the advise of the gynecologist, after abortion of the respondent's first pregnancy - The Gynecologist had advised the couple against planning any further conception, for a period of at least two years - Despite the advice, the appellant impregnated his wife, just after eight months of the said abortion - In regard to plea of appellant for dissolution of marriage on the ground, that matrimonial ties between the parties had irretrievably broken down, it is questionable as to whether such relief is available - Even otherwise, on facts, decree of divorce cannot be granted on such ground since the breakdown was only from the side of the husband and the respondent did not consent to the severance of matrimonial ties right from the beginning - Further plea of appellant for dissolution of marriage by invoking jurisdiction u/Art.142 of the Constitution also not tenable as, on facts, the same cannot be viewed as doing justice to respondent-wife - Constitution of India, 1950 - Art. 142.

Hindu Marriage Act, 1955 - s.13(1) - Divorce under - Grounds - Nature of - Held: The grounds are based on the 'fault' of the party against whom dissolution of marriage is sought - It is only on the ground of an opponent's fault, that a party may approach a Court for seeking annulment of his/her matrimonial alliance - The party seeking divorce under the "matrimonial offence theory" / the "fault theory" must be innocent - A party suffering "guilt" or "fault" disentitles himself/ herself from consideration - Matrimonial jurisprudence - 'Matrimonial offence theory' - 'Fault theory'.

The appellant-husband filed petition before the Family Court seeking dissolution of marriage on two grounds. First and foremost, he claimed to have been subjected to cruelty on account of the intemperate behaviour of respondent-wife, and in this regard, relied on clause (ia) of Section 13(1) of the Hindu Marriage Act, 1955. The second ground on which the appellant-husband sought dissolution of ma[illegible]e

respondent-wife was of incurable unsound mind, and suffered from such a mental disorder, that the appellant could not be reasonably expected to live with her. In regard to the second ground, the appellant-husband relied on clause (iii) of Section 13(1) of the Hindu Marriage Act, 1955. As against the aforesaid, the respondent-wife filed petition, before the same Court, seeking restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955. Both the cases were clubbed together.

The Family Court dismissed the petition filed by appellant-husband on the ground that he had not been able to prove the ingredients of either clause (ia) or clause (iii) of Section 13(1) of the Hindu Marriage Act, 1955. On the other hand, the petition filed by respondent-wife was allowed holding that she was entitled to the relief of restitution of conjugal rights. The appellant-husband was accordingly directed to receive her back into his house within three months, and to give her moral and emotional support. On his failure to do so, he was directed to continue to pay the interim maintenance amount fixed by the Family Court, till he finally accepted her back into his house. The appellant filed appeals before the High Court which were dismissed, and therefore the present appeals.

Dismissing the appeals, the Court

HELD: 1.1. The respondent-wife admittedly suffered brain damage after her cesarean operation in September, 2000, during her second pregnancy. She had remained unconscious for some time even after having delivered a baby on 20.9.2000. It appears, that at the time of regaining consciousness, she was totally disoriented, having lost her memory. The extent to which she had lost her memory was most definitely substantial, as it is clear, that she could not even recognize persons of close

affinity. Not only that, even her speech was substantially impaired. [Para 28] [967-E-G, H]

1.2. To deal with the medical condition of respondent-wife, the appellant-husband seems to have initially extended full financial support, by seeking consultation of specialists in fields wherein respondent-wife needed assistance. He also ensured, that such treatment was provided to her at premium hospitals. [Para 29] [968-A-B]

1.3. It, however, seems, that the appellant-husband was skeptical about the outcome of her recovery. His assessment of her medical condition, in the background of the inputs from the doctors attending on her, probably created the impression, that she would henceforth be a liability on him. Keeping in mind the hopeless condition of respondent-wife, the appellant-husband could not have expected any kind of positive relationship with respondent-wife. In 2000, when the unfortunate incident occurred, he was merely 25 years old. One would expect, that all his dreams of a happy married life, came to be shattered after seeing the medical condition of his wife, specially in the background of the assessment made by the experts being consulted. It is in the aforesaid background, that it is easier to understand why he had refrained from extending emotional or moral support to respondent-wife. But the inescapable truth is, that factually the appellant-husband did not extend emotional or moral support to his wife, after her medical episode. The distress of the appellant, and the distance that he started to keep from his wife, emerge from the statement of RW1. RW1 placed on the record of the Family Court three documents (Exhibits R1 to R3) pertaining to the treatment of respondent-wife during 2002. The attending doctor of respondent-wife considered it appropriate to expressly record in one of these

treatment of respondent-wife, he had requested her to bring her husband along with her. He also noted, that the husband had never accompanied her, despite his aforesaid indication to respondent-wife. The consequence of non-participation of appellant-husband in the course of treatment of respondent-wife, is also recorded in the report. The report notices, that her improvement would have been a lot more significant and faster, if her husband had been with her and had cared for her in her journey to recovery. The reasons which may have weighed in the young husband's mind may be any, but the harsh reality is, that appellant-husband did not extend due care and support to his wife, nor did he participate in her journey to recovery. [Para 30] [968-C-D; E-G; 969-A-F]

1.4. Shorn of the participation and support of appellant-husband to his wife, it is still material to determine the extent of recovery of respondent-wife. It would be just and appropriate to refer to and rely upon, the three reports placed on the record of the Family Court by RW1. The said reports were prepared in June, July and October 2002. The reports reveal, that respondent-wife had undergone intensive cognitive re-training using brain function therapy, and she was provided with graded re-training in alphabet and number recognition and delayed recall, recognition and recall of words and figures, different levels of working memory, etc. In the first neuro-psychological assessment of respondent-wife at NIMHANS in June, 2002, as also, in the second assessment made in July, 2002, considerable improvement was found in the medical condition of respondent-wife. Respondent-wife was subjected to a third neuro-psychological assessment in October, 2002. Again marked improvement was found in her conceptual organization of numbers and ability for arithmetic operations. The third assessment expressly records, that

respondent-wife was capable of all normal emotional experiences and expressions. Her eager and earnest desire about her future reunion with her husband, is also indicated in the report. She has been assessed as fully capable of shouldering the responsibilities of a happy marital life. RW1 categorically testified, that respondent-wife was not a case of mental disorder. He clarified, that her case was of cognitive deficiency, on account of brain damage. According to RW1, respondent-wife had recovered her working memory by more than 80%. He also explained, that cognitive deficiency is recoverable, but the recovery is dependent on the degree of damage to the brain, as also, the emotional support the patient gets from the family members, at the relevant time. This is the testimony of the same doctor, who had been requiring respondent-wife to bring appellant-husband along with her, during the course of her consultations. During the course of his cross-examination, RW1 denied the suggestion, that respondent-wife was not in a position to discharge her normal day to day functions of life. [Para 31] [969-G; 970-A-D, F-H; 971-A-C]

1.5. The Family Court had directed respondent-wife to appear before a medical board comprised of eminent specialists in psychiatry and clinical psychology. In the report (Exhibit C1) submitted by the medical board to the Family Court, conclusions were recorded on the basis of the medical history of respondent-wife, as also, the observations and examinations of the respondent-wife. The medical board concluded, that respondent-wife did not manifest any signs of major mental disorder, and that, she exhibited normal adequate emotional responses. It was also opined, that she would further benefit from neuro-psychological rehabilitation measures, which are available at NIMHANS. CW2, one of the members of the medical board, was also examined by the Family Court, as a court witness. During the cour[illegible]n,

CW2 expressed the opinion that respondent-wife could be described as a person of moderate intelligence. He also expressed, that by undergoing therapy training, there was a further likelihood of improving her cognitive deficiencies. He also clarified, that the deficiencies suffered by respondent-wife, would not come in her way to discharge her matrimonial obligations. [Para 32] [971-D-E, F-H; 972-A-B]

1.6. Based on the material evidence, it is not possible to record, that respondent-wife suffers from any incurable unsoundness of mind. It is also not possible to hold, that she suffers from such mental disorder, that it cannot be reasonably expected of her husband to live with her. The evidence produced before the Family Court makes it clear that respondent-wife merely suffers from mild to moderate cognitive deficiencies. She is categorized by medical experts as an individual of moderate intelligence. Material on the record of the case reveals, that she would further benefit from neuro-psychological rehabilitation measures, which are available at NIMHANS. Even though the said deficiencies could influence her day to day functioning, but expert opinion is unanimous that the same would not come in her way to discharge her matrimonial obligations. It cannot also be overlooked, that experts have clearly expressed that respondent-wife exhibits normal and adequate emotional responses. She has right from the beginning, fervently expressed the desire to restore her relationship with her husband, and to live a normal life, in a matrimonial relationship with him. In the aforesaid view of the matter, it is not possible to conclude, that the mental condition of respondent-wife is such as to accept the appeal preferred by appellant-husband under Section 13(1)(iii) of the Hindu Marriage Act, 1955. [Para 33] [972-C-G]

2.1. Insofar as the alleged abnormal, erratic and aggressive behaviour of respondent-wife is concerned,

the courts below were fully justified in recording, that the said behaviour of respondent-wife could have easily been established through the testimony of the attendants who looked after respondent-wife, as also, the other staff, yet the said witnesses were not produced by the appellant, despite their availability. The appellant-husband had produced PW4 to support his cause, however, PW4 during his deposition asserted that he did not observe any signs of aggressiveness in the respondent-wife. Since respondent-wife was under the care and treatment of PW4, he would have obviously known of her erratic behaviour, if the allegations of the husband were correct. The respondent-wife had also produced RW1 on her behalf. He too would have been aware of such behaviour. The appellant-husband, however, chose not to examine RW1, on the said subject. It would be pertinent to mention, that in the order of the Family Court it is duly noted, that when PW4 appeared to depose in the matter, respondent-wife was sitting in the court-hall observing court proceedings. During his interaction with respondent-wife, PW4 had enquired about her welfare, and she had responded by stating "I am fine sir, thank you". The very court which respondent-wife had repeatedly visited, recorded the above instance to demonstrate that her behavior was far from erratic, as suggested by the husband. The position would be no different, even if one considers these facts in conjunction with her medical condition. There was no material on the record of the case, to substantiate the alleged aggressive, erratic or abnormal behaviour of respondent-wife. In the aforesaid view of the matter, it is not possible to accept the appeal preferred by the appellant even under Section 13(1)(ia) of the Hindu Marriage Act, 1955. [Para 34] [972-H; 973-E-H; 974-A-E]

3.1. However, it is necessary to examine the instant controversy from another point of v

grounds on which divorce can be sought under Section 13(1) of the Hindu Marriage Act, 1955, would reveal, that the same are grounds based on the 'fault' of the party against whom dissolution of marriage is sought. In matrimonial jurisprudence, such provisions are founded on the 'matrimonial offence theory' or the 'fault theory'. Under this jurisprudential principle, it is only on the ground of an opponent's fault, that a party may approach a Court for seeking annulment of his/her matrimonial alliance. The party seeking divorce under the "matrimonial offence theory" / the "fault theory" must be innocent. A party suffering "guilt" or "fault" disentitles himself/herself from consideration. [Para 35] [974-E, G-H; 975-A-C]

3.2. In the instant case, all the grounds/facts on which divorce was sought, emerge from the medical condition of respondent-wife, after her cesarean operation in September, 2000, during her second pregnancy. After respondent-wife's first conception was aborted in June, 1999, the attending gynecologist at Apollo Hospital, had cautioned the couple against any further conception for at least two years. The couple had been advised, that pregnancy of respondent-wife during this period could lead to serious medical complications. The husband did not heed to the advice tendered by the attending gynecologist. There is no serious dispute, that to satisfy his desires, he impregnated his wife within a period of eight months, i.e., well within the risk period. Therefore, she suffered the predicted consequences. The medical condition of respondent-wife, on which the appellant bases his claim for divorce, is of his own doing. Even though at that juncture, appellant-husband was merely 25 years of age, and it may well be difficult to blame him, yet there is no escape from the fact, that the fault rests on his shoulders. In the above view of the matter, it is not possible to conclude, that appellant-

husband did not suffer from any "guilt" or "fault" in the matter. He cannot be permitted to use his own fault to his advantage. The party seeking divorce has to be innocent of blame. For the instant reason also, the prayers made by the appellant must fail. [Paras 36, 37] [975-G-H; 976-D-E, G-H; 977-A-C]

4. The appellant also sought dissolution of marriage on the ground, that the matrimonial ties between the parties had irretrievably broken down, specially when the parties have lived apart for more than 12 years and there was no likelihood of the parties ever living together as husband and wife. However, at the present juncture, it is questionable as to whether the relief sought by the appellant, on the ground of irretrievable breakdown of marriage is available to him. Even otherwise, in the facts and circumstances of this case, one cannot grant a decree of divorce, on the ground of irretrievable breakdown of marriage, for the simple reason that the breakdown is only from the side of the husband. The wife has consistently maintained, that she was intensely concerned with her future relationship with her husband, and that, her greatest and paramount desire was to rejoin her husband, and to live with him normally in a matrimonial relationship, once again. Since in the present case, the respondent does not consent to the severance of matrimonial ties, it may not be possible to accede to the instant prayer, made by the appellant. [Paras 38, 39] [977-D-E, G-H; 978-A; 979-F-H]

Vishnu Dutt Sharma vs. Manju Sharma, **(2009) 6 SCC 379 and** *Gurbax Singh vs. Harminder Kaur* **(2010) 14 SCC 301: 2010 (12) SCR 275 - referred to.**

5. Since the plea of irretrievable breakdown of marriage was not accepted by this Court, the appellant then implored this Court to invoke jurisdiction under Article 142 of the Constitution of India, and to annul the marriage between the parties, as g

complete justice between the parties. In the context of doing justice it was suggested, that the appellant would be ready and willing to pay the respondent, whatever was considered appropriate by this Court. In order to determine the issue, the matter may be examined, by reversing the roles of the parties - as if, the wife had approached the Family Court seeking divorce, on the ground that her husband had suffered brain damage leading to cognitive deficiencies. Yet, despite the said deficiencies, his working memory had returned to "near normal" after treatment. And his mental condition was such, that it would not have any effect on his matrimonial obligations. And the wife's family is agreeable to pay an amount to be determined by this Court (just as the appellant-husband has offered), so as to enable their daughter to break away, and find a more suitable match. In such situation, if this Court had, in exercise of its jurisdiction under Article 142 of the Constitution, granted compensation to the husband, and had dissolved his marriage on the pretext of doing complete justice between the parties, would the same be acceptable to the husband? There is no doubt that, on a reversal of roles, the husband, without any fault of his own, would have never accepted as just, the dissolution of his matrimonial ties, even if the couple had been separated for a duration, as is the case in hand. Specially, if the husband had, right from the beginning, fervently expressed the desire to restore his matrimonial relationship with his wife, and to live a normal life with her. The issue in hand should be adjudged by the above standards, when the same prayer is made by the husband. To constitute justice, the picture should appear to be the same, irrespective of the angle from which it is viewed. If the same sequence of facts cannot be viewed as doing justice to the husband, they have to be likewise viewed for the wife as well. It is, therefore, not possible to accept even the last plea advanced on behalf of the appellant. [Paras 40, 41 and 42] [980-A-B, E-H; 981-A-F]

Case Law Reference:

(2009) 6 SCC 379	**referred to**	**Para 39**
2010 (12) SCR 275	**referred to**	**Para 39**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6332-6333 of 2009.

From the Judgment and Order dated 06.07.2009 of the High Court of Judicature Andhra Pradesh at Hyderabad in Family Court Appeal No. 36 and 37 of 2006.

Vijay Hansaria, Prerna Kumari, Amit Anand Tiwari, Manoj, Gargi Srivastava for the Appellant.

Mukul Gupta, Sushant Kumar, Ahwesh Madhukar, Narender Singh Bisht, Rishabh, A. Venayagam Balan for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. The marriage between the appellant-husband, Darshan Gupta and the respondent-wife, Radhika Gupta, was solemnized on 9.5.1997 at the Holiday Inn Hotel in Hyderabad, as per Hindu rights and customs. This was not the first matrimonial alliance between the two families. The husband's elder brother was already married to the wife's sister. Both parties admittedly belong to well-to-do families. At the time of marriage between the parties, Darshan Gupta, the husband was 22 years of age, and Radhika Gupta was 19. Now the husband is 35, and the wife 32. The marriage between the parties was duly consummated, and their relationship blossomed into one full of love and affection.

2. The cordiality between the parties continued for a period of two years, till the wife conceived for the first time in February 1999. The aforestated conception was aborted when Radhika Gupta was in the fourth month of her pregnancy, as she had commenced to suffer from hyp[illegible]o

fits, extreme morning sickness and general weakness. The decision to abort the pregnancy in June, 1999, was based on medical advice.

3. The wife Radhika Gupta conceived for the second time in February 2000. During the instant pregnancy, she had similar symptoms, as she had suffered on the earlier occasion. For the aforesaid reason, and on medical advice, when the pregnancy was in its eighth month, a caesarian operation was performed in September, 2000. At the time of birth of the child, the wife, Radhika Gupta, was unconscious. Even after the child was delivered, she remained unconscious. The child born to Radhika Gupta survived for only eight days.

4. Since Radhika Gupta had developed serious medical complications, she was treated at the best hospitals at Hyderabad, amongst others at the Apollo Hospital, as an indoor patient. Doctors from across the country were consulted. They had attended upon her, at the behest of her husband Darshan Gupta. To ensure that there was no deficiency in her medical upkeep, she was shifted to the Leelavathi Hospital at Mumbai. At Mumbai, further tests were conducted and surgeries were performed. She also sought consultations from the National Institute of Medical Health and Neuroscience, Bangalore (NIMHANS).

5. During the treatment of Radhika Gupta, neurologists and gynecologists looking after her believed, that she had suffered brain damage. On that account, she is stated to have lost her memory, so much so, that she could not even recognize persons of close affinity. Her speech was also stated to have been substantially impaired. It was averred, that the condition of the wife was such, that she could not even discharge her personal obligations. She had to be assisted by an attendant. According to the contention of Darshan Gupta, the condition of Radhika Gupta was no better than a child of five years. He also alleged, that Radhika Gupta's condition was such, that she could not be left alone in the room, nor could she be permitted to use

the bathroom by herself. Gynecologists, who examined Radhika Gupta had opined, that she was not fit for discharging her matrimonial obligations. They also felt, that she could not bear a child. Neurologists believed, that it was impossible for the husband to live with Radhika Gupta. On the subject of their marital relationship, the husband contends, that his wife did not allow him to touch her physically, even to please her. It is the husband's assertion, that at times Radhika Gupta would wake up in the middle of the night, and thereafter, would not allow him to sleep. Darshan Gupta even accused his wife, for shouting and screaming without any reason.

6. For the upkeep, maintenance and sustenance of his wife, the appellant Darshan Gupta, is stated to have created a trust with a corpus of Rs.10,00,000/-. For his wife's residence, the appellant Darshan Gupta persuaded his father to execute a lease deed of a flat in a posh locality, at a nominal rent, in favour of the trust. Besides the aforesaid, the appellant Darshan Gupta has been paying his wife Radhika Gupta a sum of Rs.25,000/- per month towards maintenance, during the pendency of the proceedings.

7. In response, the case set up by Radhika Gupta has been, that after her first conception was aborted in June, 1999, the attending gynecologist at Apollo Hospital, had cautioned the couple against any further conception for at least two years. The couple had been advised, that pregnancy of Radhika Gupta during this period could lead to serious medical complications. Despite having been forewarned by the gynecologist, Radhika Gupta alleges, that her husband had proceeded with unsafe cohabitation, resulting in a second pregnancy within a short period of eight months (after the termination of the first pregnancy), i.e., well within the unsafe period. According to Radhika Gupta, true to the advice of the attending gynecologist, the second pregnancy resulted in the same symptoms as she had suffered during her first pregnancy. It was her assertion, that she had again started to suffer from [illegible]g

in fits, extreme morning sickness and general weakness. Despite the precarious condition of the wife, she was persuaded by her husband, Darshan Gupta, to carry on the pregnancy till the eighth month. The wife acknowledges the caesarian operation conducted on 20.9.2000, as also the fact, that the child born to her surviving for only eight days. In this behalf her assertion is, that her husband was to be blamed for the same, as he did not heed to the medical advice of the gynecologist. According to Radhika Gupta, the fall out of the second pregnancy, specially the effect thereof to her health, was the real cause of the turn around of the matrimonial relationship, between the parties. For that, Radhika Gupta blames her husband.

8. Despite the factual position noticed hereinabove, Radhika Gupta – the wife, claims to be hale and hearty. Before the Family Court, she had expressed, that she was ready and willing for any medical evaluation, at the Court's behest. According to Radhika Gupta, after the death of the new born, her husband did not extend, the care that she deserved from him. This had happened after the termination of the first pregnancy also. At that juncture, her parents had taken her to neurologists, psychologists and occupational therapists of national repute. After the caesarian surgery, Radhika Gupta had remained unconscious. She used to suffer series of fits. It is therefore, that she had to be shifted to the Apollo Hospital. After treatment, she had regained her consciousness, and had become more oriented. It is the wife's assertion, that yet again after the episode of the second pregnancy, the husband did not extend any emotional or moral support to her. Rather than taking care of her, she was shifted to her parents' house in May 2002. It is the wife's contention, that her parents again took good care of her. They had again sought advice from specialists of different medical fields, as before. The undisputed factual position between the parties is, that ever since she was shifted to her parents house in May 2002, Radhika Gupta has remained at her parents' house, except for a few days (from

29.9.2011 to 3.10.2011), that also, in compliance with the desire and directions of this Court.

9. It has been, and it still is, the wife's case, that she is intensely concerned about her future relationship with her husband, and that, her greatest and paramount desire is to rejoin her husband, and to live with him normally in a matrimonial relationship, once again. According to the respondent-wife, all efforts made by her have failed, only on account of the rigid attitude of her husband.

10. On the above facts, OP No.926 of 2002 was filed by the appellant-husband before the Family Court seeking dissolution of marriage under clauses (ia) and (iii) of Section 13(1) of the Hindu Marriage Act, 1955. As against the aforesaid, OP No.629 of 2003 was filed by Radhika Gupta, before the same Court, seeking restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955. Both the cases were clubbed together. Evidence was recorded in OP No.926 of 2002, and the same was treated as evidence for the determination of OP 629 of 2003 as well.

11. Darshan Gupta examined four witnesses in all. He examined himself as PW1. He examined his maternal aunt Nirmala Devi as PW2. Darpan Gupta, the twin elder brother of the appellant-Darshan Gupta was examined as PW3. Dr. M. Veera Raghava Reddy, a practicing neurologist was examined as PW4. The testimony of the husband Darshan Gupta who appeared before the Family Court as PW1, was in consonance with the factual position indicated in the pleadings, as also, in the factual narration recorded hereinabove. PW2 and PW3 being close family relations supported the statement of Darshan Gupta-PW1, in all material particulars. While deposing before the Family Court, Dr. M. Veera Raghava Reddy-PW4 stated, that he had referred the respondent-wife Radhika Gupta to Dr. Nagaraja for a second opinion. The said second opinion was sought by the appellant-husband Darshan Gupta and his relations. Even though Dr. M. Veera [illegible]4,

somewhat towed the line of the appellant-husband Darshan Gupta during the course of his examination-in-chief, he acknowledged during the course of his cross-examination, that when he had visited Radhika Gupta at her residence, her physical condition was normal. He also accepted, that he had not prescribed any medicine to the respondent-wife, for the effect of eclampsia on the brain, as there was no medicine for it. He admitted, that he did not advise or refer Radhika Gupta to any psychiatrist or clinical physiologist, for evaluating her physical and mental functions, nor did he prescribe her any treatment to improve the said functions. He however opined, from his experience, that even if treatment had been taken by Radhika Gupta from psychiatrists/clinical physiologists, her improvement would have been limited to 4-5%. He also acknowledged, that he had never given any opinion to the appellant-husband, that Radhika Gupta was suffering from loss of cognitive deficiency, or that she was not fit for conjugal life. It would be pertinent to mention, that it stands noticed in the order of the Family Court, that when Dr. M. Veera Raghava Reddy-PW4, appeared before the Family Colurt to depose in the matter, Radhika Gupta was sitting in the court–hall observing court proceedings. During their interaction Dr. M. Veera Raghava Reddy-PW4, had enquired about her welfare. She had responded by stating, "I am fine sir, thank you.".

12. It would be pertinent to mention, that Radhika Gupta chose not to examine herself as a witness, in either of the two cases before the Family Court. She only examined Dr. C.R. Mukundan-RW1, in her defence. During the course of his deposition, Dr. C.R. Mukundan-RW1 had produced three documents Exhibits R1 to R3. As per his deposition, when he had examined Radhika Gupta, he was working as Professor of clinical psychiatry in the neuro-psychology unit, at NIMHANS, in Bangalore. Consequent upon the respondent-wife's evaluation by him, he had issued reports Exhibits R1 and R2. As per the said reports, Radhika Gupta had undergone intensive cognitive re-training using brain function therapy, and

that, she was provided with graded re-training in alphabet and number recognition and delayed recall, recognition and recall of words and figures, different levels of working memory, etc. It was duly noted in Exhibit R2, that at the first neuro-psychological assessment of Radhika Gupta at NIMHANS in June 2002, as also, in the second assessment made in July 2002, there was considerable improvement in her medical condition. It is also recorded in Exhibit R2, that as per the follow up report, she was currently showing significant improvement in all cognitive areas, and that, her word finding difficulty was reduced by 60-70%. It also stands duly noted, that she could not spontaneously name household articles, and food materials, or recall the names of persons and objects seen in movies or read in books. The report (Exhibit-R2) however indicates, that when she had difficulty to spontaneously name an article or person, she would succeed to do so with a little effort. The report (Exhibit R2) also notices, that her working memory had improved so much, that the same could be described as "near normal", because she was able to execute and complete, working memory tasks. Thereafter, Radhika Gupta was subjected to a third neuro-psychological assessment in October, 2002. Again marked improvement was found in her conceptual organization of numbers, and ability for arithmetic operations. On this occasion it was found, that her writing skills still required further improvement. The said third assessment expressly notices, that Radhika Gupta was capable of all normal emotional experiences and expressions, and that, she was intimately desirous of restoring her future relationship with her husband. She was found to be fully capable of a happy marital life. Interestingly, the aforesaid report underlines the fact, that her improvement would have been a lot more significant and faster, if her husband had been with her, and had cared for her in her journey to recovery. It was however, pointed out, that Radhika Gupta still lacked in self-confidence. Yet, she was found to be highly motivated for further improvement, and her logical thinking and expressive abilities were described as excellent. Exhibit R3 produced by Dr. C.R. Mukundan-R

lines as the earlier two exhibits. Dr. C.R. Mukundan-RW1, deposed, that Radhika Gupta was not a case of mental disorder. Her case was of severe cognitive deficiencies, on account of brain damage. She had suffered, the aforesaid brain damage on account of eclampia during the course of her second pregnancy. According to Dr. C.R. Mukundan-RW1, in some areas of deficiency, she was found to have fully recovered. In some areas of cognitive deficiencies her improvement was about 60-70%. According to Dr. C.R. Mukundan-RW1, Radhika Gupta had recovered her working memory by more than 80%. It was further pointed out, that cognitive deficiency is recoverable, but is dependant on the degree of damage to the brain, as also, the emotional support the patient gets from family members at the relevant time. In his examination-in-chief, Dr. C.R. Mukundan-RW1 deposed, that during her treatment he had requested Radhika Gupta to bring her husband along with her. But her husband had never accompanied her. It was sought to be explained, that the presence of Darshan Gupta, would have given emotional support to her. This position remained uncontested during his cross-examination. On the issue of cognitive deficiencies, it was sought to be clarified, that even though the same would affect the quality of life of Radhika Gupta, yet the same would have no effect on her matrimonial obligations. During the course of his cross-examination, Dr. C.R. Mukundan-RW1, denied the suggestion, that Radhika Gupta was not in a position to discharge her normal day to day functions of life, like bolting a door after entering the bathroom, or opening a door after bolting it. He acknowledged, that he himself had given the reports at Exhibits R2 and R3. At this juncture, it would be necessary to notice, that after consulting Dr. C.R. Mukundan-RW1, the appellant-husband Darshan Gupta desired a second opinion, for which he obtained a letter from Dr. M. Veera Raghava Reddy-PW4, addressed to Dr. Nagaraja. Thereafter, the appellant-husband Drashan Gupta visited Dr. Nagaraja for a second opinion, but while seeking the same, he did not admittedly take the respondent-wife Radhika Gupta for

examination at the hands of Dr. Nagaraja.

13. Dr. M Gauri Devi, Superintendent, Institute of Mental Health, Erragadda, Hyderabad, was examined as Court Witness 1(CW1). Dr. M. Gauri Devi-CW1 constituted a medical board, at the asking of the Family Court, for examining and evaluating the medical condition of Radhika Gupta. The aforesaid medical board comprised of Dr. Ch. Venkata Suresh, Assistant Professor of Psychiatry of Institute of Mental Health, Hyderabad, Dr. K. Ashok Reddy, Associate Professor of Psychiatry of Institute of Mental Health and Dr. S. Bhaskara Naidu, Professor of Clinical Psychology of Institute of Mental Health Hyderabad. The medical board having examined Radhika Gupta, submitted its report (Exhibit C1) to the Family Court. A perusal of the medical report indicates, that the medical board had recorded its conclusions on the basis of the medical history of Radhika Gupta, as also, the observations and examination of the respondent-wife. The medical board expressed the opinion, that the Radhika Gupta was suffering from cognitive deficiencies, in the form of difficulty in comprehension, attention, concentration, orientation, perceptual ability, memory retrieval, word finding difficulty and organization ability. The said effects, according to the medical board, could influence her day to day functioning. The defects were, however, found to be on account of brain damage involving predominately the parietal-temporal region of the brain. It was concluded, that Radhika Gupta did not manifest any signs of major mental disorder, and that, she exhibits normal adequate emotional responses. It was opined, that she would further benefit from neuro-psychological rehabilitation measures, which are available at NIMHANS.

14. Dr. Bhaskar Naidu, one of the members of the medical board, deposed before the Court as CW2. He was cross-examined first by the learned counsel representing the respondent-wife Radhika Gupta, and thereafter, by the learned counsel representing the appellant-hus

On being cross-examined at the behest of the respondent-wife, he stated that he was of the opinion that Radhika Gupta was suffering from some deficiency of intelligence. He further stated, that the average intelligence quotient of a human is between 92 to 110 points. He opined that Radhika Gupta possessed the intelligent quotient between 50 to 55 points. It was sought to be explained, that a person having between 70 to 90 points is called a slow learner or border line person, and a person having between 50 to 70 points is described as one of moderate intelligence. In the aforesaid view of the matter, he accepted that Radhika Gupta could be described as an individual of "moderate intelligence". He also opined, that by undergoing therapy training, there is a likelihood of Radhika Gupta to further improve her cognitive deficiency. When Dr. Bhaskar Naidu-CW2 was cross-examined by the learned counsel representing the appellant-husband Darshan Gupta, he asserted that Radhika Gupta was suffering from mild to moderate cognitive deficiency. He also expressed, that the aforesaid deficiency would not come in her way in discharging her matrimonial obligations.

15. Based on the evidence led by the rival parties, and also, through the court witnesses, the Family Court arrived at the conclusion, that the husband had failed to establish, that he was subjected to cruelty at the hands of Radhika Gupta. On the issue of aggressive and abnormal behavior of the wife, the Family Court felt, that there was no evidence before the Court, except the deposition of interested witnesses, namely, the appellant-husband himself, his maternal aunt Nirmala Devi and his elder twin brother Darpan Gupta. The Court was of the view, that such behavior, if it was actually there, could have easily been established through nurses and attendants of Radhika Gupta. But these, or such like witnesses were withheld, even though they could have been easily available to the appellant-husband. It was also concluded, that Darshan Gupta had not been able to prove, that his wife was suffering from any incurable unsoundness of mind and/or mental disorder. Insofar

as the solitary expert witness produced by the appellant-husband Darshan Gupta is concerned, Dr. M. Veera Raghawa Reddy-PW4, had admitted that while examining Radhika Gupta, he did not observe any signs of aggressiveness in the respondent-wife. On the contrary, he affirmed, that she was having a smiling face, and also, observed a calm and cool conduct.

16. The Family Court, on the basis of oral and documentary evidence produced before it, arrived at the conclusion that Radhika Gupta did not suffer from any mental disorder or unsoundness of mind. She merely suffered from cognitive deficiency. The aforesaid cognitive deficiency was acquired during her second pregnancy. She was found to have substantially improved from her cognitive deficiency, during the course of her treatment. The Family Court also expressed the opinion, that Radhika Gupta could have improved even further, had there been moral and emotional support to her by her husband, Darshan Gupta. In fact, the trial Court felt, that the appellant-husband Darshan Gupta had never given the respondent, moral or emotional support, during the time of her distress. Despite the request of her treating doctor, he never accompanied her during the course of her consultations with doctors. The Family Court expressed the view, that the appellant husband Darshan Gupta himself, was responsible for the state of affairs of his wife-Radhika Gupta, inasmuch as, he did not heed the advise of the gynecologist, after the abortion of her first pregnancy in June 1999. The consulting Gynecologist had advised the couple against planning any further conception, for a period of at least two years. Despite the aforesaid advice, Darshan Gupta impregnated his wife Radhika Gupta, just after eight months of the said abortion. His desires had overridden, the health advisory of the gynecologist. The Family Court also concluded, that the appellant-husband had failed to establish, that the mental unsoundness of mind or mental disorder of the respondent-wife was of such degree, that he could not be expected to live wi

17. Having regard to the aforesaid conclusions, the Family Court dismissed OP No.926 of 2002 filed by the appellant-husband Darshan Gupta on the ground that he had not been able to prove the ingredients of either clause (ia) or clause (iii) of Section 13(1) of the Hindu Marriage Act, 1955. On the other hand, OP No.629 of 2003 was allowed holding that the respondent-wife was entitled to the relief of restitution of conjugal rights. Her husband Darshan Gupta was accordingly directed to receive her back into his house within three months, and to give her moral and emotional support. On his failure to do so, he was directed to continue to pay the interim maintenance amount fixed by the Family Court, till he finally accepts her back into his house. At this juncture, and in the context under reference, it would be sufficient to record, that the parties have not been able to reside together till date.

18. Dissatisfied with the common order dated 2.2.2006 passed by the Family Court, Hyderabad, the appellant husband filed FCA No.36 of 2006 to assail the order passed in OP No.629 of 2003. Similarly, he filed FCA No.37 of 2006 to impugn the order passed in OP No.926 of 2002. The High Court disposed of FCA No.36 of 2006 and FCA No.37 of 2006 by a common order dated 6.7.2009. By the aforesaid common order, the High Court dismissed both the appeals preferred by the appellant-husband, by accepting and re-endorsing each finding of fact, recorded by the Family Court, Hyderabad.

19. The common order passed in FCA No.36 of 2006 and FCA No.37 of 2006 by the High Court on 6.7.2009 was assailed by the appellant-husband Darshan Gupta by filing Petitions for Special Leave to Appeal being SLP (C) Nos.22571-22572 of 2009. On 14.9.2009, this Court granted leave, in the above mentioned petitions.

20. On 27.7.2011, this Court directed both parties with their family members to appear before the Hon'ble Judges hearing the matter, in chamber. Accordingly, on 23.8.2011, the parties appeared, and were heard in chambers. While

adjourning the matter to 19.9.2011, the Hon'ble Judges who had heard the parties in chamber recorded, that the parties were not in a position to arrive at an amicable settlement. Despite the above, on the next date of hearing, i.e., on 19.9.2011, learned counsel representing the rival parties informed this Court, that the appellant, as well as, the respondent had expressed their mutual willingness to live together in a separate flat, initially for a period of at least six months. This Court, being desirous of an amicable settlement, permitted the appellant and the respondent to live together. While granting the said liberty, the bench hearing the matter, recorded its earnest hope, that there would be no interference by other family members. The parties were required to inform this Court, of the outcome of their effort.

21. It is submitted by learned counsel representing the rival parties, that Radhika Gupta joined her husband Darshan Gupta in a separate flat at Hyderabad, on 29.9.2011. Darshan Gupta and Radhika Gupta, however, remained together only for a few days. During the said period, the parties could not persuade themselves to maintain a relationship of cordiality, nor was there any physical relationship between them. Radhika Gupta left the company of the appellant-husband Darshan Gupta on 3.10.2011. On the said date itself, Radhika Gupta addressed a letter to the Registry of this Court. The said letter read thus :

> "The Hon'ble Supreme Court, by the order dated 19.09.2011 directed us to live happily for a period of six months. In pursuance to the directions of the Hon'ble Supreme Court, my husband taken me into his matrimonial company on 29.09.2011 and kept me separately at his row (sic) house situated at Jubilee Hills.
>
> However, I am reporting from that day i.e. 29.09.2011 my husband is not behaving properly with me. Instead of showing love and affection, he is abusing me with filthy language without any reason. He is calling me "PAGAL"

as and when he is addressing me. He is further saying that I have no sense and intelligence. Further he repeating me to leave him by taking money. He is further saying that even though his appeal before Supreme Court is dismissed he is not going to live with me. My in-laws also compelling me to agree for divorce by accepting money. My husband threatening me to agree for Divorce. The torture of my husband is beyond my tolerance. Hence under the above compelling circumstances I am leaving to my mothers' place."

It is apperant from the above, that the efforts of the parties to convince one another, of settling the matter amicably, did not yield to any fruitful results.

22. It is thus, that the matters came to be relisted for hearing. Learned counsel representing the rival parties expressed their desire, that the appeals be heard and disposed of on merits. It is therefore, that we have resolved to adjudicate upon the matters. We may only record, that it is routine to settle issues of law, but it is formidably cumbersome, and distressingly painful to decide issues of relationship. All the same, having heard learned counsel for the rival parties, we shall record our conclusions, on the issues canvassed.

23. The appellant-husband has sought dissolution of marriage on two grounds. First and foremost, he claims to have been subjected to cruelty on account of the intemperate behaviour of his wife. For the instant prayer, he relies on clause (ia) of Section 13(1) of the Hindu Marriage Act, 1955. The second ground on which the appellant-husband seeks dissolution of marriage is, that his wife is of incurable unsound mind, and suffers from such a mental disorder, that the appellant cannot be reasonably expected to live with her. For the instant second prayer, the appellant-husband relies on clause (iii) of Section 13(1) of the Hindu Marriage Act, 1955. The two provisions on the basis whereof the husband seeks annulment of marriage are being extracted hereunder for facility

of reference:-

"**13. Divorce**

(1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

1[(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation —In this clause-

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment"

24. Insofar as the allegation of cruelty levelled against the wife is concerned, the same did not constitute a serious challenge at the hands of the appellant on the basis of the facts pleaded and proved during the course of hearing. Being conscious of the fact, that the Family Co h

Court were unanimously of the view, that the appellant had failed to discharge the onerous responsibility of substantiating even a single fact to demonstrate any erratic behaviour of Radhika Gupta, which would constitute and establish cruelty at the hands of the wife towards the husband, recourse was advisedly taken to cumulatively project the factual position for both the grounds, on the basis whereof annulment of marriage was sought, i.e., on account of intemperate behavior, as well as, on account of the alleged mental condition of the wife. This is how we understood the submissions advanced at the hands of the learned counsel for the appellant-husband. And therefore, that is the manner in which the same will be considered. We shall, therefore, first briefly record the factual basis constituting the foundation of the challenge.

25. On the attitude of Radhika Gupta, the respondent-wife, towards the appellant-husband, specially after September, 2000, it was submitted that she was totally disoriented, after she regained consciousness. She could not distinguish right from wrong. She was no better than a child of five years. She would wake up in the middle of the night and would start shouting without any reason. She would not allow the appellant-husband Darshan Gupta to sleep, after she had woken up. Even otherwise, her shouting and screaming could occur at any time of the day (or night) without any cause. She was unpredictable. Neurologist had opined, that it was impossible for Darshan Gupta, the appellant-husband, to live with his wife Radhika Gupta. On the subject of her mental condition, it was sought to be asserted, that after the tragedy wherein Radhika Gupta, lost her new born only eight days after the child's birth; the appellant-husband, as also his family members, left no stone unturned for the restoration of her health. For that, she was taken to the best hospitals, which specialized in the very disorder, she suffered from. Specialists in all the relevant fields including neurologists, gynecologists, psychologists, occupational therapists, and the like, were duly consulted. When advised, second opinions of experts were also sought. Yet the condition

of Radhika Gupta, did not improve to an extent, as would render her competent, even to take care of herself. In this behalf, it was submitted, that it was not safe to leave the respondent-wife alone in her bedroom. Likewise, she could not be permitted to use the bathroom by herself. Accordingly, an attendant was engaged to help Radhika Gupta, even for her personal day to day activities. Insofar as the mental condition of the respondent-wife is concerned, based on the testimony of Dr. M. Veera Raghava Reddy-PW4, it was submitted that there was no likelihood of any improvement in her mental framework, inasmuch as, her improvement (as per the testimony of PW4) would be limited to 4-5%. It was submitted, that she was forgetful, and had lost her memory. She could not name household articles or food materials. She could also not recall the names of persons and incidents, she was otherwise well-versed with. Her working memory was sub-normal, and therefore, she could not be expected to execute day to day tasks, or to perform ordinary obligations, towards her husband and the other family members. Her mental deficiency, according to the learned counsel representing the appellant-husband, was on account of brain damage suffered by her, at the time of the caesarian operation performed upon her, in September, 2000. The said brain damage, according to the learned counsel, was irreparable. It was pointed out, that the behaviour of Radhika Gupta, thereafter was proof in itself, for the aforesaid assertion. On account of the aforesaid brain damage, even her speech was stated to have been substantially impaired. On the subject of their marital relationship, it was contended, that the same was just out of the question. In this behalf it was sought to be pointed out, that Radhika Gupta would not allow the appellant to touch her physically, even to please her. The enjoyment of marital life was, therefore, unimaginable. According to the opinion tendered by Dr. M. Veera Raghava Reddy-PW4, on account of the cognitive deficiency suffered by Radhika Gupta, she was not fit for conjugal life. With great emphasis, learned counsel representing the appellant-husband pointed out, that Radhika Gupta was no longer fit to bea

according to the learned counsel, was acknowledged unanimously by specialists treating her. It was, therefore sought to be suggested, that the mental disorientation of Radhika Gupta was of an order and extent, that the appellant-husband could not reasonably be expected to live with her. Living with her would result in subjecting himself to cruelty.

26. The response of the learned counsel, to the factual averments canvassed at the hands of the learned counsel for the appellant-husband, constituted a two-pronged attack. First and foremost it was sought to be averred, that it was Darshan Gupta, the appellant-husband, who was pointedly responsible for the medical condition of the respondent-wife. It was therefore submitted, that he ought to squarely accept his fault for the same. Accordingly it was contended, that it was not open to him to press a claim for dissolution of marriage under Section 13(1) of the Hindu Marriage Act, 1955, by making accusations, for which he himself was blameworthy. In this behalf it was submitted, that after the first conception of Radhika Gupta was aborted in June, 1999, the attending gynecologist at Apollo Hospital, had cautioned the couple against any further conception, for at least two years. The couple had been made aware of the fact, that any pregnancy during this period would lead to serious medical complications. Despite having been conscious of the disastrous consequences of Radhika Gupta's conception, Darshan Gupta had proceeded with unsafe cohabitation, resulting in her pregnancy within a short period of eight months i.e., well within the risk period. It was submitted, that the advice of the attending gynecologist, had proved to be correct, inasmuch as, Radhika Gupta suffered hypertension resulting in fits, extreme morning sickness and general weakness. It was pointed out, that the situation could still have been saved, but for the extreme desire of the husband Darshan Gupta, to have a child. It is, therefore, that the second pregnancy was not terminated. Radhika Gupta, therefore, suffered torturous health conditions, during the eight months of her second pregnancy. The forbidden pregnancy eventually resulted

in brain damage, leading to the consequences on the basis whereof Darshan Gupta presently seeks dissolution of marriage. In this behalf it was also sought to be vehemently contended, that the appellant-husband was not truly interested in the recovery of Radhika Gupta, inasmuch as, he never extended any emotional support to her, despite the trauma that she had gone through after she lost her baby in September, 2000. It was submitted, that according to the experts who had examined her, her improvement would have been a lot more significant and faster, if her husband had been with her, and had cared for her, in her journey to recovery. Even though her attending doctor is stated to have repeatedly asked Radhika Gupta to bring her husband alongwith her, Darshan Gupta had never accompanied her during the course of her consultations with Dr. C.R. Mukundan-RW1. It was, therefore submitted, that the appellant cannot be granted relief, for a wrong for which he himself was responsible.

27. Learned counsel representing Radhika Gupta even contested the factual premise, on which the appellant-husband had based his claim for dissolution of marriage. Insofar as the factual position is concerned, Radhika Gupt contended, that she was hale and hearty. Even though she acknowledged, that she was mentally disoriented immediately after she had undergone the cesarean operation in September, 2000, it was averred, that she had regained her consciousness and had become normal. Relying on the reports prepared by experts during the course of her treatment as far back as in June, July and October, 2002, it was submitted that she had shown significant improvement in all cognitive areas. Even her working memory had improved, so much so, that experts had evaluated the same as normal. It was pointed out, that Radhika Gupta was fully capable of enjoying a happy marital life, and that, there was no evidence on the record of the case to establish, that her mental condition would have any effect on her matrimonial obligations. On her abilities to discharge her matrimonial obligations, it was submitted that Radhika Gupta was as[illegible]g

normal and adequate emotional responses. During the entire traumatic period, in the course whereof the parties had separated from one another, she had persistently expressed that she was intensely concerned with her future relationship with her husband, and that, her greatest and paramount desire was to rejoin her husband, and to live with him normally in a matrimonial relationship once again. Based on expert opinion tendered by the medical board constituted by the Family Court, the statement of Dr. C.R. Mukundan-RW1, as also, the testimony of Dr. Bhaskara Naidu-CW2, it was submitted, that there could be no doubt, that the respondent-wife was possessed of all necessary ingredients, mental as well as, physical, for effectively discharging her matrimonial obligations. On the above averments it was submitted, that the Family Court, as well as, the High Court had justly adjudicated the controversy, by expressing the same opinion concurrently.

28. We have given our thoughtful consideration to the rival submissions advanced at the hands of the learned counsel for the parties. First and foremost, we must record, that the respondent-wife Radhika Gupta admittedly suffered brain damage after her cesarean operation in September, 2000. It is not a matter of dispute, that she had remained unconscious for some time even after having delivered a baby on 20.9.2000. It appears, that at the time of regaining consciousness, she was totally disoriented, having lost her memory. The extent to which she had lost her memory is not discernible from the evidence available on the record of the case. It was most definitely substantial, as it is clear, that she could not even recognize persons of close affinity. She could not name household articles and food materials. She could not remember the names of persons known to her. She could also not recall the objects and incidents seen by her. She was unable to execute and complete, working memory tasks. Even her conceptual organization of numbers, and ability for arithmetic operations, was limited. Not only that, even her speech was substantially impaired.

29. To deal with her medical condition, her husband Darshan Gupta seems to have initially extended full financial support, by seeking consultation of specialists in fields wherein Radhika Gupta needed assistance. He also ensured, that such treatment was provided to her at premium hospitals. Material on record demonstrates, that she was admitted at the Apollo Hospital, Hyderabad, and thereafter, at the Leelavathi Hospital, Mumbai. Her treatment at NIMHANS, Bangalore, also emerges from the record of the case. There can, therefore, be no doubt about the initial commitment of Darshan Gupta towards the welfare of his wife Radhika Gupta.

30. It, however, seems, that the appellant-husband was skeptical about the outcome of her recovery. His assessment of her medical condition, in the background of the inputs from the doctors attending on her, probably created the impression, that she would henceforth be a liability on him. Dr. M. Veera Raghava Reddy-PW4 may have been responsible for the said impression. Even during the course of his testimony before the Family Court, Dr. M. Veera Raghava Reddy-PW4 had opined, that from his experience he could state, that even if the respondent Radhika Gupta was treated by psychiatrists or clinical physiologists, her improvement would be limited to 4-5%. Keeping in mind the hopeless condition of Radhika Gupta, the appellant-husband could not have expected any kind of positive relationship with Radhika Gupta. It was natural for him to infer, that his wife would henceforth be a useless burden. It is not reasonable to blame him for his impressions. In 2000, when the unfortunate incident occurred, he was merely 25 years old. One would expect, that all his dreams of a happy married life, came to be shattered after seeing the medical condition of his wife, specially in the background of the assessment made by the experts being consulted. The aforesaid impression in his mind, clearly demonstrates the reason of his responses towards Radhika Gupta, in the aftermath of her medical tragedy. He was absolutely sure, that she would never be able to lead a normal life, and that, n

of her being able to perform her matrimonial obligations. It is in the aforesaid background, that it is easier to understand why he had refrained from extending emotional or moral support to Radhika Gupta. But the inescapable truth is, that factually Darshan Gupta did not extend emotional or moral support to his wife, after her medical episode. The distress of Darshan Gupta, and the distance that he started to keep from his wife, emerge from the statement of Dr. C.R. Mukundan-RW1. Dr. C.R. Mukundan-RW1 placed on the record of the Family Court three documents (Exhibits R1 to R3). The aforesaid documents pertain to the treatment of Radhia Gupta during 2002. In our view, those are the safest documents to be relied upon, for truly assessing the medical conditions of Radhika Gupta. These reports cannot be said to have been created, at the asking of one or the other. They were honest impressions expressed about the state of mental health of Radhika Gupta. The attending doctor of Radhika Gupta considered it appropriate to expressly record in one of these reports, that during her treatment, he had requested Radhika Gupta to bring her husband along with her. He also noted, that the husband had never accompanied her, despite his aforesaid indication to Radhika Gupta. The consequence of non-participation of Darshan Gupta in the course of treatment of Radhika Gupta, is also recorded in the report. The report notices, that her improvement would have been a lot more significant and faster, if her husband had been with her and had cared for her in her journey to recovery. The reasons which may have weighed in the young husband's mind may be any, but the harsh reality is, that Darshan Gupta did not extend due care and support to his wife, nor did he participate in her journey to recovery.

31. Shorn of the participation and support of Darshan Gupta to his wife Radhika Gupta, it is still material to determine the extent of her recovery. An assessment of the mental condition of Radhika Gupta, would render it possible for us to determine whether or not in terms of Section 13(1)(iii) of the Hindu Marriage Act, 1955, her mental disorder is of such a kind,

and to such an extent, that Darshan Gupta cannot reasonably be expected to live with her. Insofar as the instant aspect of the matter is concerned, it would be just and appropriate to refer to and rely upon, the three reports prepared at the relevant time. The aforesaid reports were placed on the record of the Family Court by Dr. C.R. Mukundan-RW1. The said reports were prepared in June, July and October 2002. The reports reveal, that Radhika Gupta had undergone intensive cognitive re-training using brain function therapy, and she was provided with graded re-training in alphabet and number recognition and delayed recall, recognition and recall of words and figures, different levels of working memory, etc. In the first neuro-psychological assessment of Radhika Gupta at NIMHANS in June, 2002, as also, in the second assessment made in July, 2002, considerable improvement was found in the medical condition of Radhika Gupta. She was found to have shown significant progress in all cognitive areas, and that, her word finding difficulty was reduced by 60-70%. Even though the report records, that she could not spontaneously name household articles and food materials, or recall the names of persons and objects seen in movies or read in books, yet was noticed, that she could do so with some effort. The report also records, that her working memory had improved to an extent, that the same could be described as "near normal". In her aforesaid assessment, she was found to be able to execute and complete, working memory tasks. Radhika Gupta was subjected to a third neuro-psychological assessment in October, 2002. Again marked improvement was found in her conceptual organization of numbers and ability for arithmetic operations. The instant third assessment expressly records, that Radhika Gupta was capable of all normal emotional experiences and expressions. Her eager and earnest desire about her future reunion with her husband, is also indicated in the report. She has been assessed as fully capable of shouldering the responsibilities of a happy marital life. Dr. C.R. Mukundan-RW1 categorically testified, that Radhika Gupta was not a case of mental disorder. He clarif s

of cognitive deficiency, on account of brain damage. According to RW1, Radhika Gupta had recovered her working memory by more than 80%. He also explained, that cognitive deficiency is recoverable, but the recovery is dependent on the degree of damage to the brain, as also, the emotional support the patient gets from the family members, at the relevant time. It would be pertinent to mention, that this is the testimony of the same doctor, who had been requiring Radhika Gupta to bring Darshan Gupta along with her, during the course of her consultations. During the course of his cross-examination, Dr. C.R. Mukunan-RW1 denied the suggestion, that Radhika Gupta was not in a position to discharge her normal day to day functions of life.

32. Besides the testimony of Dr. C.R. Mukundan-RW1, it would be relevant to mention, that the Family Court had directed Radhika Gupta to appear before a medical board. It would be appropriate to refer to the findings and conclusions recorded in the report submitted by the said medical board, which comprised of eminent specialists in psychiatry and clinical psychology. In the aforesaid report (Exhibit C1) submitted to the Family Court, conclusions were recorded on the basis of the medical history of Radhika Gupta, as also, the observations and examinations of the respondent-wife. The medical board expressed the opinion, that Radhika Gupta was suffering from cognitive deficiencies in the form of difficulty in comprehension, attention, concentration, orientation, perceptual ability, memory retrieval, word finding difficulty and organization ability. The said effects, according to the Board, could influence her day to day functioning. It was however concluded, that Radhika Gupta did not manifest any signs of major mental disorder, and that, she exhibited normal adequate emotional responses. It was also opined, that she would further benefit from neuro-psychological rehabilitation measures, which are available at NIMHANS. Dr. Bhaskar Naidu, one of the members of the medical board, was also examined by the Family Court, as a court witness. During the course of his deposition, Dr. Bhaskara Naidu-CW2,

expressed the opinion that Radhika Gupta could be described as a person of moderate intelligence. He also expressed, that by undergoing therapy training, there was a further likelihood of improving her cognitive deficiencies. He also clarified, that the deficiencies suffered by Radhika Gupta, would not come in her way to discharge her matrimonial obligations.

33. The aforesaid material, in our considered view, would be sufficient in recording our conclusions, in respect of the mental health of Radhika Gupta. Based on the evidence discussed hereinabove, it is not possible for us to record, that Radhika Gupta suffers from any incurable unsoundness of mind. It is also not possible for us to hold, that she suffers from such mental disorder, that it cannot be reasonably expected of her husband to live with her. The evidence produced before the Family Court leaves no room for us but to conclude, that Radhika Gupta merely suffers from mild to moderate cognitive deficiencies. She is categorized by medical experts as an individual of moderate intelligence. Material on the record of the case reveals, that she would further benefit from neuro-psychological rehabilitation measures, which are available at NIMHANS. Even though the said deficiencies could influence her day to day functioning, but expert opinion is unanimous that the same would not come in her way to discharge her matrimonial obligations. It cannot also be overlooked, that experts have clearly expressed that Radhika Gupta exhibits normal and adequate emotional responses. She has right from the beginning, fervently expressed the desire to restore her relationship with her husband, and to live a normal life, in a matrimonial relationship with him. In the aforesaid view of the matter, it is not possible for us to conclude, that the mental condition of Radhika Gupta is such as would persuade us to accept the appeal preferred by Darshan Gupta under Section 13(1)(iii) of the Hindu Marriage Act, 1955.

34. It would also be relevant for us to refer to the alleged erratic behaviour of Radhika Gupta. In

pertinent to mention, that it was pointedly asserted at the behest of the appellant-husband, that Radhika Gupta would wake up in the middle of the night, and thereafter, would not allow him to sleep. It was also contended, that Radhika Gupta would shout and scream without any provocation or cause, at any time of the day (or night). Other similar allegations were also levelled by Darshan Gupta against his wife. The Family Court, while dealing with the said allegations, had rejected the same on the ground, that there was no evidence before the Court, except the deposition of interested witnesses, namely, the appellant-husband himself, his maternal aunt Nirmala Devi and his elder twin brother Drapan Gupta. Since the husband did not produce independent witnesses available to him before the Family Court, it was concluded that the husband had failed to establish, that Radhika Gupta's behaviour was aggressive, erratic or abnormal; or that he was subject to cruelty on account of such behaviour. We are of the considered view, that the Family Court, as also, the High Court were fully justified in drawing their conclusions, insofar as the alleged abnormal, erratic and aggressive behaviour of Radhika Gupta is concerned. The courts below were fully justified in recording, that the said behaviour of Radhika Gupta could have easily been established through the testimony of the attendants who looked after Radhika Gupta, as also, the other staff, yet the said witnesses were not produced by the appellant, despite their availability. Interestingly, however, the appellant-husband himself had produced Dr. M. Veera Raghava Reddy-PW4, to support his cause. Dr. M. Veera Raghava Reddy-PW4 appearing for the appellant-husband, during his deposition asserted that he did not observe any signs of aggressiveness in the respondent-wife. Since Radhika Gupta was under the care and treatment of Dr. M. Veera Raghava Reddy-PW4, he would have obviously known of her erratic behaviour, if the allegations of the husband were correct. The respondent-wife had also produced Dr. C.R. Mukundan-RW1 on her behalf. He too would have been aware of such behaviour. The appellant Darshan Gupta, however, chose not to examine Dr. C.R. Mukundan-RW1, on the said

subject. In fact, there is material on the record of the case to draw a finding, converse to the submission advanced. In this behalf, it would be pertinent to mention, that in the order of the Family Court it is duly noted, that when Dr. M. Veera Raghawa Reddy-PW4, appeared to depose in the matter, Radhika Gupta was sitting in the court-hall observing court proceedings. During his interaction with Radhika Gupta, PW4 had enquired about her welfare, and she had responded by stating "I am fine sir, thank you". The very court which Radhika Gupta had repeatedly visited, recorded the above instance to demonstrate that her behavior was far from erratic, as suggested by the husband. The position, in our view, would be no different, even if we consider these facts in conjunction with her medical condition. We are, therefore, satisfied in accepting the conclusion drawn concurrently by the courts below, that there was no material on the record of the case, to substantiate the alleged aggressive, erratic or abnormal behaviour of Radhika Gupta. In the aforesaid view of the matter, it is not possible to accept the appeal preferred by the appellant even under Section 13(1)(ia) of the Hindu Marriage Act, 1955.

35. Despite our aforesaid conclusions, it is necessary to examine the instant controversy from another point of view. As noticed hereinabove, it was the vehement contention of the learned counsel for the respondent-wife, based on the pleadings filed by Radhika Gupta, as also, the evidence produced by her, that it was the husband Darshan Gupta alone, who was blameworthy of the medical condition of the respondent. It was submitted, that Darshan Gupta desires to encash on his own fault, by seeking dissolution of marriage, for a consequence, of which he himself was blameworthy. The instant submission, though not canvassed in that manner, can be based on a legal premise. A perusal of the grounds on which divorce can be sought under Section 13(1) of the Hindu Marriage Act, 1955, would reveal, that the same are grounds based on the 'fault' of the party against whom dissolution of marriage is sought. In matrimonial

provisions are founded on the 'matrimonial offence theory' or the 'fault theory'. Under this jurisprudential principle, it is only on the ground of an opponent's fault, that a party may approach a Court for seeking annulment of his/her matrimonial alliance. In other words, if either of the parties is guilty of committing a matrimonial offence, the aggrieved party alone is entitled to divorce. The party seeking divorce under the "matrimonial offence theory" / the "fault theory" must be innocent. A party suffering "guilt" or "fault" disentitles himself/herself from consideration. Illustratively, desertion for a specified continuous period, is one of the grounds for annulment of marriage. But the aforesaid ground for annulment is available only, if the desertion is on account of the fault of the opposite party, and not fault of the party which has approached the Court. Therefore, if a husband's act of cruelty, compels a wife to leave her matrimonial home, whereupon, she remains away from the husband for the stipulated duration, it would not be open to a husband to seek dissolution of marriage, on the ground of desertion. The reason being, that it is the husband himself who was at fault, and not the wife. This is exactly what the respondent has contended. Her claim is, that in actuality the appellant is making out a claim for a decree of divorce, on the basis of allegations for which he himself is singularly responsible. On the said allegations, it is Darshan Gupta, who deserves to be castigated. Therefore, he cannot be allowed to raise an accusing finger at the respondent on the basis of the said allegations, or to seek dissolution of marriage, thereon.

36. There is no dispute between the rival parties, that after Radhika Gupta's first conception was aborted in June, 1999, the attending gynecologist at Apollo Hospital, had cautioned the couple against any further conception for at least two years. The couple had been advised, that pregnancy of Radhika Gupta during this period could lead to serious medical complications. Radhika Gupta alleges, that her husband had proceeded with unsafe cohabitation, leading to her second pregnancy, within a short period of eight months (after the abortion in June, 1999),

i.e. well within the risk period. Clearly contrary to the medical advisory. The truth of the second conception, cannot be disputed, in view of the overwhelming supporting evidence on the record of the case. The conception could have only occurred because of, unprotected sexual indulgence by Darshan Gupta. The medical condition of Radhika Gupta, was for one and only one reason, namely, the second conception of Radhika Gupta, during the unsafe period. Clearly, the blame thereof, rests squarely on the shoulders of Darshan Gupta. The instant conclusion is difficult to assimilate. Yet, there can be no doubt about the truthfulness thereof. It is in this view of the matter, that the submissions advanced at the hands of the learned counsel for Darshan Gupta, have been vehemently opposed. The unambiguous contention of the learned counsel for the respondent is, that the grounds/facts on which divorce is sought by the appellant, are not at all available to him under the "fault theory" on which Section 13(1) of the Hindu Marriage Act, 1955, is founded.

37. We are persuaded to accept the submission noticed in the foregoing paragraph. There can be no doubt, that all the grounds/facts on which divorce has been sought, emerge from the medical condition of Radhika Gupta, after her cesarean operation in September, 2000. The symptoms during her first pregnancy were such, that the couple was advised not to conceive for a period of two years. The husband did not heed to the advice tendered by the attending gynecologist. We are, therefore, inclined to fully endorse the view expressed by the Family Court, that the appellant-husband Darshan Gupta himself, was responsible for the state of affairs of his wife-Radhika Gupta, inasmuch as he did not heed the advice of gynecologist after the abortion of her first pregnancy in June 1999. There is no serious dispute, that to satisfy his desires, he impregnated his wife within a period of eight months, i.e., well within the risk period. Therefore, she suffered the predicted consequences. The medical condition of Radhika Gupta, on which the appellant basis his claim for n

doing. Even though at that juncture, Darshan Gupta was merely 25 years of age, and it may well be difficult to blame him, yet there is no escape from the fact, that the fault rests on his shoulders. In the above view of the matter, it is not possible for us to conclude, that Darshan Gupta did not suffer from any "guilt" or "fault" in the matter. It is, accordingly, not possible for us to accept, that he can be permitted to use his own fault to his advantage. His prayer for divorce on the facts alleged, is just not acceptable. The party seeking divorce has to be innocent of blame. We are satisfied, that the grounds/facts on which a claim for divorce can be maintained under Section 13(1) of the Hindu Marriage Act, 1955, are clearly not available to the appellant Darshan Gupta in the facts and circumstances of this case. For the instant reason also, the prayers made by the appellant must fail.

38. Towards the same end, learned counsel for the appellant advanced yet another submission. Learned counsel representing the appellant, sought dissolution of marriage on the ground, that the matrimonial ties between the parties had irretrievably broken down. It was, therefore, the contention of the learned counsel for the appellant, that this Court would be justified in annulling the marriage between the parties, specially when the parties have lived apart for more than 12 years. Inviting this Court's attention to the intervention at the instance of this Court, in compliance whereof the parties had made a last ditch effort to live together, and had actually taken up residence in an independent flat in Hyderabad on 29.9.2011, it was pointed out, that they could not persuade themselves into a relationship of cordiality. It was, therefore, sought to be suggested, that there was no likelihood of the parties ever living together as husband and wife. It was accordingly submitted, that this Court should consider the annulment of the matrimonial ties between the parties, on the ground of irretrievable breakdown of marriage.

39. At the present juncture, it is questionable as to whether

the relief sought by the learned counsel for the appellant, on the ground of irretrievable breakdown of marriage is available to him. The reason for us to say so, is based on a judgment rendered by this Court in *Vishnu Dutt Sharma vs. Manju Sharma,* (2009) 6 SCC 379, wherein this Court has held as under:-

> "10. On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.
>
> 11. Learned Counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent.
>
> 12. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned Counsel for the appellant.
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> 13. Had both parties been willing we could, of course, have granted a divorce by mutual consent as contemplated by Section 13-

case the respondent is not willing to agree to a divorce."

In this behalf, it would also be relevant to refer to another judgment rendered by this Court in *Gurbax Singh vs. Harminder Kaur,* (2010) 14 SCC 301. Paragraph 20 of the cited judgment is relevant to the issue, and is accordingly being extracted hereunder:-

"Finally, a feeble argument was made that both the appellant and respondent were living separately from 2002 and it would be impossible for their reunion, hence this Court exercising its jurisdiction under Article 142 of the Constitution, their marriage may be dissolved in the interest of both parties. Though, on a rare occasion, this Court has granted the extraordinary relief dehors to the grounds mentioned in Section 13 in view of the fact that the issue has been referred to a larger Bench about permissibility of such course at present, we are not inclined to accede to the request of the appellant. If there is any change of law or additional ground included in Section 13 by the act of Parliament, the appellant is free to avail the same at the appropriate time."

Even otherwise, in the facts and circumstances of this case (which are being highlighted while dealing with the appellant's next contention), we cannot persuade ourselves to grant a decree of divorce, on the ground of irretrievable breakdown of marriage, for the simple reason that the breakdown is only from the side of the husband. The wife - Radhika Gupta has consistently maintained, that she was intensely concerned with her future relationship with her husband, and that, her greatest and paramount desire was to rejoin her husband, and to live with him normally in a matrimonial relationship, once again. Since in the present case, the respondent does not consent to the severance of matrimonial ties, it may not be possible for us to accede to the instant prayer, made at the hands of the learned counsel for the appellant.

40. Since we were not agreeable with the contention advanced by the learned counsel for the appellant, on the plea of irretrievable breakdown of marriage, learned counsel sought the same relief, for the same reasons, by imploring us to invoke our jurisdiction under Article 142 of the Constitution of India, and to annul the marriage between the parties, as a matter of doing complete justice between the parties. Doing justice between the parties is clearly a constitutional obligation. This Court has been bestowed with the discretion "… to make such order as is necessary for doing complete justice in any cause or matter pending before it…". The concept of justice, however, varies depending on the interest of the party. On most occasions, it is advisable to adjudicate matters in consonance with law. Whenever it is possible to do so, on the touchstone of the courts conscience, the determination rendered would simultaneously result in doing justice between the parties. All the same, since we have been called upon to annul the marriage between Darshan Gupta and his wife Radhika Gupta in order to do complete justice to the parties, we have ventured to thoughtfully examine the matter from instant perspective as well.

41. In the context of doing justice it was suggested, that the appellant would be ready and willing to pay the respondent, whatever was considered appropriate by this Court. We are informed, that the appellant is financially well-to-do. We shall, therefore, keep in our mind the appellant's offer while examining the instant issue. We would, in our endeavour to determine the issue in hand, examine the matter, by reversing the roles of the parties. We will examine the matter as if, the wife had approached the Family Court seeking divorce, on the ground that her husband had suffered brain damage leading to cognitive deficiencies. Yet, despite the said deficiencies, his working memory had returned to "near normal" after treatment. And his mental condition was such, that it would not have any effect on his matrimonial obligations. And the wife's family is agreeable to pay an amount to be determined by this Court (just as the husband-Darshan Gupta, has of e

their daughter to break away, and find a more suitable match. Should she have been granted freedom from her matrimonial ties, in the given facts, in order to do complete justice to the parties? We would ask ourselves, whether the husband would have accepted such a plea, in the facts denoted above? In such situation, if this Court had, in exercise of its jurisdiction under Article 142 of the Constitution of India, granted compensation to the husband, and had dissolved his marriage on the pretext of doing complete justice between the parties, would the same be acceptable to the husband? We have no doubt in our mind, that on a reversal of roles, the husband, without any fault of his own, would have never accepted as just, the dissolution of his matrimonial ties, even if the couple had been separated for a duration, as is the case in hand. Specially, if the husband had, right from the beginning, fervently expressed the desire to restore his matrimonial relationship with his wife, and to live a normal life with her.

42. We are of the view, that the issue in hand should be adjudged by the above standards, when the same prayer is made by the husband. To constitute justice, the picture should appear to be the same, irrespective of the angle from which it is viewed. If the same sequence of facts cannot be viewed as doing justice to the husband, they have to be likewise viewed for the wife as well. It is, therefore, not possible for us to accept eventhe last plea advanced at the hands of the learned counsel for the appellant.

43. For the reasons recorded hereinabove, we find no merit in these appeals, and the same are accordingly dismissed.

B.B.B. Appeals dismissed.

P. DHARNI & ORS.
v.
GOVT. OF TAMIL NADU & ORS.
(Civil Appeal No. 4832 of 2013)

JULY 1, 2013

[P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.]

Service Law:

Promotion - Out-of-turn/accelerated promotion - Claim for - By Motor Vehicle Inspector (Grade II) - To the post of Regional Transport Officer - Under r.36(b)(ii) of Tamil Nadu State and Subordinate Services Rules - After rendering about 3 years of service - Permissibility - Held: Special rules framed prescribing conditions of eligibility and manner and method of appointment from the Post of Motor Vehicles Inspector (Grade II) to the post of Motor Vehicles Inspector (Grade I) and from the post of Motor Vehicles Inspector (Grade I) to the post of Regional Transport Officer - The claimant, since not fulfilling the eligibility criteria for promotion stipulated in Special Rules, would not be entitled to accelerated promotion under r.36(b)(ii) of the General Rules - Moreover, r.36(b)(ii) which contemplates accelerated promotion, only in cases where seniority is the sole criterion for promotion, would not be applicable to the post of Regional Transport Officer, because the appointment on the post is not made by seniority - Tamil Nadu State and Subordinate Services Rules - r.36(b)(ii).

Respondent No.5, an employee on the post of Motor Vehicles Inspector (Grade II), after his 3 years of service on the post, moved a representation seeking his out-of turn/accelerated promotion to the post of Regional Transport Officer on the basis of his outstanding performance in the service. His name was recommended

for out-of-turn/accelerated promotion by the authorities of the department citing r.36(b)(ii) of the Tamil Nadu State and Subordinate Service Rules. The claim of the respondent No.5 was rejected by State Government. The same was challenged and the Administrative Tribunal allowing the claim of respondent No.5, directed the State to issue an order promoting respondent No.5 as Regional Transport Officer. The order was further upheld by High Court and the appeal thereagainst before Supreme Court was withdrawn by the State.

The appellants in the present appeal, who were the employees senior to respondent No.5 and whose rights were liable to be prejudicially affected by the accelerated promotion of respondent No.5, filed appeal to this Court, challenging the order of accelerated promotion of respondent No.5.

Allowing the appeal, the Court

HELD: 1. A perusal of Rule 2 of Tamil Nadu State and Subordinate Services Rules leaves no room for any doubt, that in case of repugnancy between the Special Rules and the General Rules, the Special Rules will prevail over the General Rules. Rule 36(b)(ii) of the Tamil Nadu State and Subordinate Services Rules, falls in Part II - General Rules, is clearly a General Rule. The rules prescribing the conditions of eligibility and the manner/ method of appointment by promotion from the post of Motor Vehicles Inspector (Grade II) to the post of Motor Vehicles Inspector (Grade I), framed under Section 42 of the Tamil Nadu Transport Subordinate Service, are Special Rules. The rules prescribing the conditions of eligibility and the manner/method of appointment by transfer to the post of Regional Transport Officer, interalia out of Motor Vehicles Inspectors (Grade I), framed under Section 28 of the Tamil Nadu Transport Service, are Special Rules. And, in case of a conflict between the

Special Rules and the General Rules, the Special Rules will have an overriding effect over the General Rules. [Para 21] [1011-B-E]

2. The Special Rule prescribing the minimum period of eligibility for appointment to the post of Regional Transport Officer, cannot be overlooked while allowing out-of-turn/accelerated appointment to respondent No. 5, to the post of Regional Transport Officer. The claim made by respondent No. 5, for out-of-turn promotion under Rule 36(b)(ii) of the General Rules, would be valid only if respondent no.5, had satisfied the conditions of eligibility stipulated in the Special Rules for appointment to the post of Regional Transport Officer. In the present case, respondent No. 5 made a representation claiming out-of-turn/accelerated promotion, only when he had rendered just over three years of service as Motor Vehicles Inspector (Grade II). At that stage, there was no question of his being considered for appointment against the post of Regional Transport Officer, as he had by then, not rendered even a single days service as Motor Vehicles Inspector Grade-I (as against the prescribed five years' service). Thus at that juncture, he was not even eligible for promotion to the post of Motor Vehicles Inspector (Grade-I), as a minimum of five years' service as Motor Vehicles Inspector Grade-II is required before such promotion. Since a minimum of five years' service as Motor Vehicles Inspector (Grade I) is required before an individual can be appointed to the post of Regional Transport Officer, it is essential that respondent No. 5 ought to have fulfilled the prescribed condition, before claiming appointment as Regional Transport Officer. Since respondent No.5 could not have legitimately been promoted to the post of Motor Vehicles Inspector (Grade-I) itself, it is out of the question to accept or assume, that he could have nonetheless been promoted to the post of Regional Transport Officer, which re e

years' service. The Special Rules laying down the conditions of eligibility and the manner/method of promotion to the post of Regional Transport Officer, would stand violated, if the claim of respondent No. 5, for out-of-turn/accelerated promotion, was to be acceded to. [Para 25] [1014-G-H; 1015-B-G; 1016-B; 1017-B-D]

3. Thus, a minimum of ten years service after appointment as Motor Vehicles Inspector (Grade-II) is required under the Special Rules, before an individual can be appointed as Regional Transport Officer (five years' service for promotion as Motor Vehicles Inspector (Grade-I), and another five years' service as Motor Vehicles Inspector (Grade-I) before appointment as Regional Transport Officer). Therefore, that the order passed by the Administrative Tribunal, as also, by the High Court by relying on Rule 36(b)(ii) of the General Rules, was in clear derogation of the Special Rules. [Para 25] [1016-E-F; 1017-D]

4. Clause (ii) of Rule 36(b) of the General Rules, could have been invoked only in matters where promotions are to be made solely on the basis of seniority. Rule 2(b) of the Special Rules laying down the manner/method for promotion to the post of Motor Vehicles Inspector (Grade I) clearly mandates, that promotion to the said post, would be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal. It is, therefore apparent, that the post of Motor Vehicles Inspector (Grade I) is a selection post. That being the undisputed position, it would not have been possible for the authorities to invoke Rule 36(b)(ii) of the General Rules, even for promoting respondent No. 5, to the post of Motor Vehicles Inspector (Grade I). [Para 27] [1018-F-H; 1019-A]

5. Insofar as the post of Regional Transport Officer is concerned, the Special Rules framed under Section 28

of the Tamil Nadu Transport Service, laying down the conditions of eligibility and the manner/method of appointment to the post of Regional Transport Officer, do not postulate appointment to the post of Regional Transport Officer by way of promotion. Rule 2 of the Special Rules clearly envisage, that appointment against the post of Regional Transport Officer, would be made only by way of transfer, interalia from amongst Motor Vehicles Inspectors (Grade I). Rule 36(b)(ii) of the General Rules does not postulate out-of-turn/accelerated appointment by way of transfer. Even though the Special Rules do not lay down the method or manner of making appointments by way of transfer, Rule 36A (introduced with effect from 30.1.1996) contained in Part II - 'General Rules', of the Tamil Nadu State and Subordinate Services, postulates, that appointment by transfer shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal. In the aforesaid view of the matter, it is imperative to conclude, that even for appointments by way of transfer, the appointing authority must sieve the eligible candidates by adopting a process of selection. Since the post of Regional Transport Officer, is to be filled up by way of transfer, i.e., by way of selection amongst eligible candidates, Rule 36(b)(ii) of the General Rules would be inapplicable. Thus the General Rules contemplate out-of-turn/accelerated promotion, only in cases where seniority is the sole criterion for promotion, whereas, the post of Regional Transport Officer is not to be filled up on the basis of seniority. [Paras 26 and 27] [1017-F-H; 1018-A; 1019-B-E]

6. For onward promotions (from the post of Motor Vehicles Inspector (Grade II)), the criterion to be adopted was that of selection. Seniority was only to be taken into consideration where merit and ability of two eligible candidates was found to be approx s

every claim for onward promotion from the post of Motor Vehicles Inspector (Grade II) was liable to be considered on the basis of merit. Therefore, an individual with superior merit would steal a march over those less meritorious. Thus viewed, if respondent No.5, was actually possessed of outstanding and exceptional merit, as is sought to be suggested, he would have stolen a march over his seniors even under the existing Special Rules. Thus viewed, even by the manner/method of onward progression postulated in the Special Rules, a person with conspicuous merit and ability (as postulated under Rule 36(b)(ii) of the General Rules), would overtake others without having to invoke Rule 36(b)(ii) of the General Rules. Respondent No.5, after he had acquired eligibility for promotion to the post of Motor Vehicles Inspector (Grade I), he was promoted as such only on 10.5.2000. The merit and ability possessed by respondent no. 5, is not shown to have resulted in his having superseded other members of the cadre senior to them. [Para 28] [1019-G-H; 1020-A-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4832 of 2013.

From the Judgment and Order dated 29.11.2011 in CP No. 1688 of 2011 of the High Court of Madras.

R. Venkataramani, Guru Krishnakumar, AAG, Lata Krishnamurti, Dr. B. Kalaivannan, Neeraj Shekhar, Ashutosh Thakur, P.R. Mala, Pranav Diesh, Karan Kalia, Ashish Dixit, R. Nedumaran, Neelam Singh, Supriya Garg, Shodhan Babu, B. Balaji, R. Rakesh Sharma, Veera Mani, Prasana Venkat for the appearing parties.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted.

2. The controversy raised in the instant appeal revolves

around the genuineness of the claim of respondent no. 5, K.V. Karthalingan, for promotion from the post of Motor Vehicles Inspector (Grade II) to the post of Regional Transport Officer. In order to understand the veracity of the aforesaid claim it would be relevant to mention, that the post of Motor Vehicles Inspector (Grade II) is the lower most entry level post. The post of Motor Vehicles Inspector (Grade II), is filled up only by way of direct recruitment. Onward promotion therefrom is to the post of Motor Vehicles Inspector (Grade I). It is not a matter of dispute, that Special Rules framed under Section 42 of the Tamil Nadu Transport Subordinate Service exclusively prescribe the conditions of eligibility and the manner/method of promotion from the post of Motor Vehicles Inspector (Grade II) to the post of Motor Vehicles Inspector (Grade I). The aforesaid rules came into force with effect from 19.8.1981. The said rules have been made available to us from the Tamil Nadu Service Manual, Volume III. For purposes of the present controversy, a relevant extract of rules 2, 5 and 9 of the said Special Rules is being reproduced hereunder:-

"2. Appointment - (a) Appointment to the category mentioned in column (1) of the table below shall be made by the methods specified in the corresponding entries in column (2) thereof:-

TABLE

Category	Method of Recruitment
(1)	(2)
1. Motor Vehicle Inspector Grade-I	Promotion from Motor Vehicles Inspector, Grade - II
2. Motor Vehicles Inspectors Grade - II	Direct Recruitments:

(b) Promotion to category - 1 shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal.

xxx xxx xxx

5. Qualifications - (a) Age-(i) No per shall be eligible for appointment to category-2 by direct recruitment, unless he possesses the qualifications specified below, namely :-

(1) Must have completed 21 years of age;

(2) Must not have completed 32 years of age :

Provided that a person belonging to the Scheduled Caste/ Scheduled Tribes shall be eligible for appointment by direct recruitment to category-2 if he has not completed 37 years of age.

Provided further that the minimum age limit of 21 years prescribed above shall apply also to the candidate belonging to Scheduled Caste/Scheduled Tribes and Backward Classes.

(ii) The age limit prescribed in this rule shall be reckoned so far as direct recruits are concerned with reference to the first day of July of the year in which the selection for appointment is made.

(b) Other Qualifications.-No person shall be eligible for appointment to the category specified in column (1) by the method specified in column (2) of the table below unless he possess the qualifications specified in the corresponding entries in the column (3) thereof :-

TABLE

Sl.No.	Category	Method	Qualification
(1)	(2)	(3)	(4)
1.	Motor Vehicles Inspectors, Grade-I	Promotion	i) Must have served as Motor Vehicles Inspector, Grade-II for a period of not less than 5 years and must be an approved probationer in that category.
2.	Motor Vehicles Inspectors	Direct Recruitment	xxx xxx xxx

xxx xxx xxx

9. Preparation of Annual List of approved candidates - For the purpose of preparation of the annual list of approved candidates for appointment by promotion, the crucial date on which the candidates shall be qualified shall be the 15th March of every year."

A perusal of the rules extracted hereinabove reveals, that the post of Motor Vehicles Inspector is to be filled up exclusively by promotion (Rule 2(a)). The above rules postulate, that merit and ability would be the criterion for such promotion (Rule 2(b)). It is also clarified that seniority would be taken into consideration, only when merit and ability of the competing candidates is found to be almost the same. The above Special Rules lay down, that Motor Vehicles Inspectors (Grade II) would be considered for promotion to the post of Motor Vehicles Inspector (Grade I) only after rendering five years' service (Rule 5(b)). Eligibility, on the basis of the qualifications prescribed for promotion to the posts of Motor Vehicles Inspectors (Grade I) is to be determined annually. For the said exercise the cut off date is 15th of March of every year (Rule 9).

3. It is also relevant to mention, that Special Rules have been framed under Section 28 of the

Service for regulating the conditions of eligibility and the manner/method of appointment, inter alia to the post of Regional Transport Officer. Under the above rules, the post of Regional Transport Officer can be filled up only by way of transfer. The above Special Rules came into force with effect from 15.9.1974. The same have been made available to us, from the Tamil Nadu Service Manual, Volume II. Relevant extracts of Rules 2, 3 and 6 of the above Special Rules, which have a bearing on the present controversy, and are being reproduced hereunder:-

"2. Appointment.-(a) Appointment to these categories shall be as follows :

Category	Method of Appointment
(1)	(2)
Category-1: Deputy Transport Commissioner	1) By promotion from category-2; or 2) For special reasons by recruitment by transfer from any other service on tenure basis.
Category-2: (1) Regional Transport Officer and Additional Transport Officer	1) By recruitment by transfer from among-
(2) Assistant Secretary State Transport Authority	(i) Motor Vehicles Inspectors, Grade-I in the Tamil Nadu Transport Subordinate Service; or (ii) Superintendents, Selection Grade and Personal Assistant to Regional Transport Officers, in the Tamil Nadu Ministerial Service;
	(or)
	(2) For special reasons by recruitment by transfer from any other service on tenure basis;
	(3) Appointment of an Officer on tenure basis from any State Transport Undertakings.

(b) Promotion to Category-I shall be made on grounds of merit and ability, seniority being considered only where merit and ability of competing candidates are approximately equal.

(c) The posts in category 2 other than those filled up by recruitment by transfer from any other service on a tenure basis shall be filled up by rotation, the first, second, fourth and fifth vacancies being filled up by recruitment by transfer from among Motor Vehicles Inspectors, Grade I, and the third vacancy being filled up by recruitment by transfer from Superintendents in the Selection Grade and Personal Assistants to Regional Transport Officers in the Ministerial Service :

Provided that this rotation shall be followed in respect of appointments made on and from the 26th June 1978 :

Provided further that the temporary appointments to Category-2 made on and from the 15th September 1974 to the 25th June 1978 shall be regulated in the proportion of 1 : 1 between Motor Vehicles Inspectors, Grading - I, and Superintendents, Selection Grade, including Personal Assistants to Regional Transport Officers in the Ministerial Service.

3. Qualification:- No persons holding the post specified in Column (2) of the Table below, shall be eligible for appointment to the category specified in column (1) unless he posses the qualifications specified in column (3) thereof :

TABLE

CATEGORY	POST	QUALIFICATION
(1)	(2)	(3)
Category - 1	1. Regional	xxx xxx xxx
Deputy Transport Commissioner	Transport Officer and Additional Regional Transport Officer	
	2. Assistant Secretary, State Transport Authority	
Category-2		
(1) Regional Transport Officer and Additional Regional Transport Officer.	Motor Vehicles Inspector, Grade-I	Must have served for a total period of not less than five years as Motor Vehicles Inspector, Grade-I out of which not less than two years must be in a field office
(2) Assistant Secretary State Transport Authority	Superintendents, Selection Grade and Personal Assistants to the Regional Transport Officers	Must have served for a total period of not less than five years as Superintendent or a Personal Assistant to the Regional Transport Officer of which not less than two years shall be as a Personal Assistant to Regional Transport Officer.

Provided that this rule shall not be applicable to appointments prior to the date of 1st July 1978.

6 Preparation of Annual List of Approved Candidates - A list of approved candidates for appointment by promotion to Category 1 and recruitment by transfer to category 2 shall be prepared every year. The crucial date for inclusion in the panel of all eligible officers for such appointment shall be the 1st July of the year in which the selection for appointment is made."

A perusal of the rules extracted above reveal, that appointment to the post of Regional Transport Officer is to be made only by way of transfer, interalia, from amongst Motor Vehicles Inspectors (Grade I) (Rule 2(a)). Appointment by way of transfer to the post of Regional Transport Office[illegible]s,

(including the post of Motor Vehicles Inspectors (Grade-I) is to be only on tenure basis (Rule 2(c)). It is significant to notice, that to be eligible for appointment to the post of Regional Transport Officer (from amongst Motor Vehicle Inspectors (Grade I)), the incumbent in question must have served for a total period of not less than five years as Motor Vehicles Inspector (Grade I), out of which not less than two years must be in a field office (Rule 3). Eligibility, on the basis of the qualifications prescribed for transfer to the post of Regional Transport Officer, is to be determined annually. For the said exercise, the cut off date stipulated under the Special Rules is 1st July of every year (Rule 6).

4. The career of respondent no. 5, K.V. Karthalingan, in the Transport Department of the State Government commenced on his appointment by direct recruitment as Motor Vehicles Inspector (Grade II), on 9.2.1995. While serving as Motor Vehicles Inspector (Grade II), he claimed that he had detected on a single date 14 cases of passenger vans being used as public careers. He asserted, that he had seized the concerned vehicles, whose owners were evading payment of tax (to the Transport Department). He also asserted, that he had detected irregularities being committed by certain dealers, for evading revenue (payable to the Transport Department). He also claimed to have detected various instances where dealers were found meddling with chassis numbers of vehicles. By a process of tempering, chassis numbers were being altered, by the dealers. According to respondent no. 5, his actions had resulted in bringing to book, numerous persons evading payment of tax to the Transport Department. According to respondent no. 5, K.V. Karthalingan, the above actions were taken by him despite grave personal risks. In this behalf, it was his assertion, that he had received a number of threatening letters, for having revealed the aforesaid irregularities. In the above letters he was threatened, that he would be eliminated. Despite receipt of such letters, respondent no. 5 claims to have continued to discharge his duties with dedication and devotion.

5. In appreciation of the above alleged exemplary devotion of duty displayed by respondent no. 5, the Managing Director of the Tamil Nadu State Transport Corporation, Kumbakonam Division-1, as well as, the Managing Director of Cholan Roadways Corporation, recommended the name of respondent no. 5, K.V. Karthalingan, for accelerated/out of turn promotion as Regional Transport Officer. On 26.9.1997, having considered the recommendations made by the Managing Directors (referred to above), the Regional Transport Officer by citing Rule 36(b)(ii) of the Tamil Nadu State and Subordinate Services Rules, also recommended the claim of respondent no. 5 for out of turn/accelerated promotion. The Deputy Transport Commissioner, Trichy, on 10.7.1998, having considered the above recommendations, endorsed the claim of respondent no. 5, K.V. Karthalingan, for accelerated/out of turn promotion, to the Commissioner of Transport, Chennai. In order to appreciate the recommendation made on 26.9.1997 by the Regional Transport Officer, it is essential to extract hereunder Rules 36 and 36A of the Tamil Nadu State and Subordinate Services Rules, which came into force with effect from 1.1.1955. It was pointed out, that the above rules were framed in exercise of powers conferred by the proviso under Article 309 of the Constitution of India. The said rules are reproduced below :-

"36. (a) Promotion - No member of a service or class of a service shall be eligible for promotion from the category in which he was appointed to the service unless he has satisfactorily completed his probation in that category:

Provided that a member of a service or class of a service who, having satisfactorily completed his probation in the category in which he was appointed to the service, has been promoted to the next higher category shall, notwithstanding that he has not been declared to have satisfactorily completed his probation in such higher category be eligible for promoti

category:

Provided further that if scales of pay of posts in the feeder categories are different, the persons holding post carrying a higher scale of pay in the feeder category shall be considered first and that, if no qualified and suitable persons holding post in that feeder category are available, the persons holding post carrying the next higher scale of pay in descending order in other feeder categories shall be considered.

(b) (i) Promotions to selection category or grade.- Promotions in a service or class to a selection category or to a selection grade shall be made on grounds of merit and ability, seniority, being considered only where merit and ability are approximately equal. The inter-se-seniority among the persons found suitable for such promotion shall be with reference to the inter-se-seniority of such persons in the lower post.

(ii) Promotion according to seniority-All other promotions shall, be made in accordance with seniority unless-

(1) the promotion of a Member has been withheld as a penalty, or

(2) a Member is given special promotion for conspicuous merit and ability.

(c) Appointment of a member to higher category not to be considered if he had been on leave for three or four years or more continuously.-Notwithstanding anything contained in sub-rules (a) and (b), a member of a service who had been on leave for a period of three years continuously for any reason except higher studies or for a period of four years continuously for higher studies, shall not be considered for appointment as a higher category either by promotion or by recruitment by transfer unless he has completed service for a period of one year from the date on which he joins duty on return from leave.

36A. Appointment by Recruitment by Transfer.- Appointments by recruitment by transfer to a class or category in a State Service from among the holders of posts in a Subordinate Service, shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal."

6. Whilst it is the claim of respondent no. 5, that he had a genuine claim for out of turn/accelerated promotion under Rule 36(b)(ii), it is the vehement contention of the learned counsel for the appellants before us, that the aforesaid rule could neither be invoked for promotion to the post of Motor Vehicles Inspector (Grade I) nor for appointment by way of transfer to the post of Regional Transport Officer.

7. Before examining the merits of the controversy, it will be essential for us to narrate the sequence of events leading to the direction by the High Court of Judicature at Madras (hereinafter referred to as the 'High Court'), for promoting respondent no.5, K.V. Karthalingan, to the post of Regional Transport Officer. Insofar as the instant aspect of the matter is concerned, it would be relevant to mention, that respondent no. 5 addressed a representation dated 30.6.1998 seeking out of turn/accelerated promotion. For his instant prayer, he sought consideration of his sincere, efficient and unblemished record of service, detailed above. On receipt of the aforesaid representation, relying on the recommendation made by the Managing Director of the Tamil Nadu State Transport Corporation, Kumbakonam Division-1 and Managing Director of Cholan Roadways Corporation, on 26.9.1997 the Regional Transport Officer, also recommended the claim of respondent no. 5. Thereupon, the Deputy Transport [illegible],

on 10.7.1998, further recommended respondent no. 5, K.V. Karthalingan, for accelerated promotion, to the Commissioner of Transport, Chennai.

8. Despite the above recommendations, no action was taken by the authorities. It is, therefore, that respondent no. 5, K.V. Karthalingan, approached the Tamil Nadu Administrative Tribunal, at Chennai (hereinafter referred to as, the Administrative Tribunal), by filing Original Application no. 5918 of 1998. The aforesaid Original Application was disposed of by an order dated 6.11.1998, without issuing notice to the respondents. A perusal of the order dated 6.11.1998 reveals, that the Transport Secretary of the State Government, was directed to pass orders on the recommendations made by the Deputy Transport Commissioner, Trichy dated 10.7.1998.

9. Consequent upon the issuance of the above directions, the State Government passed an order dated 8.12.1998. By the instant order, the claim of the respondent no. 5 K.V. Karthalingan, for out of turn/accelerated promotion came to be rejected. While rejecting the prayer of respondent no. 5, the State Government recorded, interalia, the following reasons:-

> "2. The government have examined the representation of Mr. V. Kathalingam, taking into consideration of the direction the Hon'ble (Tribunal). (The) Tamil Nadu Transport Subordinate Service do not provide for out of turn or accelerated promotion. Besides, there is no merit in the claim of the petitioner. Instances of extraordinary services quoted by him are common in Transport Department as well as in Civil Service.
>
> 3. Accordingly, the Government rejects the request of Mr. Kathalingam, Motor Vehicles Inspector, Grade-II for accelerated Promotion."

A perusal of the order passed by the State Government reveals, that the rules regulating the conditions of service of

respondent no. 5 do not provide for an avenue for out of turn/ accelerated promotion. The State Government also arrived at the conclusion, that the instances of extraordinary service relied upon by respondent no. 5 (to claim out of turn/accelerated promotion), could not be treated as exceptional or unprecedented, because such instances were common in the Transport Department.

10. Dissatisfied with the order of the State Government dated 8.12.1998, respondent no. 5 preferred Original Application no. 429 of 2002 before the Administrative Tribunal. The aforesaid Original Application was allowed by the Administrative Tribunal vide an order dated 10.7.2002. In the instant matter, the Administrative Tribunal had issued notice to the respondents (i.e, different functionaries of the State Government). The respondents were duly served. But the matter was disposed of without waiting for a reply from them. While allowing the aforesaid application, even though the State Government while rejecting the claim of respondent no. 5 vide order dated 8.12.1998 had recorded that the instances indicated by him for out of turn/accelerated promotion, could not be treated as exceptional or extraordinary, the Administrative Tribunal held that the same constituted conspicuous merit and ability, and were sufficient to earn respondent no.5, K.V. Karthalingan, out of turn/accelerated promotion as Regional Transport Officer. In its aforesaid determination, the Administrative Tribunal recorded the following observations:-

> "5. The rejection order is found in G.O.Ms. No.2535 Home (Transport II) Department, dated 8.12.1998. There is no dispute about the extraordinary performance of the petitioner. In one of the leading English Journals circulated in Tamil Nadu, the publication is to the following effect :
>
> "Parambalur October 31 Instance of dealers in two-wheelers illegally altering the chassis and registration numbers of v[illegible]e

vehicles with numbers as desired by the clients have come to light during inspections here.

On July 18, a two-wheeler with the chassis number A 606 F 376242 was brought to the office of motor vehicle Inspector here. During the Inspection the digit '6' in the chassis number was found repunched. Following this the inspector verified the papers relating to the vehicle issued by a local dealer. It came to light that as per the invoice issued by the manufacturers of June 8, 1996, the chassis number was A 606 F 3708242 and the vehicle has been registered from June 10. The Inspector found that the digit '6' had been repunched in lieu of '0'.

Consequently, the Inspector has reportedly written to the manufacturers and the Regional Transport Officer recommending cancellation of the grade licence issued to the dealer.

Instance of meddling with the chasis number were also found in the vehicle brought for registration on earlier occasions. The digits '0' '3' and '1' were found tampered to read as '6', '8' and '7'.

The Inspector has sent letters to the individual owners calling for explanation. The replied were similar. We parted with a bribe of Rs.2300 to avoid registration numbers totaling to '8' but the Vehicles allotted to us carried numbers totaling to '8' only. We returned the vehicles and after a few days got vehicles with fresh registration numbers.

It is said though it is three months since the irregularity was detected, no action has been taken so far. On the contrary the Inspector who detected the irregularity has reportedly received threat letters from a number of sources."

6. There is already a direction from this Tribunal in O.A. No.5918 of 1998 to consider the case of the petitioner and pass orders. Accordingly the government has passed orders rejected the claim of the petitioner stating that special rules for Tamil Nadu Transport Subordinate Service do not provide for out of turn for accelerated promotion.

7. Mr. P. Jayaraman, Senior Counsel relied upon General Rule 36(b)(2). It reads as follows :-

"Promotion according to seniority:-

All the other promotion shall be made in accordance with seniority unless :

(i) The promotion of a member shall be withheld as a penalty or

(ii) A member is given special promotion for conspicuous merit and ability.

By this Sub-rule (ii), there is an implication for grant of special promotion for conspicuous merit and ability. In this case, it is not disputed that the petitioners has rendered meritorious service. Therefore, rejecting the claim of the petitioner on the ground that there are no rules is not proper. Hence the rejection order is set aside. The petitioner shall be given promotion as Regional Transport Officer. The orders shall be passed within a period of six months from today."

A perusal of the determination rendered by the Administrative Tribunal reveals, that a clear and categorical finding was recorded by it, that there was no dispute about the extraordinary performance of respondent no. 5, K.V. Karthalingan. Reliance was also placed on Rule 36(b)(ii) of the Tamil Nadu State and Subordinate Service Rules to conclude, that the claim of respondent no. 5 for out of turn/accelerated promotion could have validly been considered under

General Rules. Having recorded the aforesaid factual finding, as also having concluded that there was a statutory provision whereunder the claim of respondent no. 5 for out of turn/ accelerated promotion could be granted, the Administrative Tribunal directed the respondents, to issue an order promoting the respondent no. 5 as Regional Transport Officer, within a period of six months (from the date of the order dated 10.7.2002).

11. Now that respondent no. 5 had succeeded before the Administrative Tribunal, the State Government filed Writ Petition (Civil) no. 21562 of 2003 before the High Court, to assail the order passed by the Administrative Tribunal dated 10.7.2002 (whereby respondent no. 5 was directed to be promoted to the post of Regional Transport Officer). The instant challenge raised by the State Government did not achieve the desired purpose, inasmuch as, the aforesaid writ petition came to be dismissed by an order dated 13.10.2004. In paragraph 2 of the order passed by a Division Bench of the High Court, on a consideration of the instances relied upon by respondent no. 5, as also, the recommendations made by the Managing Directors of Tamil Nadu Transport Corporation, Kumbakonam Division-1 and Cholan Roadways Corporation, and the recommendation made by the Deputy Transport Commissioner, Trichy, dated 10.7.1998, it came to be concluded, that respondent no. 5, K.V. Karthalingan, was entitled to out of turn/ accelerated promotion. The High Court also took into consideration Rule 36(b)(ii) of the Tamil Nadu State and Subordinate Service Rules, and on the basis thereof held, that the statutory rules regulating the conditions of service of respondent no. 5, provided for out of turn/accelerated promotion, based on meritorious/outstanding service. Having so concluded, the High Court also expressed the view, that there was nothing in the Special Rules (the rules framed under Section 42 of the Tamil Nadu Transport Subordinate Service, and/or Section 28 of the Tamil Nadu Transport Service), that was repugnant to the General Rules (the Tamil Nadu State and

Subordinate Service Rules) providing for accelerated promotion. Accordingly, the High Court upheld the order passed by the Administrative Tribunal. The High Court while disposing of Writ Petition (Civil) no. 21562 of 2003, directed the State Government (i.e. the petitioners before the High Court) to implement the order passed by the Administrative Tribunal, within four months from the date of receipt of a copy of the High Court order.

12. Aggrieved with the decision rendered by the High Court in Writ Petition no. 21562 of 2003 (decided on 13.10.2004), the State Government filed Petition for Special Leave to Appeal (Civil) bearing no. 11538 of 2005. Besides the above petition filed by the State Government before this Court, one P. Mani also approached this Court by filing Petition for Special Leave to Appeal (Civil) bearing no. 11542 of 2005, for assailing the order of the High Court dated 13.10.2004. Both the above mentioned petitions were withdrawn by the State Government, as also, by the said P. Mani, on 7.7.2006. As a result of the withdrawal of the aforesaid petitions, the order passed by the High Court on 13.10.2004 directing the State Government to promote respondent no. 5 to the post of Regional Transport Officer, attained finality.

13. Despite the above legal position, namely, that the order of the High Court dated 13.10.2004 had attained finality, the State Government did not implement the order passed on 10.7.2002 (in O.A. no. 429 of 2002) by the Administrative Tribunal, or the order passed by the High Court dated 13.10.2004 (in Writ Petition No.21562 of 2003). It is in the aforesaid background, that respondent no. 5, K.V. Karthalingan, filed Contempt Petition no. 5188 of 2006 before the High Court. The High Court having taken notice of the entire factual position upto the date of withdrawal of the petitions for special leave to appeal preferred before this Court, recorded the following observations:-

"6. After dismissal of the SLPs as withdrawn, the Special Commissioner and Transport Commissioner has sent a proposal to the Government on 19.7.2006, recommending the name of the petitioner for the post of Joint Transport Commissioner also after implementing the orders of the Tribunal and this Court, since the petitioner would reach that position if the orders are implemented properly. But, pending remarks from the Transport Commissioner, the Government issued G.O.2(D) No.111, Home (Trpt-II) Department dated 21.2.2007, temporarily promoting the petitioner as Regional Transport Officer and posted him at the office of the Regional Transport Officer, Chennai (West). According to the petitioner, the Special Commissioner and Transport Commissioner, by his considered remarks dated 10.05.2007, sent a proposal that his name has to be included in the list of panel of Regional Transport Officers for the year 1996, next to Mr. A.A. Khader Moideen, who was lastly promoted on 2.4.1996, vide G.O.Rt. No.831, Home (Tr-II) Department. According to the petitioner, while the above process was on, on some complaints by a dealer, whose irregularities were found out by him, certain charges were framed against the petitioner by the authorities and on enquiry, final orders were passed in favour of the petitioner. The petitioner would further contend that the properties purchase through the business income of his wife and her brothers were shown as his disproportionate assets, charges were framed against him, but on enquiry, they dropped on 15.12.2008, in consultation with TNPSC, and the former Principal Secretary and Transport Commissioner. In his letter dated 29.4.2010 addressed to the Director of vigilance and Anti-corruption denied permission to prosecute the petitioner. But, however, on the very same allegations, the succeeding Transport Commissioner, took a contrary view and accorded sanction for prosecution on 24.11.2010. But, again on 4.2.2011, the very same Transport Commissioner sent

remarks, by referring the pleading that a person once convicted or acquitted shall not be tried for the same offence again, and sent his remarks to the Government stating that the Government is the competent authority to withdraw the case referred to Tribunal for Disciplinary Proceedings, Trichy at any stage, as per Rule 8(b) of the TNSC (D&A) Rules. A reminder was also sent by the said authority on 20.6.2011 and the petitioner has also sent a representation dated 14.7.2011, but no orders have been passed till date by the Government.

7. A perusal of the entire materials placed on record, prima facie, would establish the fact that in order to deprive the petitioner from getting his accelerated promotion as ordered by the Tribunal and by this Court, the respondents have adopted various dilatory tactics and are trying to water down the order of the Tribunal and this Court. When this Court has ordered to grant the petitioner accelerated promotion as Regional Transport Officer, the respondents have issued orders temporarily promoting him to that cadre. Today, during the course of arguments, it has been submitted on behalf of the respondents that there is a criminal case pending against the petitioner for possessing assets disproportionate to his known sources of income."

14. The appellants before us filed Petition for Special Leave to Appeal (Civil) no. 3464 of 2012 on having realised, that the claim raised by respondent no. 5, for promotion to the post of Regional Transport Officer, had now fructified into a reality. The reason for approaching this Court directly was, that it would be an exercise in futility for the appellants to approach the High Court, as a Division Bench of the High Court had already adjudicated the controversy, and while doing so, examined the factual, as well as, the legal propositions involved. And furthermore, a challenge raised to the order passed by the Division Bench of the High Court, befo[illegible]n

withdrawn. It was also their contention, that the petitioners (now the appellants before this Court) were never arrayed as party respondents in the litigation preferred by respondent no. 5, K.V. Karthalingan, even though their rights were liable to be prejudicially affected by the promotion of respondent no. 5, K.V. Karthalingan, to a higher post in the service. Since respondent no. 5 was junior to all of them, it was their submission, that they ought to have been arrayed as party respondents. Insofar as the instant aspect of the matter is concerned, it was pointed out, that whilst respondent no. 5, K.V. Karthalingan, was appointed against the post of Motor Vehicles Inspector (Grade II) on 9.2.1995, appellant no.1 P. Dharni was appointed as such on 18.1.1988, i.e., more than seven years before the appointment of respondent no.5. It was further pointed out, that even though respondent no. 5 was promoted as Motor Vehicle Inspector (Grade I) on 10.5.2000, appellant no. 1 P. Dharni was promoted as such, on 5.9.1994 i.e., almost six years before the promotion of respondent no. 5 K.V. Karthalingan as Motor Vehicles Inspector (Grade I). It was sought to be pointed out, that in the seniority list of the cadre of Motor Vehicles Inspector (Grade I), whilst the name of P. Dharni (appellant no. 1 herein) figured at serial no. 81, that of respondent no. 5, K.V. Karthalingan was placed at serial no. 141. In the above view of the matter it was submitted, that despite respondent no. 5 being 60 steps below the appellant P. Dharni, he was being promoted unjustifiably above him, and many other similarly situated persons, senior to respondent no. 5, K.V. Karthalingan. It was submitted, that even the other appellants were likewise superiorly placed vis-a-vis respondent no. 5, K.V. Karthalingan.

15. Based on the above pleas, this Court entertained the petition for special leave to appeal preferred by the appellants on 21.12.2011. While issuing notice in the matter, this Court also directed the parties to maintain status quo. After being served, all the respondents have filed counter affidavits. The appellants have also filed a rejoinder affidavit, to the counter affidavit filed by respondent no.5, K.V. Karthalingan. Pleadings

are, therefore, complete.

16. Having heard learned counsel for the rival parties we realised, that Original Application no.5918 of 1998 filed by respondent no.5 was disposed of (on 6.11.1998), without issuing notice to the State or the affected parties. Insofar as Original Application no.429 of 2002 is concerned, the same was disposed of (on 10.7.2002) without seeking a reply from the State, even though it had been duly served. In fact, in neither of the said Original Application, persons senior to respondent no.5 K.V. Karthalingan were impleaded as respondents, despite his claim for promotion before them. After the dismissal of Writ Petition no. 21562 of 2003 by the High Court, the Petitions for Special Leave to Appeal filed by the State Government, as also by a private individual, were withdrawn. There was therefore no adjudication on merits, by this Court. These factors persuade us to feel, that the questions raised had far reaching consequences, and therefore, needed to be examined on merits. Remanding the matter back to the Administrative Tribunal or the High Court, for re-determination of the issue, by affording an opportunity of hearing to the appellants before us, as also to those senior to respondent no. 5, K. Karthalingan, was one available option. Having heard learned counsel for the rival parties at great length, even on merits, we felt that it would be best for us to adjudicate upon the matter ourselves. It was possible for us to do so, because the rival parties had an opportunity for the first time before us, to raise their claims and counterclaims, through detailed pleadings and submissions.

17. During the course of hearing, submissions advanced at the behest of the appellants were based on the peculiar facts of the case, as also, purely on the basis of the rules regulating the conditions of service of the appellants, as well as, respondent no. 5, K.V. Karthalingan. Even though the chronological order in which the submissions were advanced during the course of hearing were differe

deal with the same in a different sequence so as to bring out the true effect of the statutory rules, on the basis whereof rival claims were projected.

18. We shall first deal with the legal aspects in the matter. Principally the contention advanced at the hands of the appellants before us was, that Rule 36(b)(ii) of the Tamil Nadu State and Subordinate Services Rules relied upon by respondent no. 5, K.V. Karthalingan, as also the authorities which had recommended his claim for out of turn/accelerated promotion, is a part of the General Rules, as it figures in Part II of the Tamil Nadu State and Subordinate Services Rules. It was submitted, that the Special Rules override the General Rules. Based on the Special Rules framed under Section 42 of the Tamil Nadu Transport Subordinate Service, and under Section 28 of the Tamil Nadu Transport Service, it was sought to be contended, that Rule 36(b)(ii) of the General Rules relied upon by respondent no. 5, K.V. Karthalingan, could not have been taken into consideration, for granting him out of turn/ accelerated promotion, as the same is in conflict with the Special Rules.

19. To substantiate the contention noticed in the foregoing paragraph, learned counsel for the appellants invited our attention to the Tamil Nadu State and Subordinate Services Rules. The aforesaid rules are divided into two parts. Part I bears the heading - "Preliminary", whereas Part II bears the heading "General Rules". Rule 36(b)(ii) relied upon by respondent no. 5, K.V. Karthalingan, falls in Part II - "General Rules". For all intents and purposes Rule 36(b)(ii) should therefore be perceived as a General Rule. In fact, for the instant inference, there was no dispute amongst the rival parties. Having substantiated that Rule 36(b)(ii) is a General Rule, learned counsel for the appellants, invited our attention to Rules 9 and 19 of Part I - "Preliminary", of the Tamil Nadu State and Subordinate Services Rules. The same are being extracted hereunder:-

"9. "General Rules" shall mean the rules in Part II of these rules;

xxx xxx xxx

19. "Special Rules" shall mean the rules in Part III applicable to each service or class of service;"

Rules 9 and 19 extracted above, define "General Rules" and "Special Rules" respectively. It was reiterated, that it was further clear from the above definition of "General Rules" recorded in Rule 9 extracted above, that Rule 36(b)(ii) is a General Rule, because it is a rule in Part II of the Tamil Nadu State and Subordinate Services Rules.

20. Thereupon, it was submitted, that the rules referred to in the earlier part of this order, framed under Section 42 of the Tamil Nadu Transport Subordinate Service, and under Section 28 of the Tamil Nadu Transport Service, would fall in the category of Special Rules. For the said inference, reliance was placed on Rule 19 contained in Part I - Preliminary, of the Tamil Nadu State and Subordinate Services Rules. The above inference was drawn on the assertion that the said rules were framed specially to cater to posts in different cadres of the Transport Department. Again, for the instant inference, there was no dispute amongst the rival parties. We find merit in this contention as well, for the reasons expressed by the learned counsel for the appellants. Therefore, for all intents and purposes, the rules framed under the above provisions must be deemed to be Special Rule.

21. For demonstrating the superiority of one set of rules, over the other, learned counsel for the appellants brought to our attention, Rule 2 from Part II - "General Rules", of the Tamil Nadu State and Subordinate Services Rules, which reads as under:-

"2. **Relation to the special rul** n the general rules contained i t

to a provision in the special rules applicable to any particular service, contained in Part III, the latter shall, in respect of that service, prevail over the provision in the General Rules in this part."

A perusal of Rule 2 extracted above, leaves no room for any doubt, that in case of repugnancy between the Special Rules and the General Rules, the Special Rules will prevail over the General Rules. We acknowledge and affirm the aforesaid inference. We may now summarise our conclusions. Firstly, that Rule 36(b)(ii) of the Tamil Nadu State and Subordinate Services Rules, falls in Part II - General Rules, is clearly a General Rule. Secondly, the rules prescribing the conditions of eligibility and the manner/method of appointment by promotion from the post of Motor Vehicles Inspector (Grade II) to the post of Motor Vehicles Inspector (Grade I), framed under Section 42 of the Tamil Nadu Transport Subordinate Service, are Special Rules. Thirdly, the rules prescribing the conditions of eligibility and the manner/method of appointment by transfer to the post of Regional Transport Officer, interalia out of Motor Vehicles Inspectors (Grade I), framed under Section 28 of the Tamil Nadu Transport Service, are Special Rules. And fourthly, in case of a conflict between the Special Rules and the General Rules, the Special Rules will have an overriding effect over the General Rules.

22. The first contention advanced at the hands of the learned counsel for the appellants in order to demonstrate that Rule 36(b)(ii) of the Tamil Nadu State and Subordinate Services Rules, contained in Part II - "General Rules", is in conflict with the Special Rules, was sought to be substantiated by placing reliance on the Special Rules framed under Section 42 of the Tamil Nadu Transport Subordinate Service, which exclusively prescribe the conditions of eligibility and the manner/method of appointment by promotion from the post of Motor Vehicles Inspector (Grade II) to the post of Motor Vehicles Inspector (Grade I). Referring to Rule 2 of the Special Rules it

was asserted, that the only avenue of promotion from the post of Motor Vehicles Inspector (Grade II) is to the post of Motor Vehicles Inspector (Grade I), and as such, on the subject of out of turn/accelerated promotion, the claim of respondent no. 5, K.V. Karthalingan, could only have been considered for promotion to the post of Motor Vehicles Inspector (Grade I). Relying on Rule 5(b) of the above Special Rules it was submitted, that for promotion to the post of Motor Vehicles Inspector (Grade I) the concerned incumbent must have served as Motor Vehicles Inspector (Grade II) for a period of not less than five years. Referring to Rule 9 of the said Special Rules it was asserted, that a Motor Vehicles Inspector (Grade II) would acquire eligibility after fulfilling the aforesaid eligibility criteria with reference to 15th of March of the year in which he completes the prescribed conditions of eligibility. Taking into consideration the fact, that respondent no. 5, K.V. Karthalingan, was appointed as Motor Vehicles Inspector (Grade II) in 1995, it was submitted, that he would acquire eligibility for promotion to the post of Motor Vehicles Inspector (Grade I) only on 15th of March, 2000. It was accordingly contended, that when respondent no. 5, K.V. Karthalingan, made his representation dated 30.6.1998, seeking out of turn/accelerated promotion, he was not even eligible for promotion to the post of Motor Vehicles Inspector (Grade I). In the above view of the matter, it was the contention of the learned counsel for the appellants, that granting promotion to respondent no. 5, K.V. Karthalingan, prior to his having acquired the eligibility even for appointment to the post of Motor Vehicles Inspector (Grade I), would violate Rules 5 and 9 of the Special Rules.

23. Having given our thoughtful consideration to the contention advanced at the hands of the learned counsel for the appellants, we are constrained to uphold the first contention raised at the hands of the learned counsel for the appellants. It is not as if we are oblivious of the fact that the question to be considered is whether respondent no. 5, K.V. Karthalingan, has rightfully been granted out of turn/accele e

post of Regional Transport Officer, whereas, the instant first contention advanced at the hands of the learned counsel for the appellants is with reference to promotion to the post of Motor Vehicles Inspector (Grade I). The reasons for accepting the instant contention will flow from the conclusions drawn by us with reference to the next two legal submissions advanced at the hands of the appellants. All the same, we are satisfied, that even if the claim of respondent no. 5, K.V. Karthalingan, was considered for out of turn/accelerated promotion to the post of Motor Vehicles Inspector (Grade I), such a claim could not have been accepted without his having acquired eligibility under Rules 6 and 9 of the Special Rules. Allowing him out of turn promotion even to the post of Motor Vehicles Inspector (Grade I) by relying no Rule 36(b)(ii), would have violated the mandate of the Special Rules. Rule 2 contained in Part II - "General Rules" of the Tamil Nadu State and Subordinate Service Rules, itself specifically mandates, that in case of a conflict between the Special Rules and the General Rules, the Special Rules will prevail. Rules 6 and 9 being Special Rules must therefore, be satisfied, before an individual can make a claim for out of turn/ accelerated promotion under Rule 36(b)(ii), which is a General Rule. For the reasons recorded hereinabove, we have no hesitation in holding, that even if promotion had been granted to respondent no. 5, K.V. Karthalingan against the post of Motor Vehicles Inspector (Grade I), on out of turn/accelerated basis by relying on Rule 36(b)(ii) of the General Rules, the same would have been unacceptable in law, and as such, would have been liable to be set aside.

24. The second contention advanced at the hands of the learned counsel for the appellants was, that for the same reasons and on same logic as has been indicated above, for demonstrating that promotion of respondent no. 5, K.V. Karthalingan, to the post of Motor Vehicles Inspector (Grade I) could not have been treated as valid under Rule 36(b)(ii), so also, the promotion of respondent no. 5, K.V. Karthalingan, to the post of Regional Transport Officer cannot be accepted as

valid. Insofar as the post of Regional Transport Officer is concerned, learned counsel for the appellant placed reliance on Rules 3 and 6 of the Special Rules framed under Section 28 of the Tamil Nadu Transport Service. To be eligible for appointment as Regional Transport Officer, a Motor Vehicles Inspector must have served for a total period of not less than five years as Motor Vehicles Inspector (Grade I), out of which not less than two years must be in a field office. It is also clear, that the aforesaid eligibility would be determined with reference to the 1st of July every year. Even if it is assumed, that respondent no. 5, K.V. Karthalingan, came to be promoted as Motor Vehicles Inspector (Grade I) immediately on completion of five years' service as Motor Vehicles Inspector (Grade II), he would still need another five years' service before he could be appointed as Regional Transport Officer. Out of the said service, two years ought to have been in a field office. In the above view of the matter it was submitted, that a minimum of 10 years of service must mandatorily be rendered by a Motor Vehicles Inspector (Grade II), before he can contemplate appointment to the post of Regional Transport Officer. In view of the fact that respondent no. 5, K.V. Karthalingan was appointed as Motor Vehicles Inspector (Grade II) on 9.2.1995, he would acquire eligibility for the same only on 1.7.2005. It was submitted, that if respondent no. 5, K.V. Karthalingan, was promoted as Regional Transport Officer, before fulfilling the aforesaid ten years of service, his promotion would be in violation of Rules 3 and 6 of the Special Rules referred to above.

25. We have given our thoughtful consideration to the second legal proposition canvassed at the hands of the learned counsel for the appellants. We find merit therein as well. The question to be considered is, whether the Special Rule prescribing the minimum period of eligibility for appointment to the post of Regional Transport Officer, can be overlooked while allowing out of turn/accelerated appointment to respondent no. 5, to the post of Regional Transport Of

in answering the aforesaid query in the negative. We are of the view, that if promotion is granted to respondent no. 5, K.V. Karthalingan, under Rule 36(b)(ii) of the General Rules, prior to his having rendered five years' service as Motor Vehicles Inspector (Grade I), out of which two years must be in a field office, the same would violate the Special Rules. Since the Special Rules override the General Rules, the claim made by respondent no. 5, for out of turn promotion under Rule 36(b)(ii) of the General Rules, would be valid only if respondent no.5, had satisfied the conditions of eligibility stipulated in the Special Rules for appointment to the post of Regional Transport Officer. Insofar as the present controversy is concerned, even though respondent no. 5, K.V. Karthalingan, was appointed as Motor Vehicles Inspector (Grade II) on 9.2.1995, he made a representation on 30.6.1998 claiming out of turn/accelerated promotion. By that time, he had rendered just over three years of service as Motor Vehicles Inspector (Grade II). At that stage, there was no question of his being considered for appointment against the post of Regional Transport Officer, as he had by then, not rendered even a single days service as Motor Vehicles Inspector Grade-I (as against the prescribed five years' service). The instant issue can be examined from another angle as well. It would be legitimate to accept, that in the hierarchy of posts in the Transport Department, the post of Motor Vehicles (Grade I) must be treated as a post higher in stature, as compared to the post of Motor Vehicles (Grade II). At the juncture, when respondent no.5 had made his representation claiming out of turn/accelerated promotion he was not even eligible for promotion to the post of Motor Vehicles Inspector (Grade-I), as a minimum of five years' service as Motor Vehicles Inspector Grade-II is required before such promotion. Since a minimum of five years' service as Motor Vehicles Inspector (Grade I) is required before an individual can be appointed to the post of Regional Transport Officer, it is essential to further conclude, that respondent no. 5 ought to have fulfilled the prescribed condition, before claiming appointment as Regional Transport Officer. Having already concluded, that respondent no.5 could not have legitimately been promoted to the post of Motor Vehicles Inspector (Grade-I), it is out of the question to accept or assume, that he could have nonetheless been promoted to the post of Regional Transport Officer, which required a further five years' service. Besides the above, we are of the view, that the Special Rules laying down the conditions of eligibility and the manner/method of promotion to the post of Regional Transport Officer, would stand violated if the claim of respondent no. 5, K.V. Karthalingan, for out of turn/accelerated promotion, was to be acceded to on the basis of his representation dated 30.6.1998. It needs to be kept in mind that respondent no. 5 had first approached the Administrative Tribunal for claiming out of turn/accelerated promotion in 1998 (having filed Original Application no. 5918 of 1998). He again approached the Administrative Tribunal in 2002 (having filed Original Application no. 429 of 2002) when his claim for out of turn/accelerated promotion was rejected by the State Government. In the instant latter case, his claim for out of turn/accelerated promotion to the post of Regional Transport Officer was accepted by the Administrative Tribunal (on 10.7.2002). At the cost of repetition, it may be noted, that a minimum of ten years service after appointment as Motor Vehicles Inspector (Grade-II) is required under the Special Rules, before an individual can be appointed as Regional Transport Officer (five years' service for promotion as Motor Vehicles Inspector (Grade-I), and another five years' service as Motor Vehicles Inspector (Grade-I) before appointment as Regional Transport Officer). Respondent No.5, K.V. Karthalingan, did not fulfill the prescribed minimum service for promotion, when the courts below directed his promotion to the post of Regional Transport Officer. It would not be out of place to mention, that he had neither fulfilled the conditions of eligibility of appointment to the post of Regional Transport Officer at the time of filing of the Original Applications, nor when his claim was allowed. We are, therefore of the view, that the order passed by the Administrative Tribunal, as also, by the High Court by relying

on Rule 36(b)(ii) of the General Rules, was in clear derogation of the Special Rules referred to above. We may now summarize the conclusions drawn in the instant paragraph. Firstly, respondent no. 5, K.V. Karthalingan, could not have been appointed as Regional Transport Officer because he did not satisfy the conditions of eligibility expressed therefor in the Special Rules. Secondly, because respondent no. 5, K.V. Karthalingan, was not even eligible to be appointed to the lower post of Motor Vehicles Inspector (Grade I), it was out of the question to accept that he was nonetheless eligible to be appointed to the post of Regional Transport Officer, which required a further five years' experience. And thirdly, it needed a minimum of ten years' service to become eligible for being appointed as Regional Transport Officer. Since respondent no. 5, K.V. Karthalingan, had not even rendered such minimum service, his appointment to the post of Regional Transport Officer cannot be considered as valid. For all the above reasons, we are satisfied, that the order passed by the Administrative Tribunal, as also, the High Court directing the promotion of respondent no. 5, K.V. Karthalingan, to the post of Regional Transport Officer is liable to be set aside.

26. The validity of the claim of appointment of respondent no. 5, K.V. Karthalingan, against the post of Regional Transport Officer can be examined from another perspective. Rule 36(b)(ii) contained in Part II - "General Rules", of the Tamil Nadu State and Subordinate Services Rules, clearly envisage, that an employee can be given special promotion for conspicuous merit and ability. But then, the Special Rules framed under Section 28 of the Tamil Nadu Transport Service, laying down the conditions of eligibility and the manner/method of appointment to the post of Regional Transport Officer, do not postulate appointment to the post of Regional Transport Officer by way of promotion. Rule 2 of the Special Rules clearly envisage, that appointment against the post of Regional Transport Officer, would be made only by way of transfer, interalia from amongst Motor Vehicles Inspectors (Grade I).

Rule 36(b)(ii) of the General Rules does not postulate out of turn/accelerated appointment by way of transfer. In the above view of the matter we are satisfied, that Rule 36(b)(ii) of the General Rules, would clearly be inapplicable for considering the claim of respondent no. 5, K.V. Karthalingan, for appointment to the post of Regional Transport Officer. For the instant reason as well, the direction issued by the Administrative Tribunal, as also, the High Court requiring the State Government to appoint respondent no. 5, K.V. Karthalingan by way of promotion to the post of Regional Transport Officer, is not acceptable in law.

27. There is another legal parameter on the basis of which the validity of the claim of respondent no. 5, K.V. Karthalingan, for out of turn/accelerated promotion under Rule 36(b)(ii) of the General Rules, cannot be accepted. Insofar as the instant parameter is concerned, it requires a close examination of Rule 36(b) of the General Rules. Rule 36(b) of the General Rules has two clauses, clause (i) thereof deals with promotions by way of selection, whereas clause (ii) thereof deals with promotions on the basis of seniority alone. Respondent no. 5, K.V. Karthalingan, as also, the various recommending authorities have referred to clause (ii) of Rule 36(b) of the General Rules, while recommending the claim of respondent no. 5, K.V. Karthalingan, for out of turn/accelerated promotion. We are of the considered view, that the aforesaid clause (ii) of Rule 36(b) of the General Rules, could have been invoked only in matters where promotions are to be made solely on the basis of seniority. Rule 2(b) of the Special Rules laying down the manner/method for promotion to the post of Motor Vehicles Inspector (Grade I) clearly mandates, that promotion to the said post, would be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal. It is, therefore apparent, that the post of Motor Vehicles Inspector (Grade I) is a selection post. That being the undisputed position, it would not have been possible for the authorities to invoke Rule 36(b)(ii) of the General Rules, even for promoting respondent no. 5, K e

post of Motor Vehicles Inspector (Grade I). Insofar as the post of Regional Transport Officer is concerned, we have already expressed above that the same could be filled up only by way of transfer from amongst Motor Vehicles Inspectors (Grade I), and not by promotion. Even though the Special Rules do not lay down the method or manner of making appointments by way of transfer, Rule 36A (introduced with effect from 30.1.1996) contained in Part II - 'General Rules', of the Tamil Nadu State and Subordinate Services (extracted in paragraph 5 above), postulates, that appointment by transfer shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal. In the aforesaid view of the matter, it is imperative to conclude, that even for appointments by way of transfer, the appointing authority must sieve the eligible candidates by adopting a process of selection. Since the post of Regional Transport Officer, is to be filled up by way of transfer, i.e., by way of selection amongst eligible candidates, Rule 36(b)(ii) of the General Rules would be inapplicable. Stated in other words, the General Rules contemplate out of turn/accelerated promotion, only in cases where seniority is the sole criterion for promotion, whereas, the post of Regional Transport Officer is not to be filled up on the basis of seniority. For the instant reason also, it is not possible for us to accept, that Rule 36(b)(ii) of the General Rules could have been invoked for granting out of turn/accelerated promotion to respondent no. 5, K.V. Karthalingan, against the post of Regional Transport Officer.

28. From the conclusions recorded by us, while considering the issue of out of turn/accelerated promotion, with reference to respondent no. 5, K.V. Karthalingan, we have repeatedly arrived at a firm determination, that for onward promotions (from the post of Motor Vehicles Inspector (Grade II) held by respondent no. 5, K.V. Karthalingan), the criterion to be adopted was that of selection. Seniority was only to be taken into consideration where merit and ability of two eligible candidates was found to be approximately equal. This would

lead us to yet another relevant inference on the issue in hand. In the above view of the matter, every claim for onward promotion from the post of Motor Vehicles Inspector (Grade II) was liable to be considered on the basis of merit. Therefore, an individual with superior merit would steal a march over those less meritorious. Thus viewed, if respondent no.5, K.V. Karthalingan, was actually possessed of outstanding and exceptional merit, as is sought to be suggested, he would have stolen a march over his seniors even under the existing Special Rules. Thus viewed, even by the manner/method of onward progression postulated in the Special Rules, a person with conspicuous merit and ability (as postulated under Rule 36(b)(ii) of the General Rules), would overtake others without having to invoke Rule 36(b)(ii) of the General Rules. This does not seem to have happened in case of respondent no. 5, K.V. Karthalingan. On his consideration, after he had acquired eligibility for promotion to the post of Motor Vehicles Inspector (Grade I), he was promoted as such only on 10.5.2000. The merit and ability possessed by respondent no. 5, K.V. Karthalingan, is not shown to have resulted in his having superseded other members of the cadre senior to them. For the instant reason also, reliance placed by respondent no. 5, K.V. Karthalingan, for out of turn/accelerated promotion under Rule 36(b)(ii) of the General Rules deserves outright rejection.

29. We shall now deal with the factual aspect of the matter. It is clear from the factual narration recorded above, that the claim of respondent no. 5, K.V. Karthalingan, for out of turn/accelerated promotion was based on his alleged conspicuous merit and ability. The aforestated exemplary and outstanding merit was based on actions allegedly taken by respondent no. 5, K.V. Karthalingan, while working as Motor Vehicles Inspector (Grade II). The very facts relied upon by respondent no. 5, K.V. Karthalingan, constituted the basis of the recommendations of various authorities supervising his work and conduct. Having examined the recommendations made in favour of respondent no. 5, K.V. Karthalingan (by the various o

above), the State Government vide its order dated 8.12.1998 concluded, that the factual basis relied upon by respondent no. 5, K.V. Karthalingan, would not entitle him to out of turn/ accelerated promotion, as the instances of extraordinary service relied upon by him, were common in the Transport Department. Despite the aforesaid assertion of the State Government in its order dated 8.12.1998, the Administrative Tribunal adjudicated upon the said disputed question of fact. It reversed the factual finding recorded by the State Government. While doing so, the Administrative Tribunal did not await a response by the State Government. The matter came to be disposed of without any reply having been filed by the State Government. Even though the State Government while seeking recourse to the writ jurisdiction of the High Court, brought out other related facts showing that respondent no. 5, K.V. Karthalingan, could not be treated as an employee entitled to out of turn/accelerated promotion, the High Court rejected all those submissions and reversed the factual finding recorded by the State Government (in its order dated 8.12.1998). We find it difficult to appreciate the approach of the Administrative Tribunal, as also, the High Court. The simple reason depicted in the State Government's order dated 8.12.1998 was, that the instances of extraordinary service relied upon by respondent no. 5, K.V. Karthalingan, to claim out of turn/accelerated promotion, could not be treated as exceptional or unprecedented, as such instances were common in the Transport Department. Even though respondent no. 5, K.V. Karthalingan, had not disputed the aforesaid factual position, it is difficult to understand how the Administrative Tribunal, as also, the High Court had accepted the claim of respondent no. 5, K.V. Karthalingan, by concluding that he had actually rendered extraordinary and exemplary service. Since the factual assertion made by the State Government in its order dated 8.12.1998, had remained unrebutted, we are of the view, that the Administrative Tribunal, as also, the High Court, were wholly unjustified in recording such a conclusion. For the instant reason also, the impugned orders dated 10.7.2002 (passed by the

Administrative Tribunal) and 13.10.2004 (passed by the High Court) deserve to be set aside.

30. For the reasons recorded hereinabove, we find merit in the various contentions advanced by the learned counsel for the appellants. The order passed by the Administrative Tribunal on 10.7.2002 (while disposing of Original Application no. 429 of 2002) and the order passed by the High Court on 13.10.2004 (while disposing of Writ Petition (Civil) no. 21562 of 2003) directing the promotion of respondent no. 5, K.V. Karthalingan, to the post of Regional Transport Officer, are clearly unsustainable. They are accordingly hereby set aside.

31. Allowed in the aforesaid terms.

K.K.T. Appeals allowed.

STATE OF UTTAR PRADESH
v.
DAYANAND CHAKRAWARTY & ORS.
(Civil Appeal No. 5527 of 2012)

JULY 2, 2013

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

Service Law:

Superannuation - State framed Regulations, 2005 - Fixing two different ages of superannuation (58 and 60) - For the employees of one Department, solely on the basis of their source of entry in the service - Propriety and constitutional validity of - Held: The employees from the two sources were treated alike for the purpose of superannuation under Regulation 31 of 1978 Regulations - Subsequently no discrimination can be made and differential treatment would not be permissible, solely on the basis of their source of entry - Thus, Regulations, 2005 is unconstitutional and ultra vires Art. 14 of the Constitution - The employees who were ordered to retire at the age of 58 are entitled to pecuniary benefit - The employees who approached the Court, shall be entitled to full salary upto 60 years of age - The employees who did not approach the Court shall not be entitled to full salary upto 60 years of age, but they would be deemed to have continued in service upto 60 years and their retiral benefits to be fixed accordingly - Uttar Pradesh Jal Nigam Employees (Retirement on the age of Superannuation) Regulations, 2005 - Regulation 4 - Uttar Pradesh Jal Nigam Services of Engineers (Public Health Branch) Regulations, 1978 - Regulation 31 - Constitution of India, 1950 - Art. 14.

Principles - Principle of 'No work no pay' - Applicability - Held: The principle is not applicable to the employees guided

by specific rules relating to absence from duty - It is also not applicable to the employee who was prevented by the employer from performing his duties.

Constitution of India, 1950 - Art. 14 - Differential treatment of similarly situated persons/groups - Permissibility - Held: Differential treatment would be permissible between two similarly situated persons/groups - But such treatment should be founded on an intelligible differentia and that differentia must have rational relation to the object sought to be achieved by the statute.

Appellant-State constituted Uttar Pradesh Jal Nigam under Uttar Pradesh Water Supply and Sewerage Act, 1975. The services of the employees of erstwhile Local Self Government Engineering Department (LSGED) were transferred/merged with the Jal Nigam. The Jal Nigam, in exercise of the powers conferred under the 1975 Act, made Uttar Pradesh Jal Nigam Service of Engineers (Public Health Branch) Regulations, 1978. The Regulation was made equally applicable to the employees transferred/merged from LSGED and to the directly recruited employees of the Jal Nigam. Regulation 31 of the 1978 Regulations stipulated that the service conditions of the employees of the Nigam would be governed by the Rules/Regulations, generally applicable to the employees of the State Government. Thus the retirement/superannuation age of the employees of the Nigam were to be governed by r. 56(a) of Uttar Pradesh Fundamental Rules. The State by amending the Fundamental Rules, enhanced the age of superannuation from 58 to 60 years. However, this amendment was not made applicable to the employees of the Nigam. The same was challenged. The order for retirement of the employees of the Nigam at the age of 58, was set aside by Supreme Court. Thereafter, the Nigam framed Uttar Pradesh Jal Nigam Employees (Reti... of

Superannuation) Regulations, 2005. As per the 2005 Regulations, the age of superannuation of the employees directly recruited with the Nigam would be 60 years, whereas of those transferred/merged from LSGED would be 58 years. The Regulation was held discriminatory and unconstitutional by the High Court.

In appeal to this Court, the questions for consideration were whether two different age of superannuation of 58 and 60 years can be prescribed for the employees similarly situated, including members of the same service, solely on the basis of their source of entry in the service; and whether the Uttar Pradesh Jal Nigam (Retirement on attaining age of Superannuation) Regulations, 2005 fixing two different age of superannuation for similarly situated employees of Jal Nigam are discriminatory and ultra vires Article 14 of the Constitution.

Disposing of the appeals, the Court

HELD: 1. Differential treatment would be permissible between one class and the other, even amongst persons similarly situated. In that event, it is necessary that the differential treatment should be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute. The appellants, the Nigam as well as the State of Uttar Pradesh failed to place on record the reasons for differential treatment which distinguishes employees of erstwhile LSGED and those who were appointed directly in the Nigam. Further, as employees appointed from different source, after their appointment were treated alike for the purpose of superannuation under Regulation 31 of the 'Uttar Pradesh Jal Nigam Services of Engineers (Public Health Branch) Regulations, 1978', subsequently solely on the

basis of sources of recruitment, no discrimination can be made and differential treatment would not be permissible in the matter of condition of service, including age of superannuation, in absence of an intelligible differentia distinguishing them from each other. The High Court rightly declared Regulations, 2005 unconstitutional and ultra vires of Article 14 of the Constitution of India. [Para 24] [1044-D-H]

2. Regulation 31 of 1978 Regulations (Special Regulation), will not be affected by later Regulation 4 of the Uttar Pradesh Jal Nigam (Retirement on attaining age of Superannuation) Regulations, 2005, in absence of express repeal of Special Regulation. By implication, it cannot be inferred that Regulation 31 stands repealed in view of subsequent Regulations, 2005. Even if it is treated that both the General Regulation 4 of Regulations, 2005 and Special Regulation 31 of Regulations, 1978 co-exist, one which is advantageous i.e. Regulation 31 shall be applicable to the members of the same service. [Paras 25 and 26] [1045-A-C]

3. The State Government's order dated 29th June, 2009 prescribing a uniform age of superannuation at 58 years for the employees working in the Government Companies and Government Corporations cannot prevail over statutory Regulation 31 framed by the Nigam under Section 97 (2) (c) of the Act, 1975 with the previous approval of the State Government. Therefore, the employees of the Nigam shall not be guided by the State Government's order dated 29th June, 2009 but will continue in the services up to the age of 60 years, in view of Regulation 31, having not yet amended or repealed. [Para 27] [1045-D-E]

4. During the pendency of these appeals, further development has taken place. The Government of Uttar Pradesh by its letter No.3199/9-3-

23rd December, 2011 informed the Chairman, Uttar Pradesh Jal Nigam its approval to increase the age of superannuation of full time regular officers/employees of the Nigam from 58 years to 60 years. The State Government directed to make appropriate amendments in the Regulations framed by the Nigam. [Para 29] [1045-H; 1046-A-B]

5. The principle of 'no pay no work' is not applicable to the employees who were guided by specific rules like Leave Rules etc. relating to absence from duty. Such principle can be applied to only those employees who were not guided by any specific rule relating to absence from duty. If an employee is prevented by the employer from performing his duties, the employee cannot be blamed for having not worked, and the principle of 'no pay no work' shall not be applicable to such employee. [Para 37] [1049-G-H]

6. In the present cases, following consequential and pecuniary benefits should be allowed to different sets of employees who were ordered to retire at the age of 58 years. (a) The employees including respondents who moved before a court of law irrespective of fact whether interim order was passed in their favour or not, shall be entitled for full salary up to the age of 60 years. The arrears of salary shall be paid to them after adjusting the amount if any paid. (b)The employees, who never moved any court of law and had to retire on attaining the age of superannuation, they shall not be entitled for arrears of salary. However, in view of Regulation 31 they will be deemed to have continued in service up to the age of 60 years. In their case, the appellants shall treat the age of superannuation at 60 years, fix the pay accordingly and re-fix the retirement benefits like pension, gratuity etc. On such calculation, they shall be entitled for arrears of retirement benefits after adjusting the amount already paid. [Para 38] [1050-A-E]

Harwindra Kumar vs. Chief Engineer, Karmik and Ors. **2005 (13) SCC 300: 2005 (5) Suppl. SCR 317;** *Chairman, U.P. Jal Nigam vs. Radhey Shyam Gautam* **2007 (11) SCC 507: 2007 (4) SCR 583;** *Chairman, Uttar Pradesh Jal Nigam vs. Jaswant Singh and Ors.* **2006 (11) SCC 464: 2006 (8) Suppl. SCR 916;** *Prem Chand Somchand Shah vs. Union of India* **(1991) 2 SCC 48: 1991 (1) SCR 232 - relied on.**

Case Law Reference:

1991 (1) SCR 232	**relied on**	**Para 22**
2005 (5) Suppl. SCR 317	**relied on**	**Para 34**
2007 (4) SCR 583	**relied on**	**Para 35**
2006 (8) Suppl. SCR 916	**relied on**	**Para 36**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5527 of 2012.

From the Judgment and Order dated 29.07.2010 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Writ Petition No. 1595 (S/B) of 2009.

WITH

C.A. Nos. 5528, 5529, 5530, 5531, 5532, 5533, 5534, 5535 & 5617-5659 of 2012.

Pramod Swarup, Tanmaya Agarwal, Prachi Bajpai, Shomila Bakshi, K.C. Kaushik, Shivram, Rachna Gupta, Upendra Nath Misra, Nikhil Majithia, Jitendra Mohan Sharma, Kumar Parimal for the appearing parties.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. These appeals Nos. 5527 of 2012, 5528 of 2012 and 5617-5659 of 2012 (arising out of SLP(C) Nos.31279 of 2010, 35579 of 2010, 5218-60 of 2011) have been preferred by the State of Uttar Pradesh and others against the co[illegible]d

29th July, 2010 passed by the Division Bench of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Writ Petition (C) No.1595(S/B) of 2009 etc.etc. whereby the High Court declared Uttar Pradesh Jal Nigam Employees (Retirement on attaining age of superannuation) Rules, 2005 which have created two separate age of retirement amongst same classes of employees discriminatory and unconstitutional and held that the employees of the Jal Nigam are entitled to continue in service upto the age of 60 years with further directions to pay 20% of back wages to those writ petitioners who in the meantime were forced to retire on attaining the age of 58 years in absence of any interim order in their cases.

The benefit of enhancement of age was confined to the persons who had filed the writ petitions before their retirement and was not granted to those who in the meantime retired at the age of 58 years and had not moved before the High Court.

The other appeals have been preferred against the judgments subsequently passed on 29th April, 2010, 17th August, 2010, 16th September, 2010, 28th October, 2010, 3rd December, 2010 which were disposed of in terms of the aforesaid judgment dated 29th July, 2010.

Before the High Court Writ Petition No.1191(SB) of 2009 was filed by the U.P. Engineers Association Jal Nigam, praying therein to declare U.P. Jal Nigam Karamchari (Adhivarshita Par Seva Nivarti) Viniyamawali, 2005 [U.P. Jal Nigam Employees (Retirement on attaining age of Superannuation) Regulations, 2005] (hereinafter referred to as the "Regulations, 2005") unconstitutional and ultra vires to the provisions of the Constitution of India and further to quash the orders dated 3rd July, 2009 and 29th June, 2009 passed by the respondents 1 and 2 to the writ petition, respectively. The other prayers were to restrain the respondents from causing retirement of the members of the writ petitioners' association at the age of 58 years as well as to allow them to continue to work till they attain the age of 60 years.

Except the aforesaid writ petition, in all other writ petitions, writ petitioners have challenged their respective order (s) whereby they had been asked to retire on attaining the age of 58 years as per the provisions of Regulations, 2005.

2. The questions involved in these appeals are:

(i) Whether two different age of superannuation of 58 and 60 years can be prescribed for the employees similarly situated, including members of the same service, solely on the basis of their source of entry in the service.

(ii) Whether 'the Uttar Pradesh Jal Nigam (Retirement on attaining age of Superannuation) Regulations, 2005' fixing two different age of superannuation for similarly situated employees of Jal Nigam are discriminatory and ultra vires under Article 14 of the Constitution of India.

3. The factual matrix of the case are as follows:

A department, known as Public Health Engineering (hereinafter referred to as the 'PHED') was created during the British period for performing all the works related to public health engineering including sewerage and water supply. Just before the independence, the State of United Province created a Local Self Government Engineering Department (hereinafter referred to as the 'LSGED') which was converted from PHED. All the engineering works of Local Self Government were entrusted to the said newly created department.

4. By Notification dated 18th June, 1975 issued under Section 3 of the Uttar Pradesh Water Supply and Sewerage Act, 1975 (hereinafter referred to as the "Act, 1975), the State Government constituted Uttar Pradesh Jal Nigam (hereinafter referred to as the "Nigam"). Section 37(1) of the Act, 1975 provided that the services of the employees and engineers of the Local Self-Government Engineering Department (LSGED) will be transferred and merged into the newly created Nigam

on the same terms and conditions, which were governing their services prior to such absorption, till the said service conditions are altered/changed by the Rules or Regulations framed in accordance with law.

5. In its second meeting dated 4th April, 1977 vide Agenda Item No.2.21 the Board of Nigam resolved that all the provisions of Financial Handbook, Manual of Government Order, Civil Services Regulations, Government Servant Rules and other Government orders shall be applicable to the employees of the Nigam, provided the Nigam has not passed any other order.

Initially, in exercise of powers conferred under sub-section (1) and clause (c) of sub-section (2) of Section 97 of Act, 1975 and with the previous approval of the State Government, the Nigam made regulations for regulating the recruitment to the posts and the conditions of service of persons appointed to the Uttar Pradesh Jal Nigam Service of Engineers (Public Health Branch) known as the Uttar Pradesh Service of Engineers (Public Health Branch) Regulations, 1977.

6. Subsequently, in exercise of powers conferred under sub-section (1) and clause (c) of sub-section (2) of Section 97 of the Act, 1975, and with the previous approval of the State Government, Nigam made the "Uttar Pradesh Jal Nigam Services of Engineers (Public Health Branch) Regulations, 1978" (hereinafter referred to as the "Regulations, 1978") for regulating the recruitment to the posts and the conditions of service of persons appointed to the Jal Nigam Engineers (Public Health Branch). The said Regulations, 1978 were made equally applicable to the employees transferred and merged from the erstwhile LSGED and the employees directly recruited by the Nigam and it came into force w.e.f. 27th April, 1978. Regulation 31 relates to pay, allowance, pension, leave and other conditions of service which reads as follows:

> *"**Regulation 31**.- Except as provided in these regulations the pay, allowance, pension, leave, imposition of penalties and other conditions of service of the members of the service shall be regulated by rules, regulations or orders applicable generally to the Government Service in connection with the affairs of the state."*

7. There is no separate provision for age of superannuation of employees of the Nigam prescribed under Regulations, 1978. As per Regulation, 31, the terms and conditions of service of the employees of the Nigam shall be governed by the same rules, regulations and orders generally applicable to the employees of the State Government and hence the retirement and superannuation age of employees of the Nigam shall stand governed by the provisions of Rule 56(a) of the Uttar Pradesh Fundamental Rules contained in the Financial Handbook, Volume II, Part II-IV, which reads as follows:

> *"**Rule 56(a).**Except as otherwise provided in other clauses of this rule every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. He may be retained in service after the date of retirement on superannuation with the sanction of the government on public grounds which must be recorded in writing but he must not be retained after the age of sixty years except in very special circumstances."*

The age of retirement of the State Government employees as per Rule 56(a) of Uttar Pradesh Fundamental Rules was 58 years. In the year 2001, the State Government vide its Official Order No.1098/A-1/2001 dated 28th November, 2001 informed of its intention to amend clause (a) of Rule 56. Consequently, Rule 56(a) was amended by "The Uttar Pradesh Fundamental (Amendment) Rules, 2002" vide Notification dated 27th June, 2002, which came into force on 28th November, 2001. As per the amended clause (c) of Rule 56, the age of superannuation of the State Government employees was enhanced from 58 years to 60 years, which reads as follo

*"**Rule 56(a).**Except as otherwise provided in this rule, every government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years.*

Provided that a Government servant whose date of birth is the first day of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years.

Provided further that a Government servant who has attained the age of fifty eight years on or before the first day of November, 2001 and is on extension in service shall retire from service on expiry of his extended period of service."

8. In the meantime, after issuance of Government's order expressing its intention to amend clause (a) of Rule 56 by Notification dated 28th November, 2001, the Nigam by its letter dated 31st December, 2001 enquired from the State Government as to whether the benefit of enhancement in the age of superannuation from 58 years to 60 years would be applicable to the employees of the Nigam or not. In reply thereto just before the Amendment Rules, 2002, the special Secretary to the State Government from its Department of Local Self Government by his letter dated 22nd January, 2002, conveyed that the employees of the Nigam shall not be entitled to the enhancement of age of superannuation from 58 years to 60 years as the same would be applicable only to the State Government employees. On receipt of the said letter, on 11th July, 2002 the Nigam resolved that enhancement in the age of superannuation from 58 years to 60 years would not be applicable to the employees of the Nigam.

Against the decision of the State Government dated 22nd January, 2002 and the decision of the Nigam vide Office Memorandum dated 11th July, 2002 a number of writ petitions were preferred by the employees of the Nigam who were being

sought to retire on completing the age of 58 years. Some of the employees directly filed writ petitions before this Court challenging the orders issued by the Nigam against them to the effect that they would superannuate upon completion of 58 years. This Court by its judgment in *Harwindra Kumar vs. Chief Engineer, Karmik and others,* 2005 (13) SCC 300 directed the Nigam to continue the petitioners of those cases in service till they attain the age of 60 years and the orders directing their retirement at the age of 58 years were set aside with the following observation:

*"**9.** In the present case, as the Regulations have been framed by the Nigam specifically enumerating in Regulation 31 thereof that the Rules governing the service conditions of government servants shall equally apply to the employees of the Nigam, it was not possible for the Nigam to take an administrative decision acting under Section 15(1) of the Act pursuant to the direction of the State Government in the matter of policy issued under Section 89 of the Act and directing that the enhanced age of superannuation of 60 years applicable to the government servants shall not apply to the employees of the Nigam. In our view, the only option for the Nigam was to make suitable amendment in Regulation 31 with the previous approval of the State Government providing thereunder the age of superannuation of its employees to be 58 years, in case it intended that 60 years which was the enhanced age of superannuation of the State Government employees should not be made applicable to the employees of the Nigam. It was also not possible for the State Government to give a direction purporting to act under Section 89 of the Act to the effect that the enhanced age of 60 years would not be applicable to the employees of the Nigam treating the same to be a matter of policy nor was it permissible for the Nigam on the basis of such a direction of the State Government in the* e

Nigam to take an administrative decision acting under Section 15(1) of the Act as the same would be inconsistent with Regulation 31 which was framed by the Nigam in the exercise of powers conferred upon it under Section 97(2)(c) of the Act.

10. *For the foregoing reasons, we are of the view that so long as Regulation 31 of the Regulations is not amended, 60 years which is the age of superannuation of government servants employed under the State of Uttar Pradesh shall be applicable to the employees of the Nigam. However, it would be open to the Nigam with the previous approval of the State Government to make suitable amendment in Regulation 31 and alter the service conditions of employees of the Nigam, including their age of superannuation. It is needless to say that if it is so done, the same shall be prospective.*

11. *For the foregoing reasons, the appeals as well as writ petitions are allowed, orders passed by the High Court dismissing the writ petitions as well as those by the Nigam directing that the appellants of the civil appeals and the petitioners of the writ petitions would superannuate upon completion of the age of 58 years are set aside and it is directed that in case the employees have been allowed to continue up to the age of 60 years by virtue of some interim order, no recovery shall be made from them but in case, however, they have not been allowed to continue after completing the age of 58 years by virtue of erroneous decision taken by the Nigam for no fault of theirs, they would be entitled to payment of salary for the remaining period up to the age of 60 years which must be paid to them within a period of three months from the date of receipt of copy of this order by the Nigam. There shall be no order as to costs."*

9. After the decision in *Harwindra Kumar*(supra), the Nigam in exercise of its powers conferred under sub-sections

(1) and (2) of Section 97 of the Act, 1975, framed Uttar Pradesh Jal Nigam Employees (Retirement on the age of Superannuation) Regulations, 2005 (hereinafter referred to as the 'Regulations, 2005'). It was issued by Office Order dated 8th December, 2005 and made effective from 30th August, 2005. By Regulation 3 the retirement age of 60 years was provided but for employees and Engineers who were employed in erstwhile LSGED and who were transferred and merged in the Nigam. In Regulation 4, a separate age of superannuation at the age of 58 years was prescribed for all other employees and Engineers, who were not covered under Regulation 3 i.e. those who were directly appointed in the Nigam. Regulation 3 and 4 reads as follows:

" ***Retirement on attaining age of superannuation:***

3*. Age of superannuation of every employee who was employed in the Engineering Department of the Local Self Government under Section 37(1) of the Act, and has been transferred to the Corporation and is employed in the Corporation, will be 60 years.*

4*. The age of superannuation of the employees different from those under Rule 3 above, will be 58 years. But the age of superannuation of the Group 'D' employee who have been employed prior to 5.11.1985, will be 60 years."*

After framing the aforesaid Regulation, 2005, the Nigam filed a review petition before this Court being Review Petition No.24 of 2006, seeking review of decision in *Harwindra Kumar(supra).* The review petition was dismissed by this Court on 29th August, 2006.

10. A number of employees challenged Regulation 4 by filing Writ Petition No.45800 of 2006, etc. The Allahabad High Court by its common judgment dated 21st May, 2007 allowed the writ petitions and held that Regulation 4 to the extent it provides superannuation age of 58 yea s

directly recruited is arbitrary and declared it non-est. The writ petitioners were allowed to continue in service till the age of 60 years.

11. As against the aforesaid judgment, the Nigam filed a special appeal before the Division Bench of the Allahabad High Court which by order dated 1st August, 2007 stayed the declaration given by the learned Single Judge. However, so far as the writ petitioners were concerned, no interim orders were passed in the said special appeal and as such, they were allowed to discharge their duties upto the age of 60 years.

12. The Nigam being not satisfied with the order passed by the Division Bench moved before this Court in *Chairman, Uttar Pradesh Jal Nigam & another vs. Radhey Shyam Gautam and another,* 2007 (11) SCC 507. In the said case, taking into consideration the earlier decision rendered in *Harwindra Kumar(supra)* and *Jaswant Singh(supra)* this Court dismissed the appeal with following observation:

> ***"10.*** *After the amendment made in Rule 56(a) of the Rules by the State Government and thereby enhancing the age of superannuation of government servants from 58 years to 60 years, the same would equally apply to the employees of the Nigam and in case the State Government as well as the Nigam intended that the same would not be applicable, the only option with it was to make suitable amendment in Regulation 31 of the Regulations after taking previous approval of the State Government and by simply issuing direction by the State Government purporting to act under Section 89 of the Act and thereupon taking administrative decision by the Nigam under Section 15 of the Act in relation to the age of the employees would not tantamount to amending Regulation 31 of the Regulations.*
>
> ***11.*** *In Harwindra Kumar case the Division Bench decision on which the appellant places reliance was challenged. Orders passed by the High Court dismissing the writ petitions as well as those by the Nigam directing that the appellants of the civil appeals and the petitioners of the writ petitions would superannuate upon completion of the age of 58 years were set aside and it was directed that in case the employees have been allowed to continue up to the age of 60 years by virtue of some interim order, no recovery shall be made from them but in case, however, they have not been allowed to continue after completing the age of 58 years by virtue of erroneous decision taken by the Nigam for no fault of theirs. They would be entitled to payment of salary for the remaining period up to the age of 60 years which was to be paid to them within a period of three months from the date of receipt of copy of this Court's order by the Nigam."*

13. In the meantime, a large number of employees of the Nigam, who were forced to retire on attaining the age of 58 years, preferred writ petitions and sought benefit of the directions given by this Court in *Harwindra Kumar (supra)*. The matter ultimately, moved before this Court in *Chairman, Uttar Pradesh Jal Nigam vs. Jaswant Singh & others,* 2006 (11) SCC 464. While dismissing the appeal this Court observed:

> ***"16.*** *Therefore, in case at this belated stage if similar relief is to be given to the persons who have not approached the court that will unnecessarily overburden the Nigam and the Nigam will completely collapse with the liability of payment to these persons in terms of two years' salary and increased benefit of pension and other consequential benefits. Therefore, we are not inclined to grant any relief to the persons who have approached the court after their retirement. Only those persons who have filed the writ petitions when they were in service or who have obtained interim order for their retirement, those persons should be allowed to stand to benefit and not others. We have been given a*

persons, who filed writ petitions and obtained stay and are continuing in service. They are as follows:

1. Shri Bhawani Sewak Shukla

2. Shri Vijay Bahadur Rai

3. Shri Girija Shanker

4. Shri Yogendra Prakash Kulshresht

5. Shri Vinod Kumar Bansal

6. Shri Pradumn Prashad Mishra

7. Shri Banke Bihari Pandey

8. Shri Yashwant Singh

9. Shri Chandra Shekhar

And the following persons filed writ petitions before retirement but no stay order was granted:

1. Shri Gopal Singh Dangwal (WP No. 35384 of 2005 vide order dated 5-5-2005)

2. Shri R.R. Gautam (WP No. 45495 of 2005 vide order dated 15-6-2005)

***17.** The benefits shall only be confined to abovementioned persons who have filed writ petitions before their retirement or they have obtained interim order before their retirement. The appeals filed against these persons by the Nigam shall fail and the same are dismissed. Rest of the appeals are allowed and orders passed by the High Court are set aside. There would be no order as to costs."*

14. In *Harwindra Kumar* (supra) this Court held that as long as Regulation 31 is not amended, 60 years which is the age

of superannuation of government servants employed under the State of Uttar Pradesh shall be applicable to the employees of the Nigam. However, liberty was given to the Nigam to make suitable amendment in Regulation 31 with the previous approval of the State Government to alter the service conditions of employees of the Nigam, including their age of superannuation. It was also made clear that if the same is done, it shall be prospective. It appears that in view of observation of this Court, the Nigam framed Regulations, 2005 but prescribed separate age of superannuation, one for employees and engineers who were employed in erstwhile LSGED and another for those who were directly appointed in the Nigam. Regulations 2005 were so framed without repealing or amending Regulation 31.

It appears that in view of the subsequent decisions of this Court, the Nigam vide its Resolution dated 13th April, 2008, resolved to enhance the age of the superannuation of the employees, irrespective of their source of entry, to 60 years and forwarded the same to the State Government for its approval. The resolution aforesaid reads as follows:

Agenda Item No.	**Description of Agenda**	**Decision taken by the Board of Directors**
147.07	**Regarding enhancement of age of superannuation from 58 years to 60 years, of the officers and officials working in Uttar Pradesh Jal Nigam , similar to the working Government employees.**	**Proposal approved by the Board of Directors and it is decided to refer to the Government for obtaining the approval of the Government.**

15. But the State Government provided a uniform age for superannuation as 58 years for all employees working in Government Companies and Government Corporations by its order dated 29th June, 2009. For the sa[illegible]er

dated 3rd July, 2009, the State Government refused to accord approval to the recommendations of the Nigam dated 13th April, 2008.

16. On being aggrieved by the said action of the State Government the employees of the Nigam preferred the writ petitions in question before the Allahabad High Court. A number of writ petitions were heard together and disposed of by the common impugned judgment dated 29th July, 2010. The other writ petitions which were taken up or filed subsequently were disposed of by the impugned separate orders in terms with common judgment dated 29th July, 2010.

17. By the impugned common judgment dated 29th July, 2010 the Division Bench of the Allahabad High Court, Lucknow Bench, Lucknow in Writ Petition (C) No.1595(S/B) of 2009 etc.etc. declared "Uttar Pradesh Jal Nigam Employees (Retirement on attaining age of Superannuation) Regulations", 2005 unconstitutional as it created two classes of employees in determining two separate retirement age with observation as noticed above.

18. Learned counsel for the appellant-State and the Nigam assailed the judgment mainly on the following grounds:

(i) The High Court cannot equate the employees of the public undertakings/corporations with the employees of the State Government for determination of age of superannuation.

(ii) The High Court was not justified in declaring that all the employees of the Nigam shall retire on attaining the age of 60 years like State Government employees, by pre-empting the Nigam from exercising its power under Section 97 of the Act, 1975.

(iii) The classification between the employees of Local Self-Government Engineering Department transferred to the Nigam and the employees directly recruited by the

Nigam, in prescribing different age of superannuation is valid and reasonable.

(iv) The High Court was not justified in setting aside the Jal Nigam Employees (Retirement on attaining age of Superannuation) Regulations, 2005 in absence of any challenge to the power of the Nigam to frame the regulations particularly when the petitioners only challenged the Regulation

(v) The High Court committed an error of law in not considering Section 37(1) of the Act, 1975, which protects the terms and conditions of service of the employees of erstwhile Local Self-Government Engineering Department who were transferred to the Nigam on its creation.

(vi) The question of determination of age of superannuation is a matter of policy of the State Government or the competitive authority of a Corporation, and the High Court under Article 226 cannot determine the age of superannuation.

19. Thus, from a detailed analysis and close examination of facts relating to condition of service of employees of the Nigam starting from its constitution till today, the following facts emerges:

(a) The question relating to age of superannuation of employees of the Nigam stood finally concluded on 18th November, 2005 when this Court rendered decision in *Harwindra Kumar (supra).*

(b) After judgment in *Harwindra Kumar (supra)* based on liberty given by this Court, the Nigam framed Regulations, 2005 prescribing two separate age of superannuation for the employees of the Nigam, without amending Regulation 31. The Nigam subsequently by Resolution dated 13th April, 2008 proposed to amend Regulations 2005

prescribing common age of 60 years for superannuation for all employees of the Nigam. The State Government by its order dated 29th June, 2009 prescribed uniform age of superannuation as 58 years for all the employees working in the Government Undertakings i.e. Government Companies and Government Corporations and then in view of such decision, the State Government refused to accord approval to the recommendations of the Nigam dated 13th April, 2008 by its letter dated 3rd July, 2009.

20. In view of the subsequent development after decision rendered in *Harwindra Kumar (supra)* case, again the question of age of superannuation of employees of the Nigam has been reopened keeping in view of such fact, the question required to be determined as raised in these cases.

21. This Court in *Harwindra Kumar (supra)* held that so long as Regulation 31 is not amended, 60 years which is the age of superannuation of the government servants shall be applicable to the employees of the Nigam. However, in contravention of finding of this Court without amending Regulation 31, new Regulation 3 and 4 of Regulations, 2005 has been framed by the Nigam prescribing two separate age of superannuation for similarly situated employees.

22. In *Prem Chand Somchand Shah v. Union of India* (1991) 2 SCC 48 this Court held:

> *"**8**. As regards the right to equality guaranteed under Article 14 the position is well settled that the said right ensures equality amongst equals and its aim is to protect persons similarly placed against discriminatory treatment. It means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Conversely discrimination may result if persons dissimilarly situate are treated equally. Even amongst persons similarly situate differential treatment would be permissible between one class and the other. In that event it is necessary that the differential treatment should be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute in question."*

23. Since creation of the Nigam, irrespective of source of recruitment, the employees of the Nigam were treated alike for the purpose of superannuation and were allowed to superannuate at the age of 58 years as is evident from Regulation 31.

24. As per decision of this Court in *Prem Chand Somchand Shah* (supra) even amongst persons similarly situated differential treatment would be permissible between one class and the other. In that event it is necessary that the differential treatment should be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute. The appellants, the Nigam as well as the State of Uttar Pradesh failed to place on record the reasons for differential treatment which distinguishes employees of erstwhile LSGED and those who were appointed directly in the Nigam.

Further, as employees appointed from different source, after their appointment were treated alike for the purpose of superannuation under Regulation 31, subsequently solely on the basis of source of recruitment no discrimination can be made and differential treatment would not be permissible in the matter of condition of service, including age of superannuation, in absence of an intelligible differentia distinguishing them from each other. We therefore hold that the High Court by impugned judgment rightly declared Regulations, 2005 unconstitutional and ultra wires of Article 14 of the Constitut

25. Regulation 31 of the 'Uttar Pradesh Jal Nigam Services of Engineers (Public Health Branch) Regulations, 1978' Special Regulation; it will not be affected by later Regulation 4 of the Uttar Pradesh Jal Nigam (Retirement on attaining age of Superannuation) Regulations, 2005, in absence of express repeal of Special Regulation. By implication it cannot be inferred that the Regulation 31 stands repealed in view of subsequent Regulations, 2005.

26. Even if it is treated that both the General Regulation 4 of Regulations, 2005 and Special Regulation 31 of Regulations, 1978 co-exist, one which is advantageous i.e. Regulation 31 shall be applicable to the members of the same service.

27. The State Government's order dated 29th June, 2009 prescribing a uniform age of superannuation at 58 years for the employees working in the Government Companies and Government Corporations cannot prevail over statutory Regulation 31 framed by the Nigam under Section 97 (2) (C) of the Act, 1975 with the previous approval of the State Government. Therefore, the employees of the Nigam shall not be guided by the State Government's order dated 29th June, 2009 but will continue in the services up to the age of 60 years, in view of Regulation 31, having not yet amended or repealed.

28. In *Harwindra Kumar* (supra) case this Court already held that it is not possible for the Nigam to take an administrative decision pursuant to the direction of the State Government in the matter of policy issued under Section 89 of the Act and directing that the age of superannuation of 60 years applicable to the Government servants shall not be applicable to the employees of the Nigam. In view of such finding of this Court, the Nigam cannot act on the basis of the State Government's order dated 29th June, 2009 providing uniform age of superannuation at 58 years.

29. During the pendency of these appeals further development has taken place. The Government of Uttar

Pradesh by its letter No.3199/9-3-11-113C/2011 dated 23rd December, 2011 informed the Chairman, Uttar Pradesh Jal Nigam its approval to increase the age of superannuation of full time regular officers/employees of the Nigam from 58 years to 60 years. The State Government directed to make appropriate amendments in the Regulations framed by the Nigam, which reads as follows:

"*No.3199/9-3-11-113C/2011*

From: Vijay Bahadur Singh,
Special Secretary,
Government of Uttar Pradesh.

To: The Chairman,
Uttar Pradesh Jal Nigam ,
Lucknow.

Urban Developmetn Section 3Lucknow dt. 23.12.2011

Sub: For increasing the age of retirement of full time regular employees of Uttar Pradesh Jal Nigam from 58 years to 60 years.

Sir,

This is in reference to your letter no. 86/P-1/2005-002/11 dated 23.12.2011 and Government order no.160/44-1-20911-90/2008 dated 20.12.2011 of the Public Enterprises Bureau Section, on the above subject.

2. In this regard I have been directed to say that a meeting of the Board of Directors of Jal Nigam was held on 23.12.2011 and it was decided in the said meeting that age of retirement of full time regular officers/employees of Uttar Pradesh Jal Nigam be increased from 58 years to 60 years. The aforesaid decision of Board e

Government and Government has decided that age of full time regular officers/employees of Uttar Pradesh Jal Nigam be increased from 58 years to 60 years.

3. However, the aforesaid increase in the age of retirement will be subject to the condition that all the additional financial burden which will be incurred due to aforesaid increase in the age of retirement, will be borne by Uttar Pradesh Jal Nigam from its own resources and no financial assistance whatsoever will be given by the Government in this regard.

4. I have been further directed to say that appropriate amendments in the rules/regulations/standing orders of the Uttar Pradesh Jal Nigam pertaining to fixation of the age of retirement of the personnel of the Jal Nigam will be made by the Jal Nigam on its own.

Yours
SD/- Illegible
Vijay Bahadu Singh
Special Secretary."

30. In view of the finding as recorded above and the State Government's letter dated 23rd December, 2011 no interference is called for in the impugned judgment, whereby the High Court held Regulations, 2005 unconstitutional, violative of Article 14 and set aside the orders of retirements.

31. An Interlocutory Application dated 20th March, 2013 has been filed by the counsel for the respondent in Civil Appeal No.5528 of 2012 intimating that 1st respondent-Dayanand Chakrawarty expired on 17th February, 2013, during the pendency of the case, leaving behind their legal heirs, Mrs. Pramila Chakrawarty (widow), Ms. Manisha Chakrawarty

(daughter), Mr. Vivekanand Chakrawarty (son), Ms. Utpana Chakrawarty (daughter) and Mr. Sampurna Nand Chakrawarty (son).

32. In view of the observation made in the preceding paragraphs as the employees including the respondents are entitled to get consequential benefits, we allow the petition for substitution to enable the heirs to derive the benefit of the decision of this Court.

33. Now the question arises as to what consequential benefits to which the respondents and other employees who have not moved before any court of law shall be entitled.

By impugned judgment the High Court observed:

"Similar benefit is already available to the employees who are continuing in service by virtue of interim order passed by the competent court. They should continue till the age of 60 years.

The law helps those who are vigilant and not to those who go to sleep as per maxim VIGILANTIBUS, ET NON DORMINTIBUS, JURA SUB VENIUNT. So, this benefit will not be given to the employees who peacefully retired on attaining the age of 58 years and never came before the Court. But there may be another class of the employees who came before this Court and could not get the interim order but writ petitions were admitted. Admittedly, these employees have not worked. So, on the basis of no pay no work, they will not be entitled for arrears. However, their back wages will be restricted @20% of the basic salary as per the ratio laid down in the case of M/s Gvalli v. Andhra Education Society 2010 AIR 1105 SC. Lastly, it is clarified that the extended service will be counted for all the purpose to the above mentioned employees. The petitions are allowed. No cost."

34. In *Harwindra Kumar vs. Chief Engineer, Karmik and others* (Supra), this Court while allowing the employees of Nigam to continue till the age of 60 years in view of Regulation 31, ordered that no recovery shall be made from those who continued up to the age of 60 years. This Court further observed that the employees who have not been allowed to continue after completing the age of 58 years by virtue of erroneous decision taken by the Nigam for no fault of theirs, would also be entitled to payment of salary for the remaining period up to the age of 60 years.

35. In *Chairman, U.P. Jal Nigam vs. Radhey Shyam Gautam,* 2007 (11) SCC 507, following the decision in *Harwindra Kumar (supra)* case, this Court held that the employees of the Nigam shall be entitled for full salary for the remaining period up to the age of 60 years.

36. However, in *U.P. Jal Nigam vs. Jaswant Singh,* 2006 (11) SCC 464 this Court allowed the benefits of arrears of salary only to those employees of the Nigam who had filed writ petitions and denied the same to others who have not moved before a court of law.

37. In view of the orders passed by this Court in *Harwindra Kumar(supra), Radhey Shyam Gautam(supra) and Jaswant Singh(supra),* it was not open to the High Court to rely on some other decision of this Court, ratio of which is not applicable in the present case for determining back wages of respondents restricting it to be 20% of the basic salary. We observe that the principle of 'no pay no work' is not applicable to the employees who were guided by specific rules like Leave Rules etc. relating to absence from duty. Such principle can be applied to only those employees who were not guided by any specific rule relating to absence from duty. If an employee is prevented by the employer from performing his duties, the employee cannot be blamed for having not worked, and the principle of 'no pay no work' shall not be applicable to such employee.

38. In these cases as we have already held that Regulation 31 shall be applicable and the age of superannuation of employees of the Nigam shall be 60 years; we are of the view that following consequential and pecuniary benefits should be allowed to different sets of employees who were ordered to retire at the age of 58 years:

(a) The employees including respondents who moved before a court of law irrespective of fact whether interim order was passed in their favour or not, shall be entitled for full salary up to the age of 60 years. The arrears of salary shall be paid to them after adjusting the amount if any paid.

(b) The employees, who never moved before any court of law and had to retire on attaining the age of superannuation, they shall not be entitled for arrears of salary. However, in view of Regulation 31 they will deem to have continued in service up to the age of 60 years. In their case, the appellants shall treat the age of superannuation at 60 years, fix the pay accordingly and re-fix the retirement benefits like pension, gratuity etc. On such calculation, they shall be entitled for arrears of retirement benefits after adjusting the amount already paid.

(c) The arrears of salary and arrears of retirement benefits should be paid to such employees within four months from the date of receipt of copy of this judgment.

39. The judgment passed by the Division Bench of the Allahabad High Court, Lucknow Bench dated 29th July, 2010 and other impugned judgments stand modified to the extent above. The appeals are disposed of with aforesaid observation and directions. There shall be no order as to costs.

K.K.T. Appeals disposed of.

M/S MUTHA ASSOCIATES AND ORS.
v.
STATE OF MAHARASHTRA AND ORS.
(Civil Appeal No. 2853 of 2002 etc.)

JULY 4, 2013

[T.S. THAKUR AND M.Y. EQBAL, JJ.]

Land Acquisition Act, 1894:

s.6 r/w. s.126(2) of Maharashtra Regional and Town Planning Act, 1966 - Acquisition of land - By Municipal authorities - For extention of 'Bamboo Trade and Flea Market' by Agricultural Produce Market Committee - Under development plan for the city - Acquisition proceedings challenged - High Court upheld the proceedings - Held: The High Court rightly upheld the acquisition proceedings on the grounds of delay/laches as well as on merits - There was no dichotomy between the purpose notified and the purpose for which the reservation was made.

s.48 - Withdrawal of land acquisition proceedings - By the Minister of Revenue - Withdrawal challenged - High Court set aside the withdrawal order on the grounds that the same was not notified in official Gazette, it was violative of principles of natural justice and the reasons for withdrawal were not sustainable - Held: Withdrawal order was rightly set aside by the High Court - Withdrawal order was arbitrary, lacked objectivity, it was passed by ignoring material on record and was violative of principles of natural justice.

Administrative Law - Administrative decision - Malafide - Allegation of - Standard of proof - Held: Merely because action by public authority is found untenable, it cannot be called malafide - An action may continue to be bonafide and in good faith, even if the public authority has committed

mistakes or irregularities or breached principles of natural justice - Suspicion however strong, cannot be proof of charge of malafide - In the facts of the case, malafide not proved against the public authority.

Delay/laches - Challenge to acquisition proceedings u/ Art. 226 of the Constitution - Held: The Court can decline to invoke its power of judicial review under Art.226 to interfere with acquisition proceedings, if the challenge to such proceedings is belated and the delay is unexplained - Constitution of India, 1950 - Art.226.

Pune Municipal Corporation i.e. the planning authority under Maharashtra Regional and Town Planning Act (MRTP Act) published the draft of its revised Development Plan for the city of Pune in the official Gazette. The area in question was reserved for the extention of the Agricultural Produce Market Committee (APMC) market yard. The plan was sanctioned by the State wherein the land in question was shown as reserved for APMC for the purpose of 'Bamboo Trade and Flea Market' and authorised APMC for acquisition of the land in question for the development.

Notification was issued in November 1987 u/s. 126(2) of MRTP Act r/w. s.6 of Land Acquisition Act. No objections were filed by the owners of the land or the builders-appellant. However, they filed application before Chief Minister of the State praying for deletion of the land under acquisition from reservation. In the meantime award was passed in the acquisition proceedings. The request made to the Chief Minister was rejected. After the notice for possession of the land was issued, the land owners filed civil suit against the award. During pendency of the proceedings, the owners as well the builder-appellant filed writ petition No.670 of 1996, which was entertained on the condition that they would withdraw the suit.

During pendency of the writ petition, the State by invoking its powers u/s.48 of the Land Acquisition Act, directed withdrawal of proceedings qua the land in question. Aggrieved thereby, APMC filed writ petition No. 3620/1998.

High Court dismissed the writ petition filed by the land owners and builder-appellants, upholding the acquisition proceedings. The writ petition filed by APMC was allowed holding that the withdrawal of the acquisition proceedings was not valid because the withdrawal notification was not published in the official Gazette; because the order was passed without hearing the beneficiary of the acquisition i.e. APMC; and because the reasons given by the Minister of Revenue for withdrawal were unsustainable. The Court also held that the withdrawal order passed by the Minister was malafide. Hence the present appeals were filed by the land-owners and developer and also by the Minister of Revenue.

Dismissing the appeals filed by the land-owners and the builder with cost assessed at Rs.5 lakhs, and partly allowing the appeal filed by the Minister, the Court,

HELD: 1.1. In the present case, the appellant owners or the Builders did not file any objections or move their little finger till the making of the award by the Collector. Instead of filing of the objections, opposing the proposed acquisition before the Collector and seeking redress at the appropriate stage, they remained content with making representations to the minister which was not a remedy recognised by the statute. It was only after the Collector had made his award and after notice for taking over possession was issued by the appellants that they rushed to the civil court with a suit in which too they did not assail the validity of the declaration under Section 26(2) of the Maharashtra Regional and Town Planning

Act, 1966 (MRTP) Act read with Section 6 of the Land Acquisition Act. The remedy by way of a suit was clearly misconceived. [Para 17] [1074-C-E]

State of Bihar v. Dhirendra Kumar and Ors. **(1995) 4 SCC 229: 1995 (3) SCR 857;** *Municipal Corporation of Greater Bombay v. I.D.I. Co. Pvt. Ltd. and Ors.* **(1996) 11 SCC 501: 1996 (5) Suppl. SCR 551;** *Ramjas Foundation and Ors. v. Union of India and Ors.* **1993 Supp (2) SCC 20: 1992 (2) Suppl. SCR 426;** *Larsen and Toubro Ltd. v. State of Gujarat and Ors.* **(1998) 4 SCC 387: 1998 (2) SCR 339 - relied on.**

Aflatoon and Ors. v. Lt. Governor of Delhi and Ors. **(1975) 4 SCC 285: 1975 (1) SCR 802;** *Indrapuri Griha Nirman Sahakari Samiti Ltd. v. The State of Rajasthan and Ors.* **(1973) 4 SCC 296 - followed.**

1.2. In order to succeed in a challenge to the acquisition proceedings, the interested person must remain vigilant and watchful. If instead of doing so, the interested person allows grass to grow under his feet, he cannot invoke the powers of judicial review exercisable under Article 226 of the Constitution. The failure of the interested persons to seek redress at the appropriate stage and without undue delay would in such cases give rise to an inference that they have waived of their objections to the acquisitions. The bottom line is that the High Court can legitimately decline to invoke their powers of judicial review to interfere with the acquisition proceedings under Article 226 of the Constitution if the challenge to such proceedings is belated and the explanation offered a mere moon shine as is the position in the present case. The High Court has in the fact situation of this case rightly exercised its discretion in refusing to interfere with the acquisition proceedings. [Para 18] [1075-B-E]

2.1. The High Court has even on e

challenge to the acquisition proceedings was unfounded. The proposed acquisition was notified with a view to extending the APMC market yard. This extension was, according to the APMC, meant to enable it to use the acquired area for not only regulating bamboo trade but also a flea market. That being so, it is difficult to see how the purpose indicated in the declaration was in any way different from the purpose for which the area was reserved. The High Court has correctly held that both the purposes were public purposes and that APMC had repeatedly asserted that the acquisition will eventually lead to the use of the acquired area for the purpose for which the same was reserved namely, bamboo trade and flea market. [Paras 19 and 20] [1075-E-F; 1076-A-B]

2.2. The fact that the bamboo trade was on the date of the declaration not legally open for regulatory control of the APMC would not make any material difference having regard to the fact that flea market was at any rate permissible at all points of time for there was no legal or other impediment in the APMC regulating a flea market in its market yard. The restrictions on the bamboo trade were also removed on account of vacation of stay granted by the Government. The result was that as on the date of the judgment delivered by the High Court, the APMC was and continues to be free to regulate bamboo trade also. Suffice it to say that the High Court has correctly analysed the issue and rightly held that there is no dichotomy between the purpose notified and the purpose for which the reservation was made. There is no flaw in the reasoning of the High Court insofar it upheld the validity of the acquisition proceedings even on merits. [Para 20] [1076-B-E]

3. Withdrawal of acquisition must be notified in terms of Section 48 of the Land Acquisition Act. There was admittedly no such publication in the instant case which

rendered the withdrawal order non-est in the eyes of law. [Paras 23 and 26] [1077-C; 1078-E]

State of Maharashtra v. Umashankar Rajabhau **(1996) 1 SCC 299: 1995 (5) Suppl. SCR 39;** *M/s. Larsen and Tourbo Ltd. v. State of Gujarat and Ors.* **(1998) 4 SCC 387: 1998 (2) SCR 339 - relied on.**

Prakash Vasudev Deodhar and Ors. v. State of Maharashtra and Ors. **1993 MLJ page 1768 - referred to.**

4.1. A requirement of compliance with the principles of natural justice and consequently a hearing to the beneficiary affected by withdrawal of acquisition proceedings is not incorporated in specific words in Section 48 of the Act. That does not, however, make any material difference because the law is well-settled that if a statutory provision could be read consistently with the principles of natural justice, the Courts would prefer do so. That is because it can be presumed that the legislature and the statutory authorities intend to act in accordance with such principles. In case, however, the statutory provisions either specifically or by necessary implication exclude the application of the principles of natural justice, the Court cannot ignore the mandate of the legislature and read into any such provision the principles of natural justice. [Para 27] [1078-F-H; 1079-A-B]

4.2. In the present case, the obligation to hear existed but was not satisfactorily discharged by the Minister while taking a decision in the matter, which is, by itself sufficient to vitiate the action taken by him independent of the fact that any order directing withdrawal of acquisition ought to have culminated into a proper notification and published in the official Gazette. [Para 31] [1081-B-C]

Union of India v. Col. J.N. Sinha **(1970) 2 SCC 458: 1971 (1) SCR 791 - relied on.**

5.1. The High Court found that the reasons given in the order of withdrawal passed by the Minister were wholly unsustainable. One of the reasons for withdrawal was that the APMC was not authorised to deal in bamboo and fire wood from 1977 till 1995 and that even though notification dated 6th February, 1995 included bamboo and fire wood in the coverage of the APMC, the implementation of the said order had been stayed by the State Government. The High Court found that the stay granted by the State Government stood vacated and a specific mention of this fact was made in para 6 of the representation of the APMC filed before the Minister. Not only that a copy of the notification vacating the stay against bamboo trade was enclosed. Even the developer on whose representation the withdrawal was ordered had conceded that the stay granted by the State Government had been vacated. Ignoring these facts the Minister appears to have taken a stance that was contrary to the admitted position on record; implying complete non-application of mind on his part. [Paras 32 and 33] [1081-C-E, F-H; 1082-A]

5.2. The other reason given for withdrawal of the acquisition proceedings was that the APMC has used land otherwise available to it for activities like a beer bar, a hotel and a restaurant. The High Court found that the representation of the developers and owners made no such reference to any such activity. No other material was placed before the Minister at the hearing which could possibly justify the Minister's oral observations made in the course of hearing regarding mis-utilisation of the land or justify the withdrawal of the acquisition proceedings. The High Court also found fault with the Minister making use of the report received from the Collector after the closure of the hearing and behind the back of the APMC without any notice or opportunity to it to file objections to the same. The APMC sought to justify the facilities of

a hotel and a restaurant and ancillary services without which heavy turnover of business and economic activity as was being seen and managed by the APMC was not possible. [Paras 34 and 35] [1082-C-F]

5.3. The High Court was perfectly justified in holding that the order passed by the Minister lacked objectivity and was hasty without due and proper consideration of the relevant circumstances and the material on record. There is no infirmity in the said findings. Thus, the order passed by the Minister directing withdrawal of the acquisition proceedings was bad not only because it was arbitrary, lacked objectivity and ignored the material on record but also because the said order was passed without offering to the APMC a fair and reasonable opportunity of being heard in the matter. That the order was not notified was only an additional reason that rendered the order legally unsupportable which the High Court rightly quashed. [Para 36] [1083-A, C-D]

6.1. The allegations suggesting "malice in fact" should be specific and supported by necessary particulars. Vague and general averments to the effect that the action under review was taken malafide would not therefore suffice. The burden to establish that the action under challenge was indeed malafide rests heavily upon the person making the charge; which is taken as quasi criminal in nature and can lead to adverse consequence for the person who is proved to have acted malafide. There is in fact a presumption that the public authority acted bonafide and in good faith. That presumption can no doubt be rebutted by the person making the charge but only on cogent and satisfactory proof whether direct or circumstantial or on admitted facts that may support an inference that the action lacked bonafides and was for that reason vitiated. The third principle is that the person against whom the charge is made must be impleaded as a party [illegible]s

and given an opportunity to refute the charge against him. [Para 39] [1085-D-G]

State of M.P. and Ors. v. Nandlal Jaiswal and Ors. **(1986) 4 SCC 566: 1987 (1) SCR 1 - relied on.**

6.2. The charge of malafides levelled against the then Minister was not supported by any particulars. The writ petition filed by APMC did not provide specific particulars or details of how the decision taken by minister was influenced by the builder or by any other person for that matter. The averments made in the writ petition in that regard appeared to be general and inferential in nature. Such allegations were insufficient to hold the charge of 'malice in fact' levelled against the minister proved. [Para 45] [1089-E-G]

6.3. Though High Court has enumerated certain stark irregularities in the decision making process or the use of material obtained on behalf of the back of the beneficiary of the acquisition as also the denial of fair opportunity to the beneficiary to present its case before the minister yet those irregularities do not inevitably lead to the conclusion that the minister had acted malafide. Failure to abide by the principles of natural justice are consideration of material not disclose to a party or non-application of mind, to the material available on record may vitiate the decision taken by the authority concerned and may even constitute malice in law but the action may still remain bonafide and in good faith. It is trite that every action taken by a public authority even found untenable cannot be dubbed as malafide simply because it has fallen short of the legal standards and requirements for an action may continue to be bonafide and in good faith no matter the public authority passing the order has committed mistakes or irregularities in procedures or even breached the minimal requirements of the principles of natural justice. [Para 46] [1089-G-H; 1090-A-C]

6.4. The High Court has attributed to the Minister malafides simply because the order passed by him was found to be untenable in law. Such an inference was not justified, no matter the circumstances enumerated by the High Court may have given rise to a strong suspicion that the minister acted out of extraneous considerations. Suspicion, however, strong cannot be proof of the charge of malafide. It is only on clear proof of high degree that the court could strike down an action on the ground of malafide which standard of proof was not satisfied in the instant case. To the extent the High Court held the action of the minister to be malafide, the impugned order would require correction. [Para 46] [1090-D-F]

State of Bihar v. P.P. Sharma **1992 Supp. (1) SCC 222: 1991 (2) SCR 1;**

Smt. Swaran Lata v. Union of India & Ors. **(1979) 3 SCC 165;** *Minor A Paeeiakaruppan v. Sobha Joseph* **(1971) 1 SCC 38: 1971 (2) SCR 430;** *E.P. Royappa v. State of T.N.* **(1974) 4 SCC 3: 1974 (2) SCR 348 - relied on.**

Case Law Reference:

1975 (1) SCR 802	followed	Para 16
1995 (3) SCR 857	relied on	Para 17
(1973) 4 SCC 296	followed	Para 18
1996 (5) Suppl. SCR 551	relied on	Para 18
1992 (2) Suppl. SCR 426	relied on	Para 18
1998 (2) SCR 339	relied on	Para 18
1995 (5) Suppl. SCR 39	relied on	Para 23
1998 (2) SCR 339	relied on	Para 23, 25
1993 MLJ page 1768	referred to	Para 26

1971 (1) SCR 791	**relied on**	**Para 28**
1991 (2) SCR 1	**relied on**	**Para 40**
1987 (1) SCR 1	**relied on**	**Para 42**
(1979) 3 SCC 165	**relied on**	**Para 43**
1971 (2) SCR 430	**relied on**	**Para 43**
1974 (2) SCR 348	**relied on**	**Para 43**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2853 of 2002.

From the Judgment and Order dated 09.04.2001 of the High Court of Judicature at Bombay in Writ Petition No. 670 of 1996.

WITH

C.A. Nos. 2854, 2855 & 2856-2857 of 2002.

Ranjit Kumar, V. A. Bobde, Sidharth Bhatnagar, Prasenjit Keswani, Satyajit Saha, V.D. Khanna, Krishnamurthi, Swami, Aniruddha P. Mayee, Sanjeev Kumar Choudhary, Kamna Sagar for the Appellants.

C.U. Singh, Gurukrishna Prasad, M.L. Patil, Shivaji M. Jadhav, Rahul Jain, Jayashree Wad, Ashish Wad, Tamali Wad, Kanika Bhutani, Aditya Gupte, Sanjay Kharde, Asha Gopalan Nair, S.K. Jain, Abhishek Singh, Chandan Ramamurthi for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These appeals by special leave arise out of a common Judgment and Order dated 9th April, 2001 passed by a Division Bench of the High Court of Judicature at Bombay whereby the High Court has dismissed Writ Petition No.670 of 1996 and upheld a notification dated 13th November, 1987 issued under Section 126 (2) of the MRTP Act read with

Section 6 of the Land Acquisition Act and published in the Official Gazette on 3rd December, 1987. The High Court has by the same judgment and order quashed order dated 20th May, 1998 issued under Section 40 of the Land Regulation Act directing withdrawal of the acquisition proceedings, and allowed Writ Petitions No. 3620 and 3874 of 1998. Facts leading to the filing of the writ petitions and the present appeals may be summarised as under:-

2. Pune Municipal Corporation which is also the Planning Authority under the MRTP Act published a notification on 13th May, 1976 declaring its intention to revise the development plan for the Pune city and inviting suggestions and objections to the proposed revision. The Draft Revised Development Plan inter alia covered site No.M-145 comprising Survey No.559/2B admeasuring 1 hectare 20 acres (approximately) which was under the orders of Director, Town Planning shown as reserved for the extension of the APMC market yard. The Draft Development Plan published in the Official Gazette on 7th October, 1982 in terms of Section 26 of the MRTP Act clearly reflected the reservation aforementioned.

3. The Revised Development Plan was eventually sanctioned by the State Government in which the parcel of the land aforementioned owned by late Pralhad Lokram Dodeja and his brother late Bansidhar Dodeja, appellants in Civil Appeal No.2854 of 2002 continued to be shown as reserved for APMC with the only change that instead of extension of the APMC market yard the designated purpose shown was "Bamboo Trade and Flea Market". The sanctioned Revised Development Plan further declared APMC to be the appropriate authority for acquisition and development of the said parcel of land. What is important is that although the Planning Authority had declared its intention to prepare a Revised Development Plan as early as in May 1976 and invited objections and suggestions from the public and although the Revised Draft Plan was published under Section 26 of the Act in the O

October, 1982, no objections were filed to the same by the land owners aforementioned at any point of time. It is in that backdrop that the appellant-Mutha Associates, for the first time, came on the scene on 8th March, 1984 when they acquired what was described as development rights over the disputed parcel of land upon payment of the earnest money of Rs.50,000/- only.

4. Pursuant to the sanction granted by the State Government under Section 31 of the MRTP Act, the Commissioner of Pune Division issued a declaration on 13th November, 1987 under Section 126 (2) of the MRTP Act read with Section 6 of the Land Acquisition declaring that the parcel of land aforementioned was needed for the public purpose of extension of market yard. This notification was published in the Official Gazette on 3rd December, 1987. The Special Land Acquisition Officer appointed for the purpose in due course issued notices to the owners as also to the appellant-Mutha Associates on 15th October, 1988, 31st December, 1988, 11th April, 1989 and 21st April, 1989. No objections were filed either by the owners or by Mutha Associates-their agent/Builder despite the said notices. Instead they moved two applications before the Chief Minister of the State of Maharashtra one on 11th September, 1989 and the other on 13th October, 1989 praying for deletion of the land under acquisition from reservation. The Special Land Acquisition Officer, however, went ahead with the acquisition proceedings and made an award on 9th November, 1989, pursuant whereto the respondent-APMC deposited a sum of Rs.26,29,872/- towards the cost of acquisition on 16th October, 1990. The request of the appellants for deletion of the land from acquisition proceedings was finally rejected by the Government on 5th November, 1990 thereby clearing the decks for completing the acquisition proceedings.

5. The Land Acquisition Officer accordingly issued a notice under Section 12(2) of the Land Acquisition Act for taking over

the possession of the land which was received by the land owners on 24th November, 1990. The possession was scheduled to be taken over on 26th November, 1990 at which stage the land owners filed Regular Civil Suit No.2194 of 1990 before the Civil Judge, Senior Division, Pune against the State of Maharashtra and the Land Acquisition Officer challenging the award made by the Collector. In the suit the Civil Judge, Pune passed an interlocutory order directing the parties to maintain status quo which order was challenged by the defendants before the High Court in a Civil Revision that was allowed with a direction to the trial Court to decide the application for interim relief without reference to the application for appointment of a Local Commissioner made by the owners. The Civil Judge accordingly heard and dismissed the application of the owners for interim relief, aggrieved whereof the landowners filed an appeal before the High Court.

6. It was during the pendency of the said appeal that the owners and Mutha Associates filed Writ Petition No.670 of 1996 challenging the acquisition proceedings. The writ petition was entertained by the High Court on an assurance given by the appellants that the appeal filed by them against the refusal of the interim order and so also Original Suit No.2194 of 1990 shall be withdrawn by them.

7. While Writ Petition No.670 of 1996 was pending disposal, the State Government passed an order dated 20th May, 1998 whereby the Government purported to invoke their power under Section 48 of the Land Acquisition Act to direct withdrawal of the acquisition proceedings qua the land in question. Aggrieved by the said order, the APMC filed Writ Petition No.3620 of 1998 challenging the withdrawal on several grounds including the ground that the APMC was not given a hearing before the acquisition proceedings were withdrawn and that the withdrawal order was at any rate arbitrary and malafide hence unsustainable. Writ Petition No.3874 of 1998 was also filed by a few agriculturists wh[illegible]e

APMC may withdraw writ petition No.3620 of 1998 and, thereby, allow the withdrawal of acquisition to attain finality.

8. The High Court has, as mentioned earlier, heard and disposed of all the three writ petitions together. It has while doing so dismissed Writ Petition No.3620 of 1998 and upheld the acquisition proceedings not only on the ground that the challenge to the said proceedings was highly belated but also on the ground that there was no merit in the grounds of challenge. The High court held that the reservation for Bamboo Trade and Flea Market was in no way different from extension of the market yard - the purpose for which acquisition proceedings had been started and that both the purposes were public purposes apart from the authority designated for acquiring the land in dispute being one and the same. The High Court also relied upon a specific assertion made by the APMC that the land in question shall be used for Bamboo Trade and Flea Market only. In particular, High Court referred to Para 3 of the writ petition in which the petitioners had themselves stated as under:

> *"the petitioner's thus state that the additional land was sought for by the respondent No.3 to extend the market yard to enable them to accommodate the activities of bambaoo trade which was incorporated in entries 5 and 6 under the heading No.XV forest products in the Schedule to the said Act."*

9. The High Court repelled the contention that the provisions of Section 37 of the Act were applicable to the case at hand and distinguished the decisions that were relied upon by the writ petitioners-appellants in support of that contention and dismissed Writ Petition No.670 of 1996.

10. In Writ Petitions No.3620 of 1998 and 3874 of 1998 the High Court found that the withdrawal of the acquisition proceedings was not valid not only because the withdrawal notification was not published in the Official Gazette but also

because the APMC-the beneficiary of the acquisition proceedings had not been given an opportunity of being heard by the Minister concerned before directing withdrawal of the said proceedings. The High Court went a step further and held that Shri Rane, the then Minister, not only acted in violation of the principles of natural justice but made one sided observations during the proceedings and used the Collector's report at the back of APMC and finally passed an order ignoring the legal provisions and the pendency of an earlier writ petition from which one could infer that the Minister had acted under the influence of Shri Mutha and directed withdrawal of the acquisition proceedings for his benefit.

11. The High Court also noted the fact that in Writ Petition No.3874 of 1998, there was a clear assertion that because of the influence of Shri Mutha the Minister-Shri Rane had moved to supersede the APMC in July, 1998 within two months of the date of withdrawal order dated 20th May, 1998. This supersession was according to the writ-petitioners aimed at ensuring that the challenge to the order of withdrawal was withdrawn by the officer who took over the reins of the APMC by withdrawing Writ Petition No.3620 of 1998. The High Court also found the supersession of APMC to be a strong circumstance that could not be brushed aside no matter Shri Rane had chosen to deny the allegations made against him. The High Court eventually concluded:

> *"This clearly showed his malafides. In the circumstances, we cannot but hold that the order passed by Shri Naryan Rane, the then Revenue Minister is in gross violation of principles of natural justice, is a perverse order, without any supporting material, and is actuated by malafides and is nothing short of misuse of powers to favour the land developers. By looking to the totality of the material on record that is the conclusion which is inescapable."*

12. The present appeals assail the correctness of the findings recorded by the High Court, n[illegible]e

same deal with the validity of the acquisition proceedings, but also, insofar as the High Court has held the withdrawal of the acquisition proceedings to be bad on account of non-publication of the withdrawal notification, the non-observance of principles of natural justice and the malafide exercise of power vested in the Minister under Section 48 of the Land Acquisition Act.

13. We may before adverting to the submissions made at the bar, first deal with a matter of some significance especially because, the appeals have abated on account of the death of the owners-appellants 2 & 3 as no application for substitution of the legal representatives was moved by the appellant-Mutha Associates or the legal heirs of the deceased appellants. Interlocutory Application No.6 filed after considerable delay, however, seeks condonation of delay, setting aside of abatement and for substitution of the legal heirs in place of the deceased appellants. This application has been stoutly opposed by the respondents who have filed objections asserting inter alia that the application does not, explain the inordinate delay nor does it show that the applicants or even Mutha Associates acted diligently in the matter. The opposition is not without basis. We say so because appellant No.2-Pralhad Lokhram Dodeja died on 3rd December, 2006, while appellant No.3-Bansidhar Lokram Dodeja passed away much earlier on 22.11.2003. Interlocutory Application No.6 seeking condonation, setting aside of abatement and substitution was, however, filed only on 14th October, 2011 which implied that there is a delay of nearly five years in the filing of the application qua Appellant No.2 and nearly eight years qua appellant No.3. Keeping in view the limitation prescribed for making such an application, the delay is inordinate to say the least. There is no explanation worth the name, leave alone a cogent one for the said delay. It is not the case of the legal heirs of the deceased that they were unaware of the pendency of the appeal in which their predecessors in interest were appellants. It is also not the case of Appellant No.1-Mutha Associates that it was unaware

of the death of the two appellants from whom it had acquired development rights and a power of attorney. No such plea could even otherwise be taken by appellant-Mutha Associates, having regard to the fact that in the reply to the contempt petition filed on its behalf a specific, averment had been made by the respondents that both appellants 2 and 3 had passed away. As a matter of fact in paras 6 and 7 of the Interlocutory Application No.6, the appellant Mutha Associates has clearly admitted this fact, in the following words:

> *"6.The Appellant/Petitioner No.1 further states that Appellant/Petitioner No.2 and Appellant/Petitioner No.3 died during the pendency of the Appeal on 3rd December, 2006 and 22nd November, 2003 respectively. The Appellant/Petitioner No.1 states that it is true that the Respondents had mentioned about the death of original Appellants Nos.2 and 3 in their affidavit-in-reply filed in August 2010 in this Hon'ble court in Contempt Petition No.108 of 2010 in Civil Appeal No.2853 of 2002.*
>
> *7. The Appellant/Petitioner No.1 however states that the Appellants/Petitioner No.1inadvertently missed this aspect, which was taken in the contempt proceedings. Thus, steps could not be taken for substitution immediately thereafter."*

14. The above does not constitute a reasonably acceptable explanation for the inaction and resultant delay on the part of the legal representatives of the deceased appellants or Mutha Associates. The ipxit dixit of the appellant Mutha Associates cannot be accepted as a ground for condoning delay that spreads over years and implies complete indolence and lack of diligence on its part. So also the absence any worthwhile reason for the failure of the legal heirs to come forward and apply for substitution disentitles them to any relief by way of condonation, setting aside abatement and substitution. The fact that Mutha Associates has during the pendency of the proceedings in this Court allegedly ac[illegible]n

the property by way of sale in their favour from persons who never came forward to challenge the acquisition proceedings at any stage and who remained content and in complete oblivion makes little difference. Any such acquisition pendente lite and after the land stood vested in the APMC needs to be noticed only to be ignored. The alleged acquisition on the contrary casts a cloud over the bonafides of Mutha Associates who came to the Court for relief on the basis of a power of attorney executed in its favour by the owners and a development agreement that did not by itself clothe it with the locus standi to assail the acquisition independent of the owners but now seeks to improve its case by setting up an acquisition post the preliminary notification. Suffice it to say that Interlocutory Application No.6 deserve to be and is hereby dismissed as without merit and Appeals No.2853/2002, 2854/2002, 2855/2002 and 2856-2857/2002 filed by the appellant owners and Mutha Associates in its capacity as an attorney/agent as having abated.

15. Having said that we do not intend to neglect the contentions that were urged on merits at considerable length by learned counsel for the parties. The challenge to the acquisition proceedings was, as seen earlier, negatived by the High Court not only on the ground of unexplained delay and laches but also on merits. The High Court was in our opinion perfectly justified in doing so. The challenge to the acquisition proceedings was indeed highly belated having regard to the fact that Planning Authority had declared its intention to revise the development plan for Pune city, and invited objections to the proposal as early as in May, 1976. The Special Officer authorized by the Government to discharge the functions of the Planning Authority then issued a notification under Section 26(1) of the MRTP Act publishing the Revised Development Plan and inviting objections in September, 1982. It is also not disputed that the land in question was reserved in the Revised Development Plan for extension of Market Yard and the Appropriate Authority for acquisition of the same was shown

to be the APMC. The land owners did not file any objections to the proposed reservation of their land in the Revised Development Plan. In April 1984 the Special Officer submitted a revised development Plan under Section 28 of the MRTP Act for approval. The draft plan was sanctioned and published in the official gazette on 29th January, 1987 in which the land in question continued to be reserved though the designated purpose was shown to be "Bamboo Trade and Flea Market". The process for acquisition of the land was then started under Section 126(2) of the MRTP Act read with Section 6 of the Land Acquisition Act. This declaration was made on 13th November, 1987. Not only that, specific notices were sent to the land owners as well as to M/s Mutha Associates Developers on different dates of hearing. Despite the publication and the service of notices no objections were filed by the land owners or M/s Mutha Associates Developers. In the absence of any objections or opposition to the proposed acquisition the Land Acquisition Officer was free to make an award which he did on 9th November, 1989. It was only after the Collector (Land Acquisition) initiated the proceedings for taking over the possession of the land in question that the land owners filed a civil suit in which they challenged the award made by the Collector without raising any question regarding the validity of the declaration made under Section 126(2) of the MRTP Act read with Section 6 of the Land Acquisition Act. That suit remained pending for nearly six years before the same was withdrawn to challenge the acquisition proceedings in Writ Petition No.670 of 1996 filed before the High Court. This challenge was on the face of it barred by inordinate delay and laches. The High Court was fully justified in declining to interfere with the acquisition proceedings on that ground. The High Court while doing so, rightly observed:

> *"That apart, the gross delay and laches are most fatal to this petition. The planning process started in the year 1976. The draft development plan dated 18.9.1982 was published on 7th October, 19[illegible]s*

particular parcel of land was reserved in favour of one APMC for extension of market yard. It was permissible to the petitioners to lodge their objections under Section 28 of the MRTP Act. Subsequently the plan was sanctioned and published in the official gazette on 29.1.1987 though with one change that the designated purpose was to be bamboo trade and flea market. Thereafter when the process of acquisition started, the declaration under Section 126(2) of the MRTP Act read with Section 6 of the Land Acquisition Act was made on 13th of November 1987. Not only that but specific notices to the land owners as well as developers were issued on 15.10.1988 and 31.12.1988. On 15.10.1988 it was submitted by the first two petitioners that they needed time in view of the death of their father on 13.10.1988 and hence on their request the proceedings for acquisition were adjourned to 14.11.1988 on 14.11.1988 no claim was filed and yet by the notice dated 31.12.1988 the proceedings were further adjourned and the time to file the claim was extended to 5.1.1989. On coming to know that M/s Mutha Associates had an interest in the land a specific notice was given to Shri Shantilal Mutha of M/s. Mutha Associates on 11.4.1989 to lodge the claim if any by 19.4.1989. Again, on the application given by Mutha Associates dated 19.4.1989, the Land Acquisition Officer adjourned the proceedings on 21.4.1989 and recorded it by his letter of that date of M/s. Mutha Associates. Thus the land owners and the land developers were fully aware of these proceedings and participated therein by filing the application seeking time but without lodging any claim or filing any submissions or objections. It was in these circumstances that the Land Acquisition Officer ultimately proceeded to make his Award on 9.11.1989.

Now, as can be seen from the above, instead of filing their objections before the Land Acquisition Officer, who has the authority to consider them, the petitioners

preferred to directly communicate the same to the then Chief Minister. The then Chief Minister also rejected their representation in November 1990. The petitioners did not choose to challenge that decision as well. It is only when the Land Acquisition Officer issued a notice for taking possession of the land that the petitioners rushed to the Civil Court wherein they sought to challenge the Award and an order of status quo came to be passed on 25.11.1990. As rightly pointed out by Mr. Sanghavi, in the civil suit the notice under section 126(2) of the MRTP Act read with section 6 of the Acquisition Act has not been challenged. It has been challenged for the first time in this writ petition which was filed on buth (sic) of January 1996 and it is now being contended that there is a departure from the designated purpose in the acquisition proceedings and also that the APMC did not have the capacity to deal in the particular items. The submission that the APMC had large parcel of un-utilized land and therefore it did not need the land could certainly have been made when revised draft development plan was published in the official gazette on 7.10.1982. It is at that stage that the petitioners were expected to lodge their objections to the reservation. After the plan was sanctioned and became final the acquisition proceedings were initiated. The declaration under section 126(2) of the MRTP Act read with Section 6 of the Acquisition Act was made on 13.1.1987. Thereafter specific notices under section 9 of the Acquisition Act were given to the land owners as well as to the developers. They participates in the proceedings by filing applications for adjournment and yet no objections were lodged before the Acquisition Officer. Thus the Acquisition Officer was left with no alternative but to finalise the proceedings which he did by passing the Award of 9.11.1989. The representation made to the State Government was rejected in November 1990 but that was also not challenged. In the suit filed on 25.11.1990 no challe[illegible]e

notice under section 126(2) read with Section 6. That was raised for the first time in the present writ petition filed in January 1996."

16. The legal position, as to the approach which a writ Court must adopt while examining the validity of acquisition proceedings, is settled by a long line of decisions rendered by this Court from time to time. It is not necessary to burden this judgment by referring to all those decisions, for the proposition of law is so well settled that it hardly bears repetition. We may simply refer to the Constitution Bench decision of this Court in *Aflatoon and Ors. v. Lt. Governor of Delhi and Ors.* (1975) 4 SCC 285 where this Court was dealing with a case in which the land owners had not approached the Court after the declaration under Section 6 of the Land Acquisition Act was issued by the Collector. It was only after notices under Section 9 of the Act were issued that the owners had come forward to urge that there was no public purpose supporting the proposed acquisition. This Court held that a valid notification under Section 4 is a sine qua non for initiation of proceedings for acquisition of property. The owners were not, therefore, justified in sitting on the fence and allowing the Government to complete the acquisition proceedings on the basis that the notification under Section 4 and declaration under Section 6 were valid and then to attack the notification on grounds that were available to them at the time when the notification was published. The following passage is instructive in this regard:

"There was apparently no reason why the writ petitioners should have waited till 1972 to come to this Court for challenging the validity of the notification issued in 1959 on the ground that the particulars of the public purpose were not specified. A valid notification under Section 4 is a sine qua non for initiation of proceedings for acquisition of property. To have sat on the fence and allowed the Government to complete the acquisition proceedings on the basis that the notification under

Section 4 and the declaration under Section 6 were valid and then to attach the notification on grounds which were available to them at the time when the notification was published would be putting a premium on dilatory tactics. The writ petitions are liable to be dismissed on the ground of laches and delay on the part of the petitioners. (see Tilokchand Motichand v. H.B. Munshi, (1969) 1 SCC 110, and Rabindranath Bose v. Union of India, (1970) 1 SCC 84)".

17. The position is no different in the instant case. The appellant owners or Mutha Associates Builders did not file any objections or move their little finger till the making of the award by the Collector. Instead of filing of the objections, opposing the proposed acquisition before the Collector and seeking redress at the appropriate stage they remained content with making representations to the minister which was not a remedy recognised by the statute. It was only after the Collector had made his award and after notice for taking over possession was issued by the appellants that they rushed to the civil court with a suit in which too they did not assail the validity of the declaration under Section 26(2) of the MRTP Act read with Section 6 of the Land Acquisition Act. The remedy by way of a suit was clearly misconceived as indeed this Court declared it to be so in *State of Bihar v. Dhirendra Kumar and Ors.* (1995) 4 SCC 229. The appellants could and ought to have challenged the acquisition proceedings without any loss of time. Having failed to do so, they were not entitled to claim any relief in the extraordinary jurisdiction exercised by the High Court under Article 226 of the Constitution.

18. The view taken by the Constitution Bench in *Aflatoon* case (supra) has been reiterated by another Constitution Bench decision in Indrapuri Griha *Nirman Sahakari Samiti Ltd. v. The State of Rajasthan and Ors.* (1973) 4 SCC 296. To the same effect are the decisions of this Court in *Municipal Corporation of Greater Bombay v. I.D.I. Co. Pvt. Li*

SCC 501, *Ramjas Foundation and Ors. v. Union of India and Ors.* 1993 Supp(2) SCC 20 and *Larsen & Toubro Ltd. v. State of Gujarat & Ors.* (1998) 4 SCC 387. The common thread that runs through all these decisions is that in order to succeed in a challenge to the acquisition proceedings the interested person must remain vigilant and watchful. If instead of doing so, the interested person allows grass to grow under his feet he cannot invoke the powers of judicial review exercisable under Article 226 of the Constitution. The failure of the interested persons to seek redress at the appropriate stage and without undue delay would in such cases give rise to an inference that they have waived of their objections to the acquisitions. The bottom line is that the High Court can legitimately decline to invoke their powers of judicial review to interfere with the acquisition proceedings under Article 226 of the Constitution if the challenge to such proceedings is belated and the explanation offered a mere moon shine as is the position in the case at hand. The High Court has in the fact situation of this case rightly exercised its discretion in refusing to interfere with the acquisition proceedings.

19. Delay and laches apart, the High Court has even on merits found that the challenge to the acquisition proceedings was unfounded. The challenge as noticed earlier was primarily on the ground that on the date of the initiation of the acquisition proceedings the APMC was not entitled to regulate the 'bamboo trade' and since land in question was reserved for bamboo trade in flea market, any acquisition for a purpose beyond the regulatory powers of the APMC could not be made a basis for such acquisition.

20. The proposed acquisition, it is not in dispute, was notified with a view to extending the APMC market yard. This extension was, according to the APMC, meant to enable it to use the acquired area for not only regulating bamboo trade but also a flea market. That being so, it is difficult to see how the purpose indicated in the declaration was in any way different

from the purpose for which the area was reserved. The High Court has, in our opinion, correctly held that both the purposes were public purposes and that APMC had repeatedly asserted that the acquisition will eventually lead to the use of the acquired area for the purpose for which the same was reserved namely, bamboo trade and flea market. The fact that the bamboo trade was on the date of the declaration not legally open for regulatory control of the APMC would not make any material difference having regard to the fact that flea market was at any rate permissible at all points of time for there was no legal or other impediment in the APMC regulating a flea market in its market yard. The restrictions on the bamboo trade were also removed on account of vacation of stay granted by the Government. The result was that as on the date of the judgment delivered by the High Court, the APMC was and continues to be free to regulate bamboo trade also. Suffice it to say that the High Court has correctly analysed the issue and rightly held that there is no dichotomy between the purpose notified and the purpose for which the reservation was made. There is, in our opinion, no flaw in the reasoning of the High Court insofar it upheld the validity of the acquisition proceedings even on merits.

21. That brings us to Writ Petitions No.3620 and 3874 of 1998 filed by the respondent-APMC challenging order dated 20th May, 1998 passed by Shri Narayan Rane, the then Minister of Revenue, Government of Maharashtra, directing deletion of the disputed land from acquisition. The High Court has quashed the order passed by the Minister on the ground that APMC-the beneficiary of the acquisition was not given a fair hearing by the Minister before directing the withdrawal of the acquisition proceedings. Such a hearing was, observed the High Court, essential having regard to the nature of the power exercised by the State Government under Section 48 of the Land Acquisition Act and the decisions rendered by this Court while interpreting the said provision. The High Court has, further, held that the decision was vitiated as the exercise of power by the Minister was not only arbitrary but m h

Court declared that a withdrawal that is not notified in the official Gazette was ineffective and non-est in the eye of law.

22. The appellants have assailed these findings before us and argued that the requirement of a hearing to the beneficiary before withdrawal of the acquisition proceedings was not predicated by Section 48 of the Act. A hearing was at any rate provided to the beneficiary that satisfied any such requirement. It was also contended that the High Court was wrong in holding that the exercise of the power available under Section 48 was malafide.

23. We may first deal with the question whether withdrawal of acquisition must be notified in terms of Section 48 of the Land Acquisition Act. The question is, in our view, no longer res integra in the light of the decisions of this Court in *State of Maharashtra v. Umashankar Rajabhau* (1996) 1 SCC 299 and *M/s. Larsen and Tourbo Ltd. v. State of Gujarat & Ors.* (1998) 4 SCC 387.

24. In the former case this Court while dealing with the issue of publication of notification of withdrawal under Section 48 (1) observed:

> *"So long as there is no notification published under Section 48 (1) of the Act withdrawing from acquisition, the court cannot take notice of any subsequent disinclination on the part of the beneficiary"*

25. In the case of M/s. Larsen and Tourbo Ltd. (supra), a specific submission was made on behalf of the State that Section 48 of the Land Acquisition Act did not provide for publication of a notification regarding the withdrawal of the acquisition proceedings unlike Sections 4 and 6 of the Act which require such a publication. This Court, however, repelled the contention and observed:

> *"We do not think that Mr. Salve is quite right in his submissions. When Sections 4 and 6 notifications are*

> *issued, much has been done towards the acquisition process and that process cannot be reversed merely by rescinding those notifications. Rather it is Section 48 under which, after withdrawal from acquisition is made, compensation due for any damage suffered by owner during the course of acquisition proceedings is determined and given to him. It is, therefore, implicit that withdrawal from acquisition has to be notified.*
>
> *Principles of law are, therefore, well settled. A notification in the official Gazette is required to be issued if the State Government decides to withdraw from the acquisition under Section 48 of the Act of any land of which possession has not been taken."*

26. The High Court was also right in relying upon a Division Bench decision of that Court in *Prakash Vasudev Deodhar and Ors. v. State of Maharashtra and Ors.* 1993 MLJ page 1768 where similar issue arose for consideration of the Court and was answered by holding that a publication under Section 48 was necessary specially when the withdrawal case publication of notifications issued under Sections 4 and 6 of the Act in the official Gazette. There was admittedly no such publication in the instant case which rendered the withdrawal order non-est in the eyes of law.

27. Coming then to the question whether the exercise of power under Section 48 of the Land Acquisition Act required compliance with the principles of natural justice and consequently a hearing to the beneficiary affected by such withdrawal, we must at the threshold say that such a requirement is not in specific words incorporated in Section 48 of the Act. That does not, however, make any material difference because the law is well-settled that if a statutory provision could be read consistently with the principles of natural justice, the Courts would prefer do so. That is because it can be presumed that the legislature and the statutory authorities intend to act in accordance with suc[illegible],

however, the statutory provisions either specifically or by necessary implication exclude the application of the principles of natural justice, the Court cannot ignore the mandate of the legislature and read into any such provision the principles of natural justice.

28. We may in this regard refer to the following passage from the decision of this Court in *Union of India v. Col. J.N. Sinha* (1970) 2 SCC 458:

> *"... It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislature and the statutory authorities intend to act in accordance with the principles of natural justice. But it on the other hand a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read in to the concerned provision the principles of natural justice."*

29. In Para 33 of the above decision, this Court specifically noticed the contention that the right of hearing of a beneficiary was limited to acquisitions for companies under Part VII of the Act and repelled the same in following words:

> *"The decision in Larsen and Toubro (1998 AIR SCW 1351 : AIR 1998 SC1608) which relied upon an earlier decision in Amarnath Ashram Trust Society v. Governor of U.P. (1998 AIR SCW 59: AIR 1998 SC 477) (supra) to hold that a beneficiary has a right to be heard before a notification under Section 48(1) is issued, does not appear to be limited to acquisition for companies under Part VII of the Act as is contended by the respondents although the acquisition in that case had been made for a company for the purpose of setting up a housing colony. Both cases have also drawn a distinction between the rights of an owner and the*

> *beneficiary of the acquisition to object to withdrawal from the acquisition for the reasons noted earlier."*

30. Was a proper hearing given to the APMC-the beneficiary in the instant case, is the other aspect that needs to be considered at this stage. The High Court has examined that aspect and concluded that the hearing was no more than an eye wash. The High Court observed:

> *"From the narration as above, it is very clear that the APMC was called for a hearing before the Minister only as a formality. It was not given any notice to show cause communicating the reasons for withdrawal. A copy of the land-owners representation dated 12th November 1997 which was the basis of that proceeding was admittedly not made by them that the matter may not be proceeded since writ petition No.670 of 1995 was pending in the High Court was turned down and the Minister proceeded complete the nearing on the very date. Although the hearing was concluded on that date, the Minister took into consideration the report of the Collector received much thereafter and which has been made the basis of the impugned order passed on 20th May, 1998 and admittedly a copy on that report has not been given to APMC. Thus the beneficiary was not furnished in writing the grounds on which the action of withdrawal was proposed, the matter was proceeded there and then on the returnable date in a hurry and on the top of it the Minister took into consideration as the relevant factor some material behind the back of the aggrieved party, something he could not take into account since the hearing had already been concluded. It is true that the proceeding under Section 48 is an administrative proceeding, but it is a proceeding wherein the valuable rights of the beneficiary are at stake. The hearing to be afforded to the beneficiary is not expected to be and empty formality. The emphasis on affording this opportunity of being heard led by [illegible]e*

above referred judgments is to make it a meaningful exercise. The manner in which the Minister has proceeded with the enquiry leaves us in no doubt that he has proceeded in gross violation of the principles of natural justice."

31. There is, in our view, no flaw in the above reasoning and conclusion leave alone any perversity to call for our interference. The obligation to hear existed but was not satisfactorily discharged by the Minister while taking a decision in the matter, which is by itself sufficient to vitiate the action taken by him independent of the fact that any order directing withdrawal of acquisition ought to have culminated into a proper notification and published in the official Gazette.

32. The High Court next examined the correctness of the reasons given in the order of withdrawal passed by the Minister and found that the same were wholly unsustainable. The Minister had cited two distinct reasons for directing withdrawal of the order. One of the reasons was that the APMC was not authorised to deal in bamboo and fire wood from 1977 till 1995 and that even though notification dated 6th February, 1995 included bamboo and fire wood in the coverage of the APMC, the implementation of the said order had been stayed by the State Government on 20th June, 1995. The Land Acquisition Officer could not have in the light of the said stay acquired the land for a purpose which the beneficiary could not ostensibly pursue.

33. The High Court found that the stay granted by the State Government stood vacated on 18th February, 1997 and a specific mention of this fact was made in para 6 of the representation of the APMC filed before the Minister. Not only that a copy of the notification vacating the stay against bamboo trade was enclosed as item No.9 of the supporting document and enclosed with the representation and was on the file of the minister. Even the developer on whose representation the withdrawal was ordered had in the written argument submitted

before the Minister conceded that the stay granted by the State Government had been vacated. Ignoring these facts the Minister appears to have taken a stance that was contrary to the admitted position on record; implying complete non-application of mind on his part. The High Court has come down heavily on the order passed by the Minister especially because the latter had at his disposal the assistance of the departmental officers.

34. The other reason given for withdrawal of the acquisition proceedings was that the APMC has used land otherwise available to it for activities like a beer bar, a hotel and a restaurant. The High Court found that the representation of the developers and owners made no such reference to any such activity. The High Court noted that except averments in para 17 of the written argument, no other material was placed before the Minister at the hearing which could possibly justify the Minister's oral observations made in the course of hearing regarding mis-utilisation of the land or justify the withdrawal of the acquisition proceedings. The High Court also found fault with the Minister making use of the report received from the Collector after the closure of the hearing and behind the back of the APMC without any notice or opportunity to it to file objections to the same.

35. The APMC, it is noteworthy, sought to justify the facilities of a hotel and a restaurant and ancillary services without which heavy turnover of business and economic activity as was being seen and managed by the APMC was not possible. The High Court found that the market yard was spread over 153 acres with more than 2000 shops visited by more than 50,000 visitors every day. Facilities of hotels and restaurants was, therefore, necessary observed the High Court. The Minister, however, failed to appreciate all this and even failed to notice the Collector's report which categorically stated that the permission for running the beer bar had been cancelled against which the aggrieved party had approached the High Court.

36. The High Court was, in our opinion, perfectly justified in holding that the order passed by the Minister lacked objectivity and was hasty without due and proper consideration of the relevant circumstances and the material on record. There is, in our view, no infirmity in the said findings nor was any serious attempt made before us by learned counsel for the appellants to demonstrate that the Minister had indeed acted in a fair objective and dispassionate manner while directing the withdrawal of the acquisition proceedings on the twin grounds that have been scrutinised by the High Court and rightly found to be untenable. We are satisfied that the order passed by the Minister directing withdrawal of the acquisition proceedings was bad not only because it was arbitrary, lacked objectivity and ignored the material on record but also because the said order was passed without offering to the APMC a fair and reasonable opportunity of being heard in the matter. That the order was not notified was only an additional reason that rendered the order legally unsupportable which the High Court rightly quashed.

37. That leaves us with only other question argued by Mr. V.A. Bobde at considerable length in Civil Appeals No.2856 and 2857 of 2002 filed by Mr. Narayan Rane, the then Revenue Minister. The High Court has, as noticed earlier, held the action of the Minister to be actuated by malafides. Inasmuch as the Minister, passed an order without affording a fair hearing to APMC the beneficiary of the acquisition and on grounds that were untenable, the Minister did so under the influence of the Mutha Associates, the builder observed the High Court. The High Court's reasoning for that conclusion is in the following words:

> *"89. The aforesaid narration makes a sad reading. We have a Minister of Revenue who does not consider the material placed before him, but considers the information which has come on record subsequent to the conclusion of hearing. He has courage to state on affidavit that though the hearing concluded on 5.1.1988, he passed the order after a substantial period on 20th May, 1988 and after taking into consideration the record available before the Government and the letter/report of the collector dated 16th March, 1998. We have a Minister who was making observations during the proceeding that the concerned land was being mis-utilized thought there was no material whatsoever except the reference to such allegation in another writ petition to which a reference was made in the written arguments of the land-owners. Thus we have a Minister who has no regard for the principles of natural justice or fair play or else he would not have passed the kind or order which he has passed. Why he should do this except for the reasons alleged in the petition namely the influence exercised by Shri Mutha who has just put in the earnest money of Rs.50,000/- to claim a large of plot of Hector and 34 Areas in the prime area of the city for which the compensation under the ward of 1989 was over Rs.26 Lakhs? This is obviously to favour the land developers. It shows that the Minister does not have any concern for the planning process where under a number of authorities apply their mind and thereafter reserve the land according to the requirements of the society. The Minister does not seem to have any regard for the judicial process also inasmuch as although the writ petition was pending in this Court concerning the very controversy, for the benefit of the land-developers he has tried to overreach the judicial process. Last but not the least he does not seem to have any concern for the weaker sections of the Society like the Burud Community for whom the plot was reserved. Obviously the land developer was more relevant for the Minister than APMC or these people who are on the fringe of the Society and that must be for the reasons best known to the Minister."*

38. It was contended by Mr. Bobde that the High Court went wrong in attributing motives to the Minister without there being any specific charge, material or particula[illegible].

The mere fact that an order passed by a constitutional or statutory authority was found to be legally unsustainable did not ipso facto mean that the order was malafide in that the authority had passed the same for any extraneous or other consideration. Reliance in support was placed by Mr. Bobde upon a series of decisions of this Court, in which the need for the Court examining a charge of malafides to be circumspect and the standard of proof required for holding the charge proved have been laid down. The case at hand did not argue Mr. Bobde, satisfy the said requirements and standards, rendering the order passed by the High Court unsustainable.

39. The law regarding pleading and proof of 'malice in fact' or malafides as it is in common parlance described is indeed settled by a long line of decisions of this Court. The decisions broadly recognise the requirement of allegations suggesting "malice in fact" to be specific and supported by necessary particulars. Vague and general averments to the effect that the action under review was taken malafide would not therefore suffice. Equally well settled is the principle that the burden to establish that the action under challenge was indeed malafide rests heavily upon the person making the charge; which is taken as quasi criminal in nature and can lead to adverse consequence for the person who is proved to have acted malafide. There is in fact a presumption that the public authority acted bonafide and in good faith. That presumption can no doubt be rebutted by the person making the change but only on cogent and satisfactory proof whether direct or circumstantial or on admitted facts that may support an inference that the action lacked bonafides and was for that reason vitiated. The third principle equally sanctified by judicial pronouncements is that the person against whom the charge is made must be impleaded as a party to the proceedings and given an opportunity to refute the charge against him. We may at this stage refer to a few decisions to illustrate the above for a copious reference to all the pronouncements is unnecessary and can be avoided.

40. In *State of Bihar v. P.P. Sharma* 1992 Supp. (1) SCC 222, this Court explained the juristic significance of malafides and the questions that need to be determined while examining plea based on malafides. The following passage is apposite in this regard:

> *"50. Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.*
>
> *51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand."*

41. That the allegations of malafides would require a high degree of proof to rebut the presumption that administrative action has been taken bonafide was laid down as one of the principles governing burden of proof of a

levelled by an aggrieved party. The Court in that decision observed thus:

> *".... It is well settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy". (vide E.P. Royappa v. State of T.N. (1974) 4 SCC 3). There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in Gulam Mustafa v. State of Maharashtra (1976) 1 SCC 800 (SCC p.802, para 2): "It (mala fide) is the last refuge of a losing litigant."*

42. In *State of M.P. and Ors. v. Nandlal Jaiswal and Ors.* (1986) 4 SCC 566, this Court laid emphasis on the need for furnishing full particulars of allegations suggesting malafides. The use of words such as "malafides", "corruption" and "corrupt practice" was held to be insufficient to necessitate an enquiry into such allegations. The Court observed:

> *"39. Before we part with this case we must express our strong disapproval of the observations made by B.M. Lal, J. in para 1, 9, 17, 18, 19 and 34 of his concurring opinion. The learned Judge made sweeping observations attributing mala fides, corruption and underhand dealing to the State Government. These observations are in our opinion not at all justified by the record. In the first place it is difficult to appreciate how any such observation could be made by the learned Judge without any foundation for the same being laid in the pleadings. It is true that in the writ petitions the petitioners used words such as "mala fide", "corruption" and "corrupt practice" but the use of such words is not enough. What is necessary is to give full particulars of such allegations and to set out the material facts specifying the particular*

> *person against whom such allegations are made so that he may have an opportunity of controverting such allegations. The requirement of law is not satisfied insofar as the pleadings in the present case are concerned and in the absence of necessary particulars and material facts, we fail to see how the learned Judge could come to a finding that the State Government was guilty of factual mala fides, corruption and underhand dealing."*

43. To the same effect is the decision of this Court in *Smt. Swaran Lata v. Union of India & Ors.* (1979) 3 SCC 165, the Court held that in the absence of particulars, the Court would be justified in refusing to conduct an investigation into the allegations of malafides.

44. In *Minor A Paeeiakaruppan v. Sobha Joseph* (1971) 1 SCC 38, this Court held that even when the Court examining the validity of an action may find a circumstance to be disturbing it cannot uphold the plea of malafides on ground of mere probabilities. A note of caution was similarly sounded by this Court in *E.P. Royappa v. State of T.N.* (1974) 4 SCC 3, where the Court held that it ought to be slow to draw dubious inferences from incomplete facts particularly when imputations are grave and they are made against the holder of an office which has high responsibility in the administration. The following passage from the decision is apposite:

> *"92. Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. Here the petitioner, who was himself once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custo[illegible] State, and therefore, the anxiety [illegible]*

all the greater to insist on a high degree of proof. In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charge of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up-these considerations are wholly irrelevant in judicial approach-but because otherwise, functioning effectively would become difficult in a democracy. It is from this standpoint that we must assess the merits of the allegations of mala fides made by the petitioner against the second respondent."

45. The charge of malafides levelled against the appellant-Mr. Rane, the then Minister was not supported by any particulars. The writ petition filed by APMC did not provide specific particulars or details of how the decision taken by minister was influenced by Mutha Associates or by any other person for that matter. The averments made in the writ petition in that regard appeared to be general and inferential in nature. Such allegations were, in our opinion, insufficient to hold the charge of 'malice in fact' levelled against the minister proved.

46. It is true that the High Court has enumerated certain stark irregularities in the decision making process or the use of material obtained on behalf of the back of the beneficiary of the acquisition as also the denial of fair opportunity to the beneficiary to present its case before the minister yet those

irregularities do not inevitably lead to the conclusion that the minister had acted malafide. Failure to abide by the principles of natural justice are consideration of material not disclose to a party or non-application of mind, to the material available on record may vitiate the decision taken by the authority concerned and may even constitute malice in law but the action may still remain bonafide and in good faith. It is trite that every action taken by a public authority even found untenable cannot be dubbed as malafide simply because it has fallen short of the legal standards and requirements for an action may continue to be bonafide and in good faith no matter the public authority passing the order has committed mistakes or irregularities in procedures or even breached the minimal requirements of the principles of natural justice. The High Court has attributed to the Minister appellant in Civil Appeals No.2856-2857 of 2002, malafides simply because the order passed by him was found to be untenable in law. Such an inference was not in our view justified, no matter the circumstances enumerated by the High Court may have given rise to a strong suspicion that the minister acted out of extraneous considerations. Suspicion, however, strong cannot be proof of the charge of malafide. It is only on clear proof of high degree that the court could strike down an action on the ground of malafide which standard of proof was not, in our opinion, satisfied in the instant case. To the extent the High Court held the action of the minister to be malafide, the impugned order would require correction and Civil Appeals No.2856 and 2857 of 2002 allowed.

47. In the result we dismiss Civil Appeals No.2853/2002, 2854/2002 and 2855/2002 with cost assessed at Rs. 5,00,000/- to be paid by appellant No.1-Mutha Associates to the beneficiary of the acquisition-APMC, Pune. We, however, allow Civil Appeals No.2856 and 2857 of 2002 filed by Shri Narayan Rane to the extent that the finding recorded by the High Court regarding malafides against the appellant in that case is reversed and the judgment and order passed by the High Court accordingly modified.

K.K.T.

STATE OF GUJARAT & ORS.
v.
PWD EMPLOYEES UNION & ORS. ETC.
(Civil Appeal Nos. 5321-5322 of 2013)

JULY 9, 2013

[T.S. THAKUR AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Labour Law - Regularisation - Labour and other Unions made representation to the State Government making demands and issues relating to daily wage workers of different departments of the State Government - Committee constituted by the State Government under the Chairmanship of Minister of Road and Building Department - Committee made recommendations favouring regularisation - Recommendations of the Committee accepted and accordingly the State Government resolved to provide benefits of regularization scheme contained in Resolution dated 17th October, 1988 - Dispute over applicability of Resolution dated 17th October, 1988 - Held: Resolution dated 17th October, 1988 not limited to any particular department, and applied to all departments including Road and Building, Forest and Environment Department, Water Resources Department, etc. and to all daily wage workers including semi-skilled workers performing any nature of job, working in different departments of the State including the daily wage workers of the Forest Department performing work other than building maintenance and repairing work - However, as per scheme contained in Resolution dated 17th October, 1988, all daily wage workers not entitled for regularization or permanency in the services - Direction issued for grant of benefit of Resolution dated 17th October, 1988 to eligible daily wage workers of the Forest and Environment Department working for more than 5 years including those performing work

other than building maintenance and repairing w.e.f. 29th October, 2010 or subsequent date from which they are so eligible - Industrial Disputes Act, 1947 - s.25B.

The questions which arose for consideration in the instant appeals were: 1) Whether the daily wage workers of Forest and Environment Department working for 5 to 30 years for works other than building and maintenance and repairing work were entitled to derive benefits of the regularization scheme as contained in the Resolution dated 17th October, 1988 issued by the State from Road and Building Department; and (2) If so, whether the members of the respondent-employees Union working on daily wages for more than 5 to 30 years in the Forest and Environment Department of the State will be entitled for similar benefits of the scheme contained in the Resolution dated 17th October, 1988.

Disposing of the appeals, the Court

HELD: 1.1. From a bare reading of the Resolution dated 17th October, 1988, the following facts emerge: (a) Labour and other Unions made representation to the Government making demands and issues relating to daily wage workers of different departments of the Government. (b) The State Government constituted a committee under the Chairmanship, Minister of Road and Building Department. (c) The Committee was constituted for studying (i) the wages of daily wage workers; and (ii) work related services and facilities provided to the daily wage workers who are engaged in the building maintenance and repairing work in different departments of the State. (d) The recommendations of the Committee were accepted and accordingly the State Government resolved to provide the benefits of the scheme contained in the Resolution 17th October, 1988. [Para 19] [1108-B-G]

1.2. The daily wage workers w n

building maintenance and repairing work in different departments were already entitled for their work related facilities. Therefore, the Committee has not limited the recommendation to the daily wage workers working in building maintenance and repairing work in different departments of the State. The State Government vide its Resolution dated 17th October, 1988 has not limited it to the daily wage workers working in building maintenance and repairing work. The Resolution dated 17th October, 1988 is applicable to all the daily wage workers working in different departments of the State including Forest and Environment Department performing any nature of job including the work other than building maintenance and repairing work. [Para 20] [1108-G-H; 1109-A-B]

1.3. The Resolution of the State Government dated 17th October, 1988 is not limited to any particular department, it applies to all the departments including Road and Building, Forest and Environment Department, Water Resources Department, etc. Also the Committee headed by the Minister of Road and Building Department looked into the wages of daily wage workers and work related facilities provided to the daily wage workers engaged in building maintenance and repairing work in different departments, only for the purpose of its recommendations. The Committee has not limited the recommendations amongst the daily wage workers engaged in building maintenance and repairing work in different departments by its aforesaid Resolution. It is applicable to all daily wage workers including semi-skilled workers performing any nature of job, working in different departments of the State including the daily wage workers of the Forest Department performing work other than building maintenance and repairing work. [Para 21] [1109-F-H; 1110-A-B]

1.4. The impugned order passed by the Single Judge and the Division Bench arise out of the final order and

judgment dated 29th October, 2010 passed by the High Court in SCA No.8647/2008 and connected matters wherein it was held that the nature of work showed that the daily wage-workers were engaged in the work which is perennial in nature. The said order has reached finality in absence of any challenge before the higher Court and hence became binding between the parties i.e. the appellant-State of Gujarat and the respondents-Employees Union. [Paras 22, 23] [1110-C-D; 1111-B]

1.5. However, as per scheme contained in Resolution dated 17th October, 1988 all the daily wage workers were not entitled for regularization or permanency in the services. Considering, the facts and circumstances of the case, the finding of the High Court dated 29th October, 2010 in SCA No.8647/2008 and connected matters and the fact that the said judgment is binding between the parties, the appellants are directed to grant the benefit of the scheme as contained in the Resolution dated 17th October, 1988 to all the daily wage workers of the Forest and Environment Department working for more than five years. The benefit should be granted to the eligible daily wage workers of the Forest and Environment Department working for more than five years including those who are performing work other than building maintenance and repairing but they will be entitled for the consequential benefit w.e.f. 29th October, 2010 or subsequent date from which they are so eligible. [Paras 25, 26] [1111-E-F; 1112-G-H; 1113-A, B-C]

Gujarat Forest Producers, Gatherers and Forest Workers Union vs. State of Gujarat **(2004) 2 GLH 302: (2004) 2 GLR 568 - overruled.**

Secretary, State of Karnataka and Others vs. Uma Devi (3) and Others **(2006) 4 SCC 1: 2006 (3) SCR 953 and** *A. Umarani v. Registrar Co-operative Societies and Others* **(2004) 7 SCC 112 - held inapplicable.**

Case Law Reference:

(2004) 2 GLR 568	**overruled**	**Para 4**
2006 (3) SCR 953	**held inapplicable**	**Para 16(iv)**
(2004) 7 SCC 112	**held inapplicable**	**Para 16(iv)**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5321-5322 of 2013.

From the Judgment and Order 28.02.2012 of the High Court of Gujarat at Ahmadabad in Letters Patent Appeal No. 1754 of 2011 in Special Civil Application No. 8647 of 2008 and Letters Patent Appeal No. 88 of 2012 in Special Civil Application No. 8751 of 2008.

L.N. Rao, Shamik Sanjanwala, Hemantika Wahi, Mayank Pandey for the Appellants.

P.H. Parekh (for Parekh & Co.) for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted. These appeals have been preferred by the State of Gujarat and others against a common judgment dated 28th February, 2012 passed by the Division Bench of the High Court of Gujarat at Ahmedabad whereby Letters Patent Appeal No. 1754 of 2011 in Misc. Civil Application No.17/2011 preferred by the State of Gujarat and its officials has been dismissed and the order dated 25th August, 2011 passed by the learned Single Judge has been affirmed giving direction to the appellant-State and its officials to regularize the services of respondents-workmen.

2. The factual matrix of the case is as follows:

The Gujarat State Employees Union, Gujarat State Public Works Department Employees Union, Labour Union and other

Unions made a representation to the State Government for regularization of daily wage workers, working since long. On their demand, the State Government constituted a Committee vide Resolution dated 24th March, 1988 under the Chairmanship of Minister of Road and Building Department to make proper recommendations after studying the demands, issues and questions of the Labour Unions. After thoroughly studying the wages of daily wage workers, work related services & facilities provided to the daily wage workers who were engaged in the building maintenance and repairing work in different departments of the State such as Road and Building Department, Water Resources Department, Forest Department, Agriculture Department etc. the Committee made recommendations favouring the regularization. The State Government on considering the recommendations submitted by the Committee decided to accept all the said recommendations and resolved as follows:

"RESOLUTION

The Government has taken into consideration the recommendations submitted by committee and so, it is decided to accept all recommendations of the Committee. Accordingly, it is resolved to provide following wages and services to daily wagers and semi skilled workers working in different departments of the State.

1.It is decided to pay daily wages as per the prevailing Daily Wages Rules to daily wagers and semi skilled workers who has less than five years service as on 1.10.1988. If there is presence of more than 240 days in first year, he is eligible for paid Sunday, medical allowance and national festival holidays.

(2) As per provisions of Section 25B of the Industrial disputes act, daily wagers and semi skilled workers who has service of more than five years but less than 10 years as on 1.10.1988, will get Rs.750/- a

alongwith dearness allowance as per prevailing standard, for his working days. Moreover, he/she will get two optional leave in addition to 14 misc. leave, Sunday leave and national festival holidays. He/She will be eligible for getting medical allowance and deduction of provident fund.

(3) As per provisions of Section 25B of the Industrial disputes act, daily wagers and semi skilled workers who has service of more than ten years but less than 15 years as on 1.10.1988, will get minimum pay scale at par with skilled work along with dearness allowance as per prevailing standard, for his working days. Moreover, he/she will get two optional leave in addition to 14 misc. leave, Sunday leave and national festival holidays. He/She will be eligible for getting medical allowance and deduction of provident fund.

(4) As per provisions of Section 25B of the Industrial Disputes Act, daily wagers and semi skilled workers who has service of more than fifteen years as on 1.10.1988 will be considered as permanent worker and such semi skilled workers will get current pay scale of skilled worker along with dearness allowance, local city allowance and house rent allowance. They will get benefit as per the prevailing rules of gratuity, retired salary, general provident fund. Moreover they will get two optional leave in addition to 14 misc. leave, 30 days earned leave, 20 days half pay leave, Sunday leave & national festival holidays. The retirement age of such semi skilled workers will be 60 years and their services will be rendered for pensionable period. As per provisions of Section 25B of the Industrial Disputes Act, daily wagers and semi skilled workers who have completed more than fifteen years of their service will get one increment, two increment for 20 years service and three increments for 25 years in the current pay scale of skilled worker and their salary will be fixed accordingly on 1.10.1998."

The aforesaid Resolution was issued and published with the consent of the Finance Department dated 14th October, 1988 and General Administrative Department dated 17th October, 1988.

3. In spite of the Resolution of the State Government dated 17th October, 1988 the benefit was not provided to the daily wage workers of the Forest Department of the State. Aggrieved by the same, some of the daily wage workers of Forest Department filed a Special Civil Application No.3500 of 1992 before the High Court of Gujarat. The learned Single Judge by the judgment dated 21st March, 1997 relying on a common judgment dated 4th March, 1996, passed by the same Court in a group of similar cases, held that Resolution dated 17th October, 1988 is applicable to the employees of the Forest Department as well.

4. Against the aforesaid decision an LPA No.1642 of 1999 was filed by the State Government which was dismissed by the Division Bench of the Gujarat High Court by its order dated 29th April, 2003. On being aggrieved by the same, the State Government moved before this Court by filing SLP(C)….of 2004 (CC No.10763/2004) which also got dismissed by the order dated 29th November, 2004. Thereby the finding that the Resolution dated 17th October, 1988 is applicable to the daily wage workers of the Forest Department reached finality. In another case when some of the daily wage workers of Forest Department moved before the High Court of Gujarat, the matter was referred to a larger Bench. A three-Judge Bench by its judgment in *Gujarat Forest Producers, Gatherers and Forest Workers Union vs. State of Gujarat,* (2004) 2 GLH 302: (2004) 2 GLR 568, held that the Government Resolution dated 17th October, 1988 is applicable only to the daily wage workers of the Forest and Environment Department engaged in the work of maintenance and repairing of constructions in that Department, and not to the daily wag[illegible]n

other type of work in that Department.

5. In the meantime, the State Government took up the matter in its Forest and Environment Department. Referring to the Resolution dated 17th October, 1988 it was observed that the said resolution was passed by accepting the recommendations of the Committee appointed for studying wages, service oriented and other facilities giving to the daily wagers, labourers and workers employed for preservation and repairing constructions in various departments of the State viz., Roads & Building Department, Water Resources Department, Forest Department, Agricultural Department, Narmada Development Department, Water Supply Department and Panchayat & Rural Home Development and other departments, and it has been decided to give wages and service oriented facilities to such daily wagers, labourers and workers vide Resolution dated 17th October, 1988, of the Roads and Building Department and the then ancillary resolutions. With the aforesaid observation, the following decision was taken by the Resolution dated 22nd December, 1999:

*"**RESOLUTOIN***

In connection with aforesaid preface regarding daily-wagers working in the Forest Department under the control of the Forest & Environment Department and resolution of Hon'ble Shri Daulatbhai Parmar Committee, it is resolved that,

1. *On the basis of report of Hon'ble Shri Daulatbhai Parmar Committee, the Resolution dated 17/10/1988 of the Roads & Building Department, which is passed regarding wages, services & other facilities to be applied to the daily-wagers, labourers and workers of Forest Department under the control of Forest & Environment Department, cannot be applied in view of work of daily-wagers of the Forest Department and in view of nature of work and financial arrangement and their temporary/seasonal & limited work, because on applying the said resolution, after completion of work, such daily-wagers cannot be employed continuously for long time where there is no work. But they are supposed to be removed. In view of the said circumstances, on the basis of report of Hon'ble Shri Daulatbhai Parmar Committee, there is no intention of applying Resolution dated 17/10/1998 of the Roads & Building Department to the daily-wagers of the Forest Department of the State Government.*

2. *In the Notification issued from time to time regarding minimum wages also, minimum wages for the daily-wagers of the Forest Department is indicated separately and in view of the burden of their work, in comparison with daily-wagers of construction wages is indicated at less rate, which falls under heading of reasonable classification, therefore, the Resolution dated 17/10/1988 of the Roads & Building, Department cannot be applied for the said reasons.*

3. *These orders have been passed in view of opinion/consent, vide entry dated 05/11/1999 of the Legal Department, entry dated 18/11/1999 of the Finance Department and entry dated 25/11/1999 of the Roads & Building Department."*

On bare perusal of the Resolution dated 22nd December, 1999, we find that by such Resolution the State Government (Forest and Environment Department) wrongly interpreted the Resolution dated 17th October, 1988 that the said Resolution passed on the opinion of the Legal Department runs contrary to the Resolution of the State dated 17th October, 1988, and decision of the High Court of Gujarat dated 21st March, 1997 in Special Civil Application No.3500 of 1 d

by the Division Bench vide letter dated 29th April, 2003 and against which the SLP was dismissed by this Court on 29th November, 2004.

6. The present case pertains to daily wage workers of the Forest Department, who have been in service for about 5-30 years as on 29th October, 2010, of more than 240 days for large number of years, doing full-time work of a perennial nature as stated by the High Court of Gujarat in its judgment dated 29th October, 2010. In the said judgment, the High Court directed the authority to consider the above stated factors while deciding the individual cases for regularization.

7. The Unions of the employees and individual workmen employed by the Forest Department approached the High Court of Gujarat in Special Civil Application No.6913 of 2006, inter alia, seeking directions to the State authorities for framing of a scheme for the purpose of giving permanent or quasi permanent status to the daily wagers of Forest Department in the light of their long services in the Forest Department on daily wage basis. By order dated 12th October, 2006, the High Court disposed of the aforesaid SCA permitting the petitioner Union (1st respondent in present matter) to make a detailed representation to the State authorities and directing the State authorities to consider the representation within a specified period. Pursuant to the aforesaid direction of the Court the Union (1st respondent herein) made a representation dated 30th October, 2006 to the Secretary, Forest and Environment Department, the Secretary, Finance Department, the Principal Chief Conservator of Forests and the Chief Conservator of Forests. After more than a year, the Deputy Conservator of Forests, Rajpipla West Division passed order dated 17th November, 2007 rejecting the representation dated 30th October, 2006 with respect to 12 daily wagers of the Rajpipla West Division.

8. Being aggrieved, the PWD Employees (1st respondent herein) filed a Miscellaneous Civil Application No.119 of 2008

in SCA No.6913 of 2006 challenging the rejection order dated 17th November, 2007. By an order dated 31st January, 2008, the High Court of Gujarat directed the Secretary, Forest and Environment Department to decide the representation filed by the PWD Employees Union.

9. The Secretary, Forest and Environment Department rejected the application by his order dated 3rd May, 2008 which was a verbatim reproduction of the order dated 17th November, 2007 passed by the Deputy Conservator of Forests, West Division.

10. It is pertinent to mention that by order dated 3rd May, 2008 the Secretary, Forest and Environment Department, inter alia, admits that "the initial entry in the sense of engagement on daily wages does not suffer from any illegality or irregularity and was in consonance with the provisions of the Minimum Wages Act and continues to be so".

However, the representation was rejected, on the ground that "the daily wagers have not worked on any duly sanctioned posts which were otherwise required to be filled up in a regular manner and further that no such duly sanctioned posts exist. Therefore, the Union's claim of one time regularization, the same being on non-existent posts, is not maintainable and is consequently denied".

11. After the rejection of the representation, the respondents-Employees Union had to again move before the High Court in SCA No.8647 of 2008 challenging the order of rejection dated 3rd May, 2008. On hearing the parties and perusal of record, the learned Single Judge of the High Court by its order and judgment dated 29th October, 2010 disposed of the representation recording the following facts:

(i) The Secretary, Forest and Environment Department, State of Gujarat has himself come to the conclusion vide order dated 3rd May, 2008 that ir

wagers does not suffer from any illegality or irregularity but is in consonance with the provisions of Minimum Wages Act. Therefore, the question of regularization by removing the procedural defects does not arise.

(ii) Looking to the nature of work described in the order dated 3rd May, 2008, the daily wagers are engaged in the work which is perennial in nature.

(iii) The daily wagers of other Government Departments like Roads & Buildings Department, Narmada Water Resources, Water Supply and Kalpasar Department, etc. have been made permanent pursuant to the Government Resolution dated 17th October, 1988.

(iv) The Department of Agriculture and Cooperation has also issued analogous resolution dated 20th December, 2005 to regularize the services of daily wagers of the Fisheries Department.

(v) The Forest Department of the State of Maharashtra had also issued a scheme in the year 1996 quite similar to the Government Resolution dated 17th October, 1988 in respect to the daily wagers in their Forest Department.

(vi) In compliance of award passed by the Labour Court in Reference (IT) No.386/88, a number of daily wagers of the Forest Department who have completed 5 years 900 days were absorbed against 22 supernumerary posts created.

Learned Single Judge finally passed the following order:

***"7.** In the interest of justice, the following directions are issued which will meet with the ends of justice:*

1. *The impugned order dated 3.05.2008 passed by the Secretary, Forest & Environment Department, State of Gujarat is quashed and set aside.*

2. *The Secretary, Forest & Environment Department, State of Gujarat, is directed to consider the case of the petitioners for regularization/conferring permanent status, afresh in light of the facts of each individual case keeping in mind the observations made hereinabove and also to consider the scope of framing a scheme for giving quasi permanent status to the petitioners-daily wagers at par with the scheme for daily wagers in other Government Departments like Roads & Buildings Department, Narmada Water Resources, Water Supply and Kalpasar Department, etc., contained in Government Resolution dated 17.10.1988. In case, the authority is of the view that the benefits as prayed for cannot be granted then a reasoned order be passed supported by detailed reasons.*

3. *The aforesaid exercise be undertaken within a period of two months from today.*

4. *Liberty to revive the petitions in case of difficulty by filing required application/s."*

Against the judgment dated 29th October, 2010 no appeal was preferred by the State Government or by any person and, thereby, the said judgment reached finality.

12. The 1st respondent- Employees Union, thereafter requested the Chief Secretary, Forest & Environment Department by letter dated 20th November, 2010 to consider the issue and pass an appropriate resolution in consultation with the Union. However, no action has been taken. Hence, the respondent Union filed Misc. Civil Application No.17/2011 in SCA No.8647/2008 and connected matters before the High Court.

13. When the matter was pending, [illegible],

Forest & Environment Department by order dated 21st April, 2011 rejected the request of regularization taking a stand that the job carried out by the respondents herein cannot be said to be perennial in nature. Before the High Court, Conservator of Forests filed affidavit giving details of number of daily wagers whose cases were examined and, inter alia, stating that by orders dated 21.4.2011 total 745 cases were considered and proposal to grant benefit has not found favour. One additional-affidavit was filed by the respondent-Union showing therein the fact that the State Government already regularized the services of 21 daily wagers of the Forest Department by creating supernumerary posts pursuant to the High Court of Gujarat order dated 21st March, 1997 passed in SCA No.3500 of 1992. There respondent-Union also filed a draft Amendment in Misc. Civil Application No.17 of 2011 with additional prayer to quash the order of rejection dated 21st April, 2011.

14. Learned Single Judge of the High Court of Gujarat by order dated 25th August, 2011 allowed the Misc.C.A No.17 of 2011, inter alia, holding that the judgment dated 29th October, 2010 could not have been construed to mean to pass a reasoned order rejecting the representation of the respondents herein. An order was passed directing the State to frame a scheme for giving quasi-permanent status to the respondents herein in compliance with the judgment dated 29th October, 2010. Learned Single Judge also recorded the offer made on behalf of the respondents that they were willing to waive the financial benefits for the past period i.e. upto 29th October, 2010, subject to the fact that period of service rendered by them be counted notionally for other purposes.

15. The aforesaid order of the learned Single Judge was affirmed by the Division Bench by the impugned common judgment dated 28th February, 2012. Hence, the present SLPs are preferred by the State.

16. Learned *counsel for the appellant-State contended as follows:*

(i) The High Court under Article 226 of the Constitution cannot direct absorption, regularization or permanency of the daily wage workers unless the recruitment itself was made in a regular manner in terms of the constitutional scheme.

(ii) A large scale regularization of daily wage workers will increase the financial burden on the State.

(iii) The respondents or its member cannot base their claim under Article 14 and 16 of the Constitution to seek permanence or quasi permanence in service .

(iv) Direction given by the High Court is against the principle laid down by this Court in Secretary, State of Karnataka and Others vs. UmaDevi(3) and Others, (2006) 4 SCC 1 and A. Umarani v. Registrar Co-operative Societies and Others, (2004) 7 SCC 112.

(v) Resolution dated 17th October, 1988 applies only to the daily wage workers who were engaged in building maintenance and repairing work as held by Full Bench of Gujarat High Court in Gujarat Forest Producers, Gatherers and Forest Workers Union vs. State of Gujarat (supra). The respondents or its members are not entitled to claim any benefit under the said scheme contained in Resolution dated 17th October, 1988.

17. Per contra, according to learned counsel for the respondents, the judgment dated 29th October, 2010 passed in SCA No.8647/2008 and connected matters is binding between the parties i.e. the appellants and the respondents as it was not challenged by the appellants or any other person, on the contrary the appellants claimed to have complied with the judgment aforesaid. Learned counsel for the respondents contended as follows:

(i) The scheme contained in Resolution dated 17th

October, 1988 is equally applicable to the daily wage workers of the Forest Department. It does not distinguish the employees on the basis of nature of job performed by one or the other daily wage workers.

(ii) The Resolution dated 22nd December, 1999 issued by the Forest & Environment Department, Government of Gujarat was not brought on record before the High Court. It is for the first time without any leave from this Court such fact has been brought on record by filing additional documents. The Full Bench judgment in Gujarat Forest Producers, Gatherers and Forest Workers Union vs. State of Gujarat (supra) was also not placed before the High Court, therefore, the appellants cannot derive any advantage of the same.

(iii) The Resolution dated 22nd December, 1999 issued from Forest & Environment Department is contrary to the scheme contained in Resolution dated 17th October, 1988 issued by the State of Gujarat.

(iv) The Full Bench of the Gujarat High Court in Gujarat Forest Producers, Gatherers and Forest Workers Union(supra) wrongly interpreted the scheme contained in Resolution dated 17th October, 1988. The same is not binding in case of the respondents who were not parties to the said case.

18. The main questions which arise for our consideration in these appeals are:

(1) Whether the daily wage workers of Forest and Environment Department working for 5 to 30 years for works other than building and maintenance and repairing work are entitled to derive benefits of the scheme contained in the Resolution dated 17th October, 1988 issued by the State from Road and Building Department;

(2) If so, whether the members of the respondent-employees Union working on daily wages for more than 5 to 30 years in the Forest and Environment Department of the State will be entitled for similar benefits of the scheme contained in the Resolution dated 17th October, 1988.

19. From a bare reading of the Resolution dated 17th October, 1988, the following facts emerge:

(a) Labour and other Unions made representation to the Government making demands and issues relating to daily wage workers of different departments of the Government.

(b) The State Government constituted a committee under the Chairmanship, Minister of Road and Building Department.

(c) The Committee was constituted for studying

(i) the wages of daily wage workers;and

(ii) work related services and facilities provided to the daily wage workers who are engaged in the building maintenance and repairing work in different departments of the State.

(d) The recommendations of the Committee were accepted and accordingly the State Government resolved to provide the benefits of the scheme contained in the Resolution 17th October, 1988.

20. The daily wage workers who were engaged in building maintenance and repairing work in different departments were already entitled for their work related facilities. Therefore, what we find is that the Committee has not limited the recommendation to the daily wage workers working in building maintenance and repairing work in differ e

State. The State Government vide its Resolution dated 17th October, 1988 has not limited it to the daily wage workers working in building maintenance and repairing work. What we find is that the Resolution dated 17th October, 1988 is applicable to all the daily wage workers working in different departments of the State including Forest and Environment Department performing any nature of job including the work other than building maintenance and repairing work. The decision of the Full Bench of *Gujarat High Court in Gujarat Forest Producers, Gatherers and Forest Workers Union*(supra and the subsequent Resolution dated 22nd December, 1999 issued from Forest and Environment Department of the State, in our opinion are not sustainable, as the intent of Resolution dated 17th October, 1988 was not properly explained therein and, therefore, the aforesaid decision of Full Bench and Resolution dated 22nd December, 1999 cannot be made applicable to the daily wage workers of the Forest and Environment Department of the State of Gujarat.

21. In view of the aforesaid observation, we find that the full Bench of the Gujarat High Court in *Gujarat Forest Producers, Gatherers and Forest Workers Union*(supra) proceeded on erroneous premises to hold that the Resolution dated 17th October, 1988 is applicable only to the daily wage workers of Forest Department engaged in building maintenance and repairing work. The conclusions in the said judgment are not sustainable otherwise also. We have already noticed that the Resolution of the State Government dated 17th October, 1988 is not limited to any particular department, it applies to all the departments including Road and Building, Forest and Environment Department, Water Resources Department, etc. We have also noticed that the Committee headed by the Minister of Road and Building Department looked into the wages of daily wage workers and work related facilities provided to the daily wage workers engaged in building maintenance and repairing work in different departments, only for the purpose of its recommendations. The

Committee has not limited the recommendations amongst the daily wage workers engaged in building maintenance and repairing work in different departments by its aforesaid Resolution. It is applicable to all daily wage workers including semi-skilled workers performing any nature of job, working in different departments of the State including the daily wage workers of the Forest Department performing work other than building maintenance and repairing work.

22. The impugned order passed by the learned Single Judge and the Division Bench arise out of the final order and judgment dated 29th October, 2010 passed in SCA No.8647/2008 and connected matters. The said order has reached finality in absence of any challenge before the higher Court and hence became binding between the parties i.e. the appellant-State of Gujarat and the respondents-Employees Union. Therefore, none of the parties including appellants-State of Gujarat can rely on Full Bench decision in *Gujarat Forest Producers, Gatherers and Forest Workers Union*(supra) to scuttle the decision and direction given by the Gujarat High Court in SCA No.8647/2008 and connected matters.

23. The decisions in *Uma Devi* (supra) and A. *Umarani* (supra) were regarding the question concerning regularization of employees entered by back door method or those who were illegally appointed encouraging a political set up, in violation of Article 14 and 16 of the Constitution of India. We are of the opinion that both the aforesaid decisions are not applicable in the present case i.e. to the members of the respondent-Employees Union for the following reasons:

(i) The Secretary, Forest and Environment Department of the State of Gujarat by his order dated 3rd May, 2008 held that initially the entry of the daily wagers do not suffer from any illegality or irregularity but is in consonance with the provisions of Minimum Wages Act. Therefore, the question of regularization by removing procedural defects does not arise

(ii) The Gujarat High Court by its judgment dated 29th October, 2010 passed in SCA No.8647 of 2008 while noticing the aforesaid stand taken by the State also held that the nature of work described in the order dated 3rd May, 2008 shows that the daily wage-workers are engaged in the work which is perennial in nature.

(iii) The case of A.Uma Rani (supra) related to regularization of services of irregular appointees. In the said case this Court held that when appointments are made in contravention of mandatory provisions of the Act and statutory rules framed therein and in ignorance of essential qualifications, the same would be illegal and cannot be regularized by the State.

24. Thus, the principal question that falls to be considered in these appeals is whether in the facts and circumstances it will be desirable for the Court to direct the appellants to straightaway regularize the services of all the daily wage workers working for more than five years or the daily wage workers working for more than five years are entitled for some other relief.

25. As per scheme contained in Resolution dated 17th October, 1988 all the daily wage workers were not entitled for regularization or permanency in the services. As per the said Resolution the daily wagers are entitled to the following benefits:

"(i) They are entitled to daily wages as per the prevailing Daily Wages. If there is presence of more than 240 days in first year, daily wagers are eligible for paid Sunday, medical allowance and national festival holidays.

(ii) Daily wagers and semi skilled workers who has service of more than five years and less than 10 years are entitled for fixed monthly salary along with dearness allowance as per prevailing standard, for his working

days. Such daily wagers will get two optional leave in addition to 14 misc. leave, Sunday leave and national festival holidays. Such daily wagers will also be eligible for getting medical allowance and deduction of provident fund.

(iii) Daily wagers and semi skilled workers who has service of more than ten years but less than 15 years are entitled to get minimum pay scale at par with skilled worker along with dearness allowance as per prevailing standard, for his working days. Moreover, such daily wagers will get two optional leave in addition to 14 misc. leave, Sunday leave and national festival holidays. He/she will be eligible for getting medical allowance and deduction of provident fund.

(iv) Daily wagers and semi skilled workers who has service of more than 15 years will be considered as permanent worker and such semi skilled workers will get current pay scale of skilled worker along with dearness allowance, local city allowance and house rent allowance. They will get benefit as per the prevailing rules of gratuity, retired salary, general provident fund. Moreover, they will get two optional leave in addition to 14 misc. leave, 30 days earned leave, 20 days half pay leave, Sunday leave and national festival holidays. The daily wage workers and semi skilled who have completed more than 15 years of their service will get one increment, two increments for 20 years service and three increments for 25 years in the current pay scale of skilled workers and their salary will be fixed accordingly."

26. Considering, the facts and circumstances of the case, the finding of Gujarat High Court dated 29th October, 2010 in SCA No.8647/2008 and connected matters and the fact that the said judgment is binding between the parties, we are of the view that the appellants should be directed to grant the benefit of the scheme as contained in the R[illegible]h

October, 1988 to all the daily wage workers of the Forest and Environment Department working for more than five years, providing them the benefits as per our finding at Paragraph 25 above. The appellants are directed accordingly. The judgment and order passed by the learned Single Judge dated 29th October, 2010 as affirmed by the Division Bench by its order dated 28th February, 2012 stands modified to the extent above. The benefit should be granted to the eligible daily wage workers of the Forest and Environment Department working for more than five years including those who are performing work other than building maintenance and repairing but they will be entitled for the consequential benefit w.e.f. 29th October, 2010 or subsequent date from which they are so eligible within four months from the date of receipt/production of the copy of this order. The appeals stand disposed of with the aforesaid observation and directions to the appellant-State and its authorities. There shall be no separate orders as to costs.

B.B.B. Appeals disposed of.

VIKAS PRATAP SINGH AND ORS.
v.
STATE OF CHHATTISGARH AND ORS.
(Civil Appeal Nos. 5318-19 of 2013 etc.)

JULY 9, 2013

[H.L. DATTU AND JAGDISH SINGH KHEHAR, JJ.]

Service Law:

Recruitment/Selection - Competitive examination - Appointment of successful candidates as per the merit list - Complaints regarding defects/mistakes in questions of main examination - Expert Committee found the defects - Selective re-evaluation of the answer-scripts of all the candidates - Revised merit list drawn - In the revised list name of 26 candidates who were appointed on the basis of first merit list, did not figure - Writ petition by the 26 candidates challenging validity of the revised merit list - Dismissed by High Court - Held: The decision of re-evaluation was valid and has not caused any prejudice either to the 26 candidates or to the candidates selected in the revised merit list - But since the candidates have successfully completed their training and rendered 3 years service by virtue of the interim order passed by the High Court and also because the 26 candidates were not responsible for the irregularity, their appointment cannot be cancelled - The 26 candidates would be put at the bottom of the revised merit list - They also will not be entitled to back wages, seniority or any other benefit on the basis of their appointment as per the first merit list.

Chairman, J and K State Board of Education vs. Feyaz Ahmed Malik and Ors., **(2000) 3 SCC 59: 2000 (1) SCR 402;** *Sahiti and Ors. vs. The Chancellor, Dr. N.T.R. University of Health Sciences and Ors.,* **(2009) 1 SCC 599: 2008 (14) SCR 1032;** *Union of India and Ors. vs. M. Bhaskaran* **1995**

Suppl. (4) SCC 100: 1995 (4) Suppl. SCR 526; *Vinodan T. and Ors. vs. University of Calicut and Ors.* **(2002) 4 SCC 726: 2002 (3) SCR 530;** *State of U.P. vs. Neeraj Awasthi and Ors.* **(2006) 1 SCC 667: 2005 (5) Suppl. SCR 906;** *Girjesh Shrivastava and Ors. vs. State of M.P. and Ors.* **(2010) 10 SCC 707: 2010 (12) SCR 839;** *Union of India (UOI) and Anr. vs. Narendra Singh* **(2008) 2 SCC 750: 2007 (13) SCR 504;** *Gujarat State Deputy Executive Engineers' Association vs. State of Gujarat and Ors.* **1994 Supp (2) SCC 591;** *Buddhi Nath Chaudhary and Ors. vs. Akhil Kumar and Ors.* **(2001) 2 SCR 18;** *M.S. Mudhol (Dr.) and Anr. vs. S.D. Halegkar and Ors.* **(1993) II LLJ 1159 SC** *Tridip Kumar Dingal and Ors. vs. State of West Bengal and Ors.* **(2009) 1 SCC 768: 2008 (15) SCR 194 - relied on.**

District Collector and Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and Anr. vs. M. Tripura Sundari Devi **(1990) 3 SCC 655: 1990 (2) SCR 559;** *P. Chengalvaraya Naidu vs. Jagannath and Ors.* **(1994) 1 SCC 1: 1993 (3) Suppl. SCR 422 - referred to.**

Maxim - 'frans et jus nunquam cohyabitant' - Applicability of.

Case Law Reference:

2000 (1) SCR 402	**relied on**	**Para 16**
2008 (14) SCR 1032	**relied on**	**Para 16**
1990 (2) SCR 559	**referred to**	**Para 20**
1993 (3) Suppl. SCR 422	**referred to**	**Para 20**
1995 (4) Suppl. SCR 526	**relied on**	**Para 20**
2002 (3) SCR 530	**relied on**	**Para 20**
2005 (5) Suppl. SCR 906	**relied on**	**Para 20**
2010 (12) SCR 839	**relied on**	**Para 21**
2007 (13) SCR 504	**relied on**	**Para 22**

1994 Supp (2) SCC 591	**relied on**	**Para 23**
(2001) 2 SCR 18	**relied on**	**Para 24**
(1993) II LLJ 1159 SC	**relied on**	**Para 24**
2008 (15) SCR 194	**relied on**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5318-5319 of 2013.

From the Judgment and Order dated 06.09.2011 of the High Court of Chhattisgarh at Bilaspur, in Writ Petition No. 4229 of 2009.

WITH

Civil Appeal Nos. 5318-5319 of 2013 (S.L.P. (C) Nos. 26341-26342 of 2011.

C.A. No. 5320 of 2013 & Contempt Petition (C) No. 433 of 2011 in C.A. No. 5320 of 2013.

S.K. Dubey, Mukul Rohatgi, Sameer Shrivastava, Kunal Verma, Atul Jha, Sandeep Jha, Dharmendra Kumar Sinha, Apoorv Kurup (for C.D. Singh), Sanjeeb Panigrahi, L. Nidhiram Sharma (for Sidhartha Chowdhury) for the appearing parties.

The Order of the Court was delivered by

H.L. DATTU, J. 1. Leave granted in all the Special Leave Petitions.

2. These batch of appeals are directed against the common judgment and order passed by the High Court of Chhattisgarh in Writ Petition Nos. 3087, 3204 and 4229 of 2009, dated 06.09.2011, whereby and whereunder the High Court has dismissed the Writ Petitions filed by the appellants herein and confirmed the revised merit list drawn after the selective re-evaluation of the answer scripts of all the candidates who had appeared in the Main Examination for the posts of Subedars, Platoon Commande[illegible]s

in the respondent-State of Chhattisgarh.

3. The appellants before us (in SLP (C) Nos. 26341-26342 of 2011 and 26349 of 2011) are the 26 candidates aggrieved by the cancellation of the first merit list and the redrawal of the second revised merit list by the Chhattisgarh Professional Examination Board (for short "respondent-Board"), whereby their appointments to the aforesaid posts have been cancelled.

4. The facts in a nutshell are as under:

On 18.09.2006, an advertisement inviting applications for recruitment to 380 posts of Subedars, Platoon Commanders and Sub-Inspectors in the respondent-State was issued by the Police Headquarters, Chhattisgarh. For the said purpose, the Preliminary Examination was conducted on 24.12.2006 and the successful candidates thereat were called for the Main Examination held in two parts as Paper I and II on 04.02.2007 and 05.02.2007, respectively. After conducting physical examination and personal interviews, the final merit list of candidates was published on 08.04.2008, whereby all the appellants herein were selected. Based on the said merit list, the appointment letters were issued to the selected candidates including the appellants on various dates between 21.08.2008 and 15.09.2008. In the meanwhile, the Inspector General of Police and the respondent-Board received complaints in respect of defects/mistakes in several questions of the Main Examination Papers. The respondent-Board constituted an Expert Committee to inquire into the complaints. Upon examination of the two Papers, two sets of defects were noticed: (a) eight questions in Paper II itself were incorrect and (b) model answers for evaluation of answer scripts to another eight questions of Paper II were incorrect. The respondent-Board directed for deletion of the first set of eight questions in Paper II and preparation of correct model answers key for objective questions in Papers I and II and accordingly carried out re-evaluation of the answer scripts of the candidates. On

27.06.2009 a new revised merit list was published wherein the names of twenty six appellants did not figure at all and accordingly, the appointment of the appellants were cancelled by the respondent-State.

5. At the time of publication of the revised merit list, the appellants were already undergoing training along with other candidates who were selected in the first list. The appellants aggrieved by the cancellation of the aforesaid appointment in the wake of revised merit list filed several Writ Petitions before the learned Single Judge *inter alia* challenging the validity of the revised merit list on the ground that decision of re-evaluation by the respondent-Board was arbitrary and irrational and therefore the said list requires to be quashed.

6. The learned Single Judge while entertaining the Writ Petitions had issued an interim order directing the respondent-State not to take any coercive steps against the appellants and further to allow them to continue their training programme. The learned Single Judge has observed that a substantial question of public importance has arisen in the matter and therefore, referred the matter to the Division Bench with a request to consider and decide the following question of law of public importance:

> "Whether the VYAPM (respondent-Board) after publication of the select list and passing of the appointment orders also on the basis of evaluation of questions, could have done the exercise of re-evaluating the answers after editing and reframing answers, and prepare the second select list for fresh recruitment of the candidates, cancelling the first select list?"

7. The Division Bench has delved into merits of the matter at length and analyzed the arguments advanced by both the parties. The Division Bench has noticed the pattern of the Main Examination to include two separate papers: Paper I comprising of both objective and subje

and 4 in number in Hindi and English languages, respectively and Paper II comprising of 150 objective-type questions of General Knowledge. Further that the Expert Committee constituted by the respondent-Board examined both Paper I and II and found irregularities only in respect of the eight incorrect objective questions of Paper II and model answers to another eight questions in model answers key of Paper II, pursuant to which the respondent-Board re-evaluated Paper II and only objective questions of Paper I on basis of fresh model answers key and in *toto* only sixteen questions and answers of Paper II were interfered with upon such re-evaluation. The eight incorrect questions were deleted and their marks were distributed on the pro-rata basis in accordance with Clause 14 of the Examination Conduct Rules (for short "the Rules") of the respondent-Board and the other eight questions, answers to which were incorrect in the first model answers key were re-evaluated on the basis of new model answers key and marks were awarded accordingly. The Division Bench has observed that since all the questions so re-evaluated were objective type carrying fixed marks for only one correct answer, the possibility of difference in marking scheme or prejudice during re-evaluation does not arise and therefore has concluded that no irregularity or illegality could be said to have crept in the manner and method of re-evaluation carried out by the respondent-Board and that the said decision of re-evaluation was justified, balanced and harmonious and has not caused any injustice to the candidates and therefore cannot be interfered with unless found arbitrary, unreasonable or *malafide* which is not the case at hand. In consequence of the aforesaid conclusion, the Division Bench has thought it fit to uphold the cancellation of appointments of the appellants *qua* the first list and accordingly dismissed the writ petitions.

8. It is the correctness or otherwise of the said judgment and order passed by the High Court which is before us in these appeals by special leave.

9. We have heard Shri P.P. Rao and Shri Ravindra Srivastava learned Senior Counsels appearing for the appellants and Shri Mukul Rohtagi and Shri P.S. Patwalia learned Senior Counsels appearing for the respondents and have also carefully perused the documents on record.

10. Shri Rao would submit that the decision of the respondent-Board to re-evaluate the answer scripts in the absence of any statutory provisions for the same and subsequent publication of a revised merit list cancelling the appointment of the appellants is arbitrary and has caused prejudice to the appellants. He would further submit that Clause 14 of the Rules providing for procedure to be adopted in respect of erroneous objective questions is of a wider ambit and includes exigencies such as model answers to examination questions being incorrect and therefore, the respondent-Board instead of directing re-evaluation of answer scripts ought to have acted in compliance with the said statutory provision.

11. *Per contra*, Shri Rohtagi, learned Senior Counsel would submit that the re-evaluation of answer scripts affected three genre of objective questions: *firstly*, the eight questions in Paper II which were found incorrect; *secondly*, the eight questions in Paper II answers to which were found to be incorrect in the model answers key and *thirdly*, the questions in Paper I to which no model answers were provided for prior to the appointment of the Expert Committee. He would submit that the first set of eight questions was deleted and marks were awarded on a pro-rata basis in accordance with Clause 14 of the Rules. The second set of eight questions were re-evaluated on the basis of corrected model answers key and the third set of questions in Paper I, all being objective type, were re-evaluated with the aid of model answers key prepared by the Expert Committee. He would submit that the decision of the respondent-Board to re-evaluate the answer scripts has not caused any prejudice to the appellants-herein but in fact identified and rectified the irregularities i[illegible]n

of answer scripts of the candidates and therefore, such decision cannot be termed as arbitrary, vindictive and whimsical.

12. In these appeals what falls for our consideration is whether the decision of the respondent-Board in directing re-evaluation of the answer scripts has caused any prejudice to the appellants appointed *qua* the first merit list, dated 08.04.2008.

13. At the outset, before delving into the merits of the submissions made by the learned Senior Counsels, the relevant statutory provisions and the re-evaluation scheme requires to be noticed.

14. It is not in dispute nor it can be disputed that for the purposes of re-evaluation, the eight questions found incorrect were deleted and their marks were rightly allotted on a pro-rata basis in accordance with Clause 14 of the Rules which reads as under:

> "Clause 14. Wrong (Defective) objective type question, its cancellation and marks to be allotted in lieu of it.
>
> After the exams, the Chhattisgarh Professional Examination Board (VYAPAM) gets each question examined by the subject expert. If, upon examination by the subject experts, the questions are found defective/ wrong, it is rejected. Questions may be rejected on the following reasons:
>
> (i) if the structure of the question is wrong;
>
> (ii) out of the options given as answers, if more than one options are correct.
>
> (iii) If no option is correct.
>
> (iv) If there is difference in Hindi and English translation of

> any question because of which different meaning is drawn from both and one correct answer could not be ascertained.
>
> (v) If any other printing mistake is there because of which correct answer is not ascertainable or more than one option is correct.
>
> On such rejection of question upon the recommendation of Subject Expert Committee, on such questions the marks would be awarded by the Chhattisgarh Professional Examination Board (VYAPAM) to the candidates in proportion to their marks obtained in the particular question paper. Whether the rejected question has been or not been attempted. The question papers in which the questions have been rejected, their evaluation procedure would be as follows, if in any question papers out of 100 questions two questions are rejected and after evaluation candidate secures 81 marks out of 98 questions then in such case calculation of marks would be done as (81*100)/100-2= 82.65. On which basis merit would be determined. "

The other eight questions whose answers were found incorrect in the earlier model answers key were re-evaluated on the basis of revised model answers key. In Paper I, only the objective type questions were re-evaluated with the aid of model answers key prepared and provided to the examiners for the first time after the inquiry by the respondent-Board.

15. The submission made by Shri Rao in respect of Clause 14 being an inclusive provision and thus providing ample room for inclusion of similar irregularities that may occur in conduct of competitive examinations fails to convince us. Clause 14 contemplates and enlists five specific instances wherein the question in the examination paper itself is wrong and thus could not possibly be evaluated to have any correct answer. It is in such circumstances that it provides for deletion of such incorrect questions and the a

distribution of the marks allocated to them. The said Rule is clear and only provides for the procedure in case of discrepancies in questions only. It does not leave any room for inclusion of the exigency such as errors in answers/model answers and therefore, the respondent-Board has rightly re-evaluated only eight incorrect questions as per Clause 14.

16. In respect of the respondent-Board's propriety in taking the decision of re-evaluation of answer scripts, we are of the considered view that the respondent-Board is an independent body entrusted with the duty of proper conduct of competitive examinations to reach accurate results in fair and proper manner with the help of Experts and is empowered to decide upon re-evaluation of answer sheets in the absence of any specific provision in that regard, if any irregularity at any stage of evaluation process is found. (*See: Chairman, J & K State Board of Education v. Feyaz Ahmed Malik and others,* (2000) 3 SCC 59 *and Sahiti and Ors. v. The Chancellor, Dr. N.T.R. University of Health Sciences and Ors.,* (2009) 1 SCC 599). It is settled law that if the irregularities in evaluation could be noticed and corrected specifically and undeserving select candidates be identified and in their place deserving candidates be included in select list, then no illegality would be said to have crept in the process of re-evaluation. The respondent-Board thus identified the irregularities which had crept in the evaluation procedure and corrected the same by employing the method of re-evaluation in respect of the eight questions answers to which were incorrect and by deletion of the eight incorrect questions and allotment of their marks on pro-rata basis. The said decision cannot be characterized as arbitrary. Undue prejudice indeed would have been caused had there been re-evaluation of subjective answers, which is not the case herein.

17. In view of the aforesaid, we are of the considered opinion that in the facts and circumstances of the case the decision of re-evaluation by the respondent-Board was a valid decision which could not be said to have caused any prejudice,

whatsoever, either to the appellants or to the candidates selected in the revised merit list and therefore, we do not find any infirmity in the judgment and order passed by the High Court to the aforesaid extent.

18. It is brought to our notice that in view of the interim orders passed by the learned Single Judge the appellants have now completed their training and have been in service for more than three years. Therefore the only question which survives for our consideration and decision is whether after having undergone training and assumed charge at their place of posting the 26 appellants be ousted from service on the basis of cancellation of their appointment *qua* the revised merit list.

19. Shri Rao would submit that the case of these appellants requires sympathetic consideration by this Court, since the appointment of appellants on the basis of a properly conducted competitive examination cannot be said to have been affected by any malpractice or other extraneous consideration or misrepresentation on their part. The ouster of 26 appellants from service after having successfully undergone training and serving the respondent-State for more than three years now would cause undue hardship to them and ruin their lives and careers. He would further submit that an irretrievable loss in terms of life and livelihood would be caused to eight appellants amongst them who have now become over aged and have also lost the opportunity to appear in the subsequent examinations. He would place reliance upon the decision of this Court in *Rajesh Kumar and Ors. v. State of Bihar and Ors.,* 2013(3) SCALE 393 wherein this Court has directed the respondent-State to re-evaluate the answer scripts on the basis of correct model answers key and sympathetically considered the case of such candidates who, after having being appointed in terms of erroneous evaluation and having served the State for considerable length of time, would not find place in the fresh merit list drawn after re-evaluation and directed the respondent-State against ousting of such candidates and further that they be placed at the bottom of the fresh me

20. The pristine maxim of *fraus et jus nunquam cohabitant* (fraud and justice never dwell together) has never lost its temper over the centuries and it continues to dwell in spirit and body of service law jurisprudence. It is settled law that no legal right in respect of appointment to a said post vests in a candidate who has obtained the employment by fraud, mischief, misrepresentation or malafide. (*See: District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and another v. M. Tripura Sundari Devi,* (1990) 3 SCC 655*, P. Chengalvaraya Naidu v. Jagannath and others,* (1994) 1 SCC 1 *and Union of India and others v. M. Bhaskaran, 1995 Suppl.* (4) SCC 100). It is also settled law that a person appointed erroneously on a post must not reap the benefits of wrongful appointment jeopardizing the interests of the meritorious and worthy candidates. However, in cases where a wrongful or irregular appointment is made without any mistake on the part of the appointee and upon discovery of such error or irregularity the appointee is terminated, this Court has taken a sympathetic view in the light of various factors including *bonafide* of the candidate in such appointment and length of service of the candidate after such appointment (See: *Vinodan T. and Ors. v. University of Calicut and Ors*.,(2002) 4 SCC 726*; State of U.P. v. Neeraj Awasthi and Ors.* (2006) 1 SCC 667).

21. In *Girjesh Shrivastava and Ors. v. State of M.P. and Ors.,* (2010) 10 SCC 707, the High Court had invalidated the rule prescribing selection procedure which awarded grace marks of 25 per cent and age relaxation to the candidates with three years' long non-formal teaching experiences as a consequence of which several candidates appointed as teachers at the formal education institutions under the said rule stood ousted. This Court while concurring with the observations made by the High Court kept in view that upon rectification of irregularities in appointment after a considerable length of time an order for cancellation of appointment would severely affect economic security of a number of candidates and observed as

follows:

> "28. …Most of them were earlier teaching in Non-formal education centers, from where they had resigned to apply in response to the advertisement. They had left their previous employment in view of the fact that for their three year long teaching experiences, the interview process in the present selection was awarding them grace marks of 25 per cent. It had also given them a relaxation of 8 years with respect to their age. Now, if they lose their jobs as a result of High Court's order, they would be effectively unemployed as they cannot even revert to their earlier jobs in the Non-formal education centers, which have been abolished since then. This would severely affect the economic security of many families. Most of them are between the age group of 35-45 years, and the prospects for them of finding another job are rather dim. Some of them were in fact awaiting their salary rise at the time of quashing of their appointment by the High Court."

Therefore, mindful of the aforesaid circumstances this Court directed non-ouster of the candidates appointed under the invalidated rule.

22. In *Union of India (UOI) and Anr. v. Narendra Singh,* (2008) 2 SCC 750 this Court considered the age of the employee who was erroneously promoted and the duration of his service on the promoted post and the factor of retiring from service on attaining the age of superannuation and observed as follows:

> "31. The last prayer on behalf of respondent, however, needs to be sympathetically considered. The respondent is holding the post of Senior Accountant (Functional) since last seventeen years. He is on the verge of retirement, so much so, that only few days have remained. He will be reaching at the age of superannuation by the end of this month i.e. December 31, 2007. In it

would not be appropriate now to revert the respondent to the post of Accountant for very short period. We, therefore, direct the appellants to continue the respondent as Senior Accountant (Functional) till he reaches the age of superannuation i.e. upto December 31, 2007. At the same time, we hold that since the action of the Authorities was in accordance with Statutory Rules, an order passed by the Deputy Accountant-General canceling promotion of the respondent and reverting him to his substantive post of Accountant was legal and valid and the respondent could not have been promoted as Senior Accountant, he would be deemed to have retired as Accountant and not as Senior Accountant (Functional) and his pensionary and retiral benefits would be fixed accordingly by treating him as Accountant all through out.

32. For the foregoing reasons, the appeal is partly allowed. Though the respondent is allowed to continue on the post of Senior Accountant (Functional) till he reaches the age of retirement i.e. December 31, 2007 and salary paid to him in that capacity will not be recovered, his retiral benefits will be fixed not as Senior Accountant (Functional) but as Accountant. In the facts and circumstances of case, there shall be no order as to costs."

23. This Court in *Gujarat State Deputy Executive Engineers' Association v. State of Gujarat and Ors.,* 1994 Supp (2) SCC 591 although recorded a finding that appointments given under the 'wait list' were not in accordance with law but refused to set aside such appointments in view of length of service (five years and more).

24. In *Buddhi Nath Chaudhary and Ors. v. Akhil Kumar and Ors.,* (2001) 2 SCR 18, even though the appointments were held to be improper, this Court did not disturb the appointments on the ground that the incumbents had worked for several years and had gained experience and observed:

"We have extended equitable considerations to such selected candidates who have worked on the posts for a long period."

(See: *M.S. Mudhol (Dr.) and Anr. v. S.D. Halegkar and Ors.,* (1993) II LLJ 1159 *SC and Tridip Kumar Dingal and Ors. v. State of West Bengal and Ors.,* (2009) 1 SCC 768)

25. Admittedly, in the instant case the error committed by the respondent-Board in the matter of evaluation of the answer scripts could not be attributed to the appellants as they have neither been found to have committed any fraud or misrepresentation in being appointed *qua* the first merit list nor has the preparation of the erroneous model answer key or the specious result contributed to them. Had the contrary been the case, it would have justified their ouster upon re-evaluation and deprived them of any sympathy from this Court irrespective of their length of service.

26. In our considered view, the appellants have successfully undergone training and are efficiently serving the respondent-State for more than three years and undoubtedly their termination would not only impinge upon the economic security of the appellants and their dependants but also adversely affect their careers. This would be highly unjust and grossly unfair to the appellants who are innocent appointees of an erroneous evaluation of the answer scripts. However, their continuation in service should neither give any unfair advantage to the appellants nor cause undue prejudice to the candidates selected *qua* the revised merit list.

27. Accordingly, we direct the respondent-State to appoint the appellants in the revised merit list placing them at the bottom of the said list. The candidates who have crossed the minimum statutory age for appointment shall be accommodated with suitable age relaxation.

28. We clarify that their appointment[illegible]d

purpose be fresh appointment which would not entitle the appellants to any back wages, seniority or any other benefit based on their earlier appointment.

29. The order passed by the High Court shall stand modified to the above extent. Appeals disposed of.

30. There shall be no order as to costs.

Contempt Petition No. 433 of 2011 in Civil Appeal No.5320 of 2013 (@ S.L.P. (C) No. 26349 of 2011)

In view of the orders passed in Special Leave Petition (C) Nos. 26341-26342 of 2011 and Special Leave Petition (C) No. 26349 of 2011, nothing survives in this Contempt Petition for our consideration and decision. The Contempt Petition is accordingly dismissed as having become infructuous.

Ordered accordingly.

K.K.T. Appeals & Contempt Petition disposed of.

LILY THOMAS

v.

UNION OF INDIA & ORS.

(Writ Petition (Civil) No. 490 of 2005)

JULY 10, 2013

[A.K. PATNAIK AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Representation of the People Act, 1951 - s.8(4) - Vires of - Challenge to - Legislative power of the Parliament to enact s.8(4) - Held: The Parliament exceeded its powers conferred by the Constitution in enacting sub-section (4) of s.8 and accordingly sub-section (4) of s.8 is ultra vires the Constitution - Sub-section (4) of s.8 which carves out a saving in the case of sitting members of Parliament or State Legislature from the disqualifications under sub-sections (1), (2) and (3) of s.8 or which defers the date on which the disqualification will take effect in the case of a sitting member of Parliament or a State Legislature is beyond the powers conferred on Parliament by the Constitution - Sitting members of Parliament and State Legislature who have already been convicted for any of the offences mentioned in sub-section (1), (2) and (3) of s.8 and who have filed appeals or revisions which are pending and are accordingly saved from the disqualifications by virtue of sub-section (4) of s.8 not to be affected by the declaration now made in this judgment - However, if any sitting member of Parliament or a State Legislature is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of s.8 and by virtue of such conviction and/or sentence suffers the disqualifications mentioned in sub-sections (1), (2) and (3) of s.8 after the pronouncement of this judgment, his membership of Parliament or the State Legislature, as the case may be, will not be saved by sub-section (4) of s.8 which is now declared as ultra vires the Constitution notwithstanding that

he files the appeal or revision against the conviction and /or sentence - Constitution of India, 1950 - Arts. 101(3)(a), 102(1)(e), 190(3)(a) and 191(1)(e).

In exercise of power conferred under Article 102(1)(e) and under Article 191(1)(e) of the Constitution, the Parliament has provided in the Representation of the People Act, 1951, the disqualifications for membership of Parliament and State Legislatures. Sub-sections (1), (2) and (3) of Section 8 of the Act provide that a person convicted of an offence mentioned in any of these sub-sections shall stand disqualified from the date of conviction and the disqualification was to continue for the specific period mentioned in the sub-section.

However, sub-section (4) of Section 8 of the Act provides that notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3) in Section 8 of the Act, a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court. The saving or protection provided in sub-section (4) of Section 8 of the Representation of the People Act, 1951 for a member of Parliament or the Legislature of a State was challenged in the present writ petitions as ultra vires the Constitution.

Allowing the writ petitions, the Court

HELD: 1. When a question is raised whether Parliament has exceeded the limits of its powers, courts have to decide the question by looking to the terms of the instrument by which affirmatively, the legislative powers were created, and by which negatively, they are

restricted. [Para 14] [1153-D]

Kesavananda Bharti v. State of Kerala **AIR 1973 SC 1465 - relied on.**

K. Prabhakaran v. P. Jayarajan etc. **(2005) 1 SCC 754: 2005 (1) SCR 296 - referred to.**

The Empress v. Burah and Another **(1878) 5 I.A. 178 - referred to.**

Shri Manni Lal v. Shri Parmal Lal and Others **(1970) 2 SCC 462: 1971 (1) SCR 798;** *B.R. Kapur v. State of T.N. and Another* **(2001) 7 SCC 231: 2001 (3) Suppl. SCR 191;** *Navjot Singh Sidhu v. State of Punjab and Another* **(2007) 2 SCC 574: 2007 (1) SCR 1143 - cited.**

Constitutional Law of India, by H.M. Seervai, Fourth Edition, Vol. I, para 2.4 at page 174 - referred to.

2. The legislative power of Parliament to enact any law relating to disqualification for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State can be located only in Articles 102(1)(e) and 191(1)(e) of the Constitution and not in Articles 246(1) read with Entry 97 of List I of the Seventh Schedule and Article 248 of the Constitution. It cannot be said that the power to enact sub-section (4) of Section 8 of the Act is vested in Parliament under Articles 246(1) read with Entry 97 of List I of the Seventh Schedule and 248 of the Constitution, if not in Articles 102 (1)(e) and 191 (1)(e) of the Constitution. [Para 15] [1155-A-C]

Commentary on the Constitution of India by Durga Das Basu (8th Edition) Volume 8 at page 8988 - referred to.

3. A reading of the provisions in Articles 102(1)(e) and 191(1)(e) of the Constituti t

abundantly clear that Parliament is to make one law for a person to be disqualified for being chosen as, and for being, a member of either House of Parliament or Legislative Assembly or Legislative Council of the State. The Parliament does not have the power under Articles 102(1)(e) and 191(1)(e) of the Constitution to make different laws for a person to be disqualified for being chosen as a member and for a person to be disqualified for continuing as a member of Parliament or the State Legislature. To put it differently, if because of a disqualification a person cannot be chosen as a member of Parliament or State Legislature, for the same disqualification, he cannot continue as a member of Parliament or the State Legislature. This is so because the language of Articles 102(1)(e) and 191(1)(e) of the Constitution is such that the disqualification for both a person to be chosen as a member of a House of Parliament or the State Legislature or for a person to continue as a member of Parliament or the State Legislature has to be the same. [Para 16] [1155-G-H; 1156-A-D]

Election Commission, India v. Saka Venkata Rao **AIR 1953 SC 210: 1953 SCR 1144 - relied on.**

4. Article 101(3)(a) provides that if a member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (1), his seat shall thereupon become vacant and similarly Article 190(3)(a) provides that if a member of a House of the Legislature of a State becomes subject to any of the disqualifications mentioned in clause (1), his seat shall thereupon become vacant. This is the effect of a disqualification under Articles 102(1) and 190(1) incurred by a member of either House of Parliament or a House of the State Legislature. Accordingly, once a person who was a member of either House of Parliament or House of the State Legislature

becomes disqualified by or under any law made by Parliament under Articles 102(1)(e) and 191(1)(e) of the Constitution, his seat automatically falls vacant by virtue of Articles 101(3)(a) and 190(3)(a) of the Constitution and Parliament cannot make a provision as in sub-section (4) of Section 8 of the Act to defer the date on which the disqualification of a sitting member will have effect and prevent his seat becoming vacant on account of the disqualification under Article 102(1)(e) or Article 191(1)(e) of the Constitution. [Para 17] [1157-D-G]

5. It cannot be said that until the decision is taken by the President or Governor on whether a member of Parliament or State Legislature has become subject to any of the disqualifications mentioned in clause (1) of Article 102 and Article 191 of the Constitution, the seat of the member alleged to have been disqualified will not become vacant under Articles 101(3)(a) and 190(3)(a) of the Constitution. Articles 101(3)(a) and 190(3)(a) of the Constitution provide that if a member of the House becomes subject to any of the disqualifications mentioned in clause (1), "his seat shall thereupon become vacant". Hence, the seat of a member who becomes subject to any of the disqualifications mentioned in clause (1) will fall vacant on the date on which the member incurs the disqualification and cannot await the decision of the President or the Governor, as the case may be, under Articles 103 and 192 respectively of the Constitution. The filling of the seat which falls vacant, however, may await the decision of the President or the Governor under Articles 103 and 192 respectively of the Constitution and if the President or the Governor takes a view that the member has not become subject to any of the disqualifications mentioned in clause (1) of Articles 102 and 191 respectively of the Constitution, it has to be held that the seat of the member so held not to be disqualified did not become va[illegible]n

which the member was alleged to have been subject to the disqualification. [Para 18] [1157-G-H; 1158-A-E]

6. The affirmative words used in Articles 102(1)(e) and 191(1)(e) confer power on Parliament to make one law laying down the same disqualifications for a person who is to be chosen as member of either House of Parliament or as a member of the Legislative Assembly or Legislative Council of a State and for a person who is a sitting member of a House of Parliament or a House of the State Legislature and the words in Articles 101(3)(a) and 190(3)(a) of the Constitution put express limitations on such powers of the Parliament to defer the date on which the disqualifications would have effect. Accordingly, sub-section (4) of Section 8 of the Act which carves out a saving in the case of sitting members of Parliament or State Legislature from the disqualifications under sub-sections (1), (2) and (3) of Section 8 of the Act or which defers the date on which the disqualification will take effect in the case of a sitting member of Parliament or a State Legislature is beyond the powers conferred on Parliament by the Constitution. [Para 19] [1158-F-H; 1159-A-B]

7. Looking at the affirmative terms of Articles 102(1)(e) and 191(1)(e) of the Constitution, it is clear that Parliament has been vested with the powers to make law laying down the same disqualifications for person to be chosen as a member of Parliament or a State Legislature and for a sitting member of a House of Parliament or a House of a State Legislature. Also, the provisions of Article 101(3)(a) and 190(3)(a) of the Constitution expressly prohibit Parliament to defer the date from which the disqualification will come into effect in case of a sitting member of Parliament or a State Legislature. Parliament, therefore, has exceeded its powers conferred by the Constitution in enacting sub-section (4) of Section 8 of the Act and accordingly sub-section (4) of Section 8

of the Act is ultra vires the Constitution. [Para 20] [1159-B-D]

8. There is no merit in the submission that if a sitting member of Parliament or the State Legislature suffers from a frivolous conviction by the trial court for an offence given under sub-section (1), (2) or (3) of Section 8 of the Act, he will be remediless and he will suffer immense hardship as he would stand disqualified on account of such conviction in the absence of sub-section (4) of Section 8 of the Act. [Para 21] [1159-E-F]

Rama Narang v. Ramesh Narang & Ors. **(1995) 2 SCC 513: 1995 (1) SCR 456 and** *Ravikant S. Patil v. Sarvabhouma S. Bagali* **(2007) 1 SCC 673: 2006 (8) Suppl. SCR 1156 - referred to.**

9.1. Under sub-sections (1), (2) and (3) of Section 8 of the Act, the disqualification takes effect from the date of conviction for any of the offences mentioned in the sub-sections and remains in force for the periods mentioned in the sub-sections. Thus, there may be several sitting members of Parliament and State Legislatures who have already incurred disqualification by virtue of a conviction covered under sub-section (1), or sub-section (2) or sub-section (3) of Section 8 of the Act. However, the Supreme Court has the power not only to declare the law but also to restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise, that were effected on the basis of the earlier law. [Para 23] [1161-E-G, H; 1162-A]

9.2. Sitting members of Parliament and State Legislature who have already been convicted for any of the offences mentioned in sub-section (1), (2) and (3) of Section 8 of the Act and who have filed appeals or revisions which are pending and are accordingly saved from the disqualifications by virtue of

Section 8 of the Act should not be affected by the declaration now made in this judgment. This is because the knowledge that sitting members of Parliament or State Legislatures will no longer be protected by sub-section (4) of Section 8 of the Act will be acquired by all concerned only on the date this judgment is pronounced by this Court. [Para 23] [1162-A-D]

9.3. However, if any sitting member of Parliament or a State Legislature is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act and by virtue of such conviction and/or sentence suffers the disqualifications mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act after the pronouncement of this judgment, his membership of Parliament or the State Legislature, as the case may be, will not be saved by sub-section (4) of Section 8 of the Act which by this judgment have been declared as ultra vires the Constitution notwithstanding that he files the appeal or revision against the conviction and /or sentence. [Para 23] [1162-E-G]

Golak Nath and Others vs. State of Punjab and Another **AIR 1967 SC 1643: 1967 SCR 762 - followed.**

Harla v. State of Rajasthan **AIR 1951 SC 467: 1952 SCR 110 - relied on.**

Case Law Reference:

1953 SCR 1144	**relied on**	**Para 4**
1971 (1) SCR 798	**cited**	**Para 7**
2001 (3) Suppl. SCR 191	**cited**	**Para 7**
2005 (1) SCR 296	**referred to**	**Para 7**
2007 (1) SCR 1143	**cited**	**Para 7**
(1878) 5 I.A. 178	**referred to**	**Para 14**
AIR 1973 SC 1465	**relied on**	**Para 14**

1995 (1) SCR 456	**referred to**	**Para 21**
2006 (8) Suppl. SCR 1156	**referred to**	**Para 21**
1967 SCR 762	**followed**	**Para 23**
1952 SCR 110	**relied on**	**Para 23**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 490 of 2005.

Under Article 32 of the Constitution of India.

WITH

W.P. (C) No. 231 of 2005.

Paras Kuhad, Siddharth Luthra, ASG, F.S. Nariman, Harish Chander, Mukul Gupta, Subhash Sharma, Lily Thomas (Petitioner-In-Person), Meenakshi Arora, Amit Pawan, Rajiv Kumar Sinha, S. Chandra Shekhar, Satya Narain Shukla (Petitioner-In-Person), Saurabh Suman Sinha, Shipla Singh, Kamini Jaiswal, Abhimanue Shrestha, Amit Kumar, Abhinav Mukerji, Tufail A. Khan, Mrinmayee Shau, Yatin Bhushan, B.V. Balaram Das, Angad Kochhar, V.K. Biju, Satya Siddiqui, Sarfraz Ahmed Siddiqui, S.K. Mishra, S.S. Rawat, V.N. Subramaniam, S. Wasim A. Qadri, P. Parmeswaran, D.S. Mahra, S. Ahmed Siddiqui, Priyanka, V.N. Raghupathi, Vasav Anantharaman, Sibo Sankar Mishra, Vijaya Lakshmi, Pragya Singh, Saurabh Kumar, Abhisth Kumar, Vikrant Yadav, Raman Yadav, Irshad Ahmad, Mohd. Irshad Hanif, Anil Kumar Jha for the appearing parties.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. These two writ petitions have been filed as Public Interest Litigations for mainly declaring sub-section (4) of Section 8 of the Representation of the People Act, 1951 as *ultra vires* the Constitution.

The background facts

2. The background facts relevant for appreciating the challenge to sub-section (4) of Section 8 [illegible] e

Constituent Assembly while drafting the Constitution intended to lay down some disqualifications for persons being chosen as, and for being, a member of either House of Parliament as well as a member of the Legislative Assembly or Legislative Council of the State. Accordingly, in the Constitution which was finally adopted by the Constituent Assembly, Article 102(1) laid down the disqualifications for membership of either House of Parliament and Article 191(1) laid down the disqualifications for membership of the Legislative Assembly or Legislative Council of the State. These two Articles are extracted hereinbelow:

> **102**. **Disqualifications for membership.** –(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—
>
> (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;
>
> (b) if he is of unsound mind and stands so declared by a competent court;
>
> (c) if he is an undischarged insolvent;
>
> (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
>
> (e) if he is so disqualified by or under any law made by Parliament.
>
> **191**. **Disqualifications for membership.** – (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—
>
> (a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature

> of the State by law not to disqualify its holder;
>
> (b) if he is of unsound mind and stands so declared by a competent court;
>
> (c) if he is an undischarged insolvent;
>
> (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
>
> (e) if he is so disqualified by or under any law made by Parliament.
>
> [Explanation.—For the purposes of this clause], a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

A reading of the aforesaid constitutional provisions will show that besides the disqualifications laid down in clauses (a), (b), (c) and (d), Parliament could lay down by law other disqualifications for membership of either House of Parliament or of Legislative Assembly or Legislative Council of the State. In exercise of this power conferred under Article 102(1)(e) and under Article 191(1)(e) of the Constitution, Parliament provided in Chapter-III of the Representation of the People Act, 1951 (for short 'the Act'), the disqualifications for membership of Parliament and State Legislatures. Sections 7 and 8 in Chapter-III of the Act, with which we are concerned in these writ petitions, are extracted hereinbelow:

> **7**. **Definitions.**—In this Chapter,—
>
> (a) "appropriate Government" means in relation to any disqualification for being chosen as or for being a member of either House of Parliament, the Central Government, and in relation to any disqualification for being chosen as or for being a member of the Le[illegible]or

Legislative Council of a State, the State Government;

(b) "disqualified" means disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.

8. Disqualification on conviction for certain offences.— (1) A person convicted of an offence punishable under—

(a) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955) which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified

place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) of clause (a) of sub-section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; [or]

[(j) section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991], [or]

[(k) section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971), [or]

[(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or]

[(m) the Prevention of Corruption Act, 1988 (49 of 1988); or]

[(n) the Prevention of Terrorism Act, 2002 (15 of 2002)]

[shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

(2) A person convicted for the contravention of—

(a) any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or drugs; or

(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961); and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

[(4)] Notwithstanding anything [in sub-section (1), sub-section (2) or sub-section (3)] a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation. —In this section, —

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for—

(I) the regulation of production or manufacture of any essential commodity;

(II) the control of price at which any essential commodity may be bought or sold;

(III) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(IV) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) "drug" has the meaning assigned to it in the Durgs and Cosmetics Act, 1940 (23 of 1940);

(c) "essential commodity" has the meaning assigned to it in the Essential Commodity Act, 1955 (10 of 1955);

(d) "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

3. Clause (b) of Section 7 of the Act quoted above defines the word "disqualified" to mean disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or of Legislative Council of State. Sub-sections (1), (2) and (3) of Section 8 of the Act provide that a person convicted of an offence mentioned in any of these sub-sections shall stand disqualified from the date of conviction and the disqualification was to continue for the specific period mentioned in the sub-section. However, sub-section (4) of Section 8 of the Act provides that notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3) in Section 8 of the Act, a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from th[illegible]at

period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court. It is this saving or protection provided in sub-section (4) of Section 8 of the Act for a member of Parliament or the Legislature of a State which is challenged in these writ petitions as *ultra vires* the Constitution.

Contentions on behalf of the Petitioners

4. Mr. Fali S. Nariman, learned Senior Counsel appearing for the petitioner in Writ Petition No. 490 of 2005 and Mr. S.N. Shukla, the General Secretary of the Petitioner in Writ Petition No. 231 of 2005, submitted that the opening words of clause (1) of Articles 102 and 191 of the Constitution make it clear that the same disqualifications are provided for a person being chosen as a member of either House of Parliament, or the State Assembly or Legislative Council of the State and for a person being a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State and therefore the disqualifications for a person to be elected as a member of either House of the Parliament or of the Legislative Assembly or Legislative Council of the State and for a person to continue as a member of either House of Parliament or of the Legislative Assembly or Legislative Council of the State cannot be different. In support of this submission, Mr. Nariman cited a Constitution Bench judgment of this Court in *Election Commission, India v. Saka Venkata Rao* (AIR 1953 SC 210) in which it has been held that Article 191 lays down the same set of disqualifications for election as well as for continuing as a member. Mr. Nariman and Mr. Shukla submitted that sub-section (4) of Section 8 of the Act, insofar as it provides that the disqualification under sub-sections (1), (2) and (3) of Section 8 for being elected as a member of either House of Parliament or the Legislative Assembly or Legislative Council of State shall not take effect in the case of a person who is already a member of Parliament or Legislature of a State on the date of the conviction if he files an appeal or a revision in

respect of the conviction or the sentence within three months till the appeal or revision is disposed of by the Court, is in contravention of the provisions of clause (1) of Articles 102 and 191 of the Constitution.

5. Mr. Shukla referred to the debates of the Constituent Assembly on Article 83 of the Draft Constitution, which corresponds to Article 102 of the Constitution. In these debates, Mr. Shibban Lal Saksena, a member of the Constituent Assembly moved an Amendment No. 1590 on 19.05.1949 to provide that when a person who, by virtue of conviction becomes disqualified and is on the date of disqualification a member of Parliament, his seat shall, notwithstanding anything in this Article, not become vacant by reason of the disqualification until three months have elapsed from the date thereof or, if within those three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of, but during any period during which his membership is preserved by this provision, he shall not sit or vote. Mr. Shukla submitted that this amendment to Article 83 of the Draft Constitution was not adopted in the Constituent Assembly. Instead, in sub-clause (e) of clause (1) of Articles 102 and 191 of the Constitution, it was provided that Parliament may make a law providing disqualifications besides those mentioned in sub-clauses (a), (b), (c) and (d) for a person being chosen as, and for being, a member of either House of Parliament and of the Legislative Assembly or Legislative Council of a State. Mr. Shukla submitted that despite the fact that a provision similar to sub-section (4) of Section 8 of the Act was not incorporated in the Constitution by the Constituent Assembly, Parliament has enacted sub-section (4) of Section 8 of the Act.

6. According to Mr. Nariman and Mr. Shukla, in the absence of a provision in Articles 102 and 191 of the Constitution conferring power on Parliament to make a provision protecting sitting members of either House of Parliament or the Legislative Assem e

Council of a State, from the disqualifications it lays down for a person being chosen as a member of Parliament or a State Legislature, Parliament lacks legislative powers to enact sub-section (4) of Section 8 of the Act and sub-section (4) of Section 8 of the Act is therefore *ultra vires* the Constitution.

7. Mr. Nariman next submitted that the legal basis of sub-section (4) of Section 8 of the Act is based on an earlier judicial view in the judgment of a Division Bench of this Court in *Shri Manni Lal v. Shri Parmal Lal and Others* [(1970) 2 SCC 462] that when a conviction is set aside by an appellate order of acquittal, the acquittal takes effect retrospectively and the conviction and the sentence are deemed to be set aside from the date they are recorded. He submitted that in *B.R. Kapur v. State of T.N. and Another* [(2001) 7 SCC 231] a Constitution Bench of this Court reversed the aforesaid judicial view and held that conviction, and the sentence it carries, operate against the accused in all their rigour until set aside in appeal, and a disqualification that attaches to the conviction and sentence applies as well. He submitted that this later view has been reiterated by a Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan etc.* [(2005) 1 SCC 754]. Mr. Nariman argued that thus as soon as a person is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act, he becomes disqualified from continuing as a member of Parliament or of a State Legislature notwithstanding the fact that he has filed an appeal or a revision against the conviction and there is no legal basis for providing in sub-section (4) of Section 8 of the Act that his disqualification will not take effect if he files an appeal or revision within three months against the order of conviction. He submitted that in case a sitting member of Parliament or State Legislature feels aggrieved by the conviction and wants to continue as a member notwithstanding the conviction, his remedy is to move the Appellate Court for stay of the order of conviction. He cited the decision in *Navjot Singh Sidhu v. State of Punjab and Another* ([2007) 2 SCC 574] in which this Court has clarified

that under sub-section (1) of Section 389 of the Code of Criminal Procedure, 1973 power has been conferred on the Appellate Court not only to suspend the execution of the sentence and to grant bail, but also to suspend the operation of the order appealed against, which means the order of conviction. He submitted that in appropriate cases, the Appellate Court may stay the order of conviction of a sitting member of Parliament or State Legislature and allow him to continue as a member notwithstanding the conviction by the trial court, but a blanket provision like sub-section (4) of Section 8 of the Act cannot be made to keep the disqualification pursuant to conviction in abeyance till the appeal or revision is decided by the Appellate or Revisional Court.

8. Mr. Nariman and Mr. Shukla submitted that in *K. Prabhakaran v. P. Jayarajan etc.* (supra) the validity of sub-section (4) of Section 8 of the Act was not under challenge and only a reference was made to the Constitution Bench of this Court on certain questions which arose in civil appeals against judgments delivered by the High Court in election cases under the Act. They submitted that the Constitution Bench of this Court framed three questions with regard to disqualification of a candidate under Section 8 of the Act and while answering question no.3, the Constitution Bench indicated reasons which seem to have persuaded Parliament to classify sitting members of the House into a separate category and to provide in sub-section (4) of Section 8 of the Act that if such sitting members file appeal or revision against the conviction within three months, then the disqualification on account of their conviction will not take effect until the appeal or revision is decided by the appropriate court. They submitted that the opinion expressed by the Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan etc.* (supra) regarding the purpose for which Parliament classified sitting members of Parliament and State Legislatures into a separate category and protected them from the disqualifications by the saving provision in sub-section (4) of Section 8 of the A[illegible]d

are not binding *ratio* on the issue of the validity of sub-section (4) of Section 8 of the Act.

9. Mr. Nariman and Mr. Shukla submitted that sub-section (4) of Section 8 of the Act, in so far as it does not provide a rationale for making an exception in the case of members of Parliament or a Legislature of a State is arbitrary and discriminatory and is violative of Article 14 of the Constitution. They submitted that persons to be elected as members of Parliament or a State Legislature stand on the same footing as sitting members of Parliament and State Legislatures so far as disqualifications are concerned and sitting members of Parliament and State Legislatures cannot enjoy the special privilege of continuing as members even though they are convicted of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act.

Contentions of behalf of the respondents

10. Mr. Siddharth Luthra, learned ASG appearing for the Union of India in Writ Petition (C) 231 of 2005, submitted that the validity of sub-section (4) of Section 8 of the Act has been upheld by the Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan etc.* (supra). He submitted that while answering question no.3, the Constitution Bench has held in *Prabhakaran's* case that the purpose of carving out a saving in sub-section (4) of Section 8 of the Act is not to confer an advantage on sitting members of Parliament or of a State Legislature but to protect the House. He submitted that in para 58 of the judgment the Constitution Bench has explained that if a member of the House was debarred from sitting in the House and participating in the proceedings, no sooner the conviction was pronounced followed by sentence of imprisonment, entailing forfeiture of his membership, then two consequences would follow: first, the strength of membership of the House shall stand reduced, so also the strength of the political party to which such convicted member may belong and the Government in power may be surviving on a razor-edge thin

majority where each member counts significantly and disqualification of even one member may have a deleterious effect on the functioning of the Government; second, a bye-election shall have to be held which exercise may prove to be futile, also resulting in complications in the event of the convicted member being acquitted by a superior criminal court. Mr. Luthra submitted that for the aforesaid two reasons, Parliament has classified the sitting members of Parliament or a State Legislature in a separate category and provided in sub-section (4) of Section 8 of the Act that if on the date of incurring disqualification, a person is a member of Parliament or of a State Legislature, such disqualification shall not take effect for a period of three months from the date of such disqualification to enable the sitting member to file appeal or revision challenging his conviction, and sentence and if such an appeal or revision is filed, then applicability of the disqualification shall stand deferred until such appeal or revision is disposed of by the appropriate Court.

11. Mr. Luthra next submitted that the reality of the Indian judicial system is that acquittals in the levels of the Appellate Court such as the High Court are very high and it is for this reason that Parliament has provided in sub-section (4) of Section 8 of the Act that disqualification pursuant to conviction or sentence in the case of sitting members should stand deferred till the appeal or revision is decided by the Appellate or the Revisional Court. He submitted that the power to legislate on disqualification of members of Parliament and the State Legislature conferred on Parliament carries with it the incidental power to say when the disqualification will take effect. He submitted that the source of legislative power for enacting sub-section (4) of Section 8 of the Act is, therefore, very much there in Articles 101(1)(e) and 191(1)(e) of the Constitution and if not in these articles of the Constitution, in Article 246(1) read with Entry 97 of List I of the Seventh Schedule of the Constitution and Article 248 of the Constitution, which confer powers on Parliament to legislate on any matter no[illegible]ll

and List III of the Seventh Schedule of the Constitution.

12. Mr. Paras Kuhad, learned ASG, appearing for the Union of India in Writ Petition (C) No.490 of 2005 also relied on the judgment of the Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan etc.* (supra) on the validity of sub-section (4) of Section 8 of the Act and the reasoning given in the answer to question no.3 in the aforesaid judgment of this Court. He further submitted that sub-section (4) of Section 8 of the Act does not lay down disqualifications for members of Parliament and the State Legislatures different from the disqualifications laid down for persons to be chosen as members of Parliament and the State Legislatures in sub-sections (1), (2) and (3) of Section 8 of the Act. He submitted that sub-section (4) of Section 8 of the Act merely provides that the very same disqualifications laid down in sub-sections (1), (2) and (3) of Section 8 of the Act shall in the case of sitting members of Parliament and State Legislatures take effect only after the appeal or revision is disposed of by the Appellate or Revisional Court as the case may be if an appeal or revision is filed against the conviction. He submitted that Parliament has power under Article 102(1)(e) of the Constitution and Article 191(1)(e) of the Constitution to prescribe when exactly the disqualification will become effective in the case of sitting members of Parliament or the State Legislature with a view to protect the House. He also referred to the provisions of Articles 101(3)(a) and 190 (3)(a) of the Constitution to argue that a member of Parliament or a State Legislature will vacate a seat only when he becomes subject to any disqualification mentioned in clause (1) of Article 102 or clause (1) of Article 191, as the case may be, and this will happen only after a decision is taken by the President or the Governor that the member has become disqualified in accordance with the mechanism provided in Article 103 or Article 192 of the Constitution.

13. Mr. Kuhad further submitted that Mr. Nariman is not right in his submission that the remedy of a sitting member who

is convicted or sentenced and gets disqualified under sub-sections (1), (2) or (3) of Section 8 of the Act is to move the Appellate Court under Section 389 of the Code of Criminal Procedure for stay of his conviction. He submitted that the Appellate Court does not have any power under Section 389, Cr.P.C. to stay the disqualification which would take effect from the date of conviction and therefore a safeguard had to be provided in sub-section (4) of Section 8 of the Act that the disqualification, despite the conviction or sentence, will not have effect until the appeal or revision is decided by the Appellate or the Revisional Court. He submitted that there is, therefore, a rationale for enacting sub-section (4) of Section 8 of the Act.

Findings of the Court

14. We will first decide the issue raised before us in these writ petitions that Parliament lacked the legislative power to enact sub-section (4) of Section 8 of the Act as this issue was not at all considered by the Constitution Bench of this Court in the aforesaid case of *K. Prabhakaran* (supra). In *The Empress v. Burah and Another* [(1878) 5 I.A. 178] the Privy Council speaking through Selborne J. laid down the following fundamental principles for interpretation of a written constitution laying down the powers of the Indian Legislature:

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it; and it can, of course, do nothing beyond the limits which circumscribes these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created,

and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

The correctness of the aforesaid principles with regard to interpretation of a written constitution has been re-affirmed by the majority of Judges in *Kesavananda Bharti* v. *State of Kerala* (AIR 1973 SC 1465) (See the *Constitutional Law of India*, H.M. Seervai, Fourth Edition, Vol.I, para 2.4 at page 174). Hence, when a question is raised whether Parliament has exceeded the limits of its powers, courts have to decide the question by looking to the terms of the instrument by which affirmatively, the legislative powers were created, and by which negatively, they are restricted.

15. We must first consider the argument of Mr. Luthra, learned Additional Solicitor General, that the legislative power to enact sub-section (4) of Section 8 of the Act is located in Article 246(1) read with Entry 97 of List I of the Seventh Schedule and Article 248 of the Constitution, if not in Articles 102(1)(e) and 191(1)(e) of the Constitution. Articles 246 and 248 of the Constitution are placed in Chapter I of Part XI of the Constitution of India. Part XI is titled "Relations between the Union and the States" and Chapter I of Part XI is titled "Legislative Relations". In Chapter I of Part XI, under the heading "Distribution of Legislative Powers" Articles 245 to 255 have been placed. A reading of Articles 245 to 255 would show that these relate to distribution of legislative powers between the Union and the Legislatures of the States. Article 246(1) provides that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule of the Constitution and under Entry 97 of List I of the Seventh Schedule of the Constitution, Parliament has exclusive

power to make law with respect to any other matter not enumerated in List II or List III. Article 248 similarly provides that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List (List III) or State List (List II) of the Seventh Schedule of the Constitution. Therefore, Article 246(1) read with Entry 97 and Article 248 only provide that in residuary matters (other than matters enumerated in List II and List III) Parliament will have power to make law. To quote from Commentary on the Constitution of India by Durga Das Basu (8th Edition) Volume 8 at page 8988:

> "In short, the principle underlying Article 248, read with Entry 97 of List I, is that a written Constitution, which divides legislative power as between two legislatures in a federation, cannot intend that neither of such Legislatures shall go without power to legislate with respect of any subject simply because that subject has not been specifically mentioned nor can be reasonably comprehended by judicial interpretation to be included in any of the Entries in the Legislative Lists. To meet such a situation, a residuary power is provided, and in the Indian Constitution, this residuary power is vested in the Union Legislature. Once, therefore, it is found that a particular subject-matter has not been assigned to the competence of the State Legislature, "it leads to the irresistible inference that (the Union) Parliament would have legislative competence to deal with the subject-matter in question."

Articles 102(1)(e) and 191(1)(e) of the Constitution, on the other hand, have conferred specific powers on Parliament to make law providing disqualifications for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State other than those specified in sub-clauses (a), (b), (c) and (d) of clause (1) of Articles 102 and 191 of the Constitution. We may note that no power is vested in the State Legislature to make law laying down disqualifications of membership of the Legislative Assembly or Legislative Council of the State and power is vested in P[illegible]w

laying down disqualifications also in respect of members of the Legislative Assembly or Legislative Council of the State. For these reasons, we are of the considered opinion that the legislative power of Parliament to enact any law relating to disqualification for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State can be located only in Articles 102(1)(e) and 191(1)(e) of the Constitution and not in Articles 246(1) read with Entry 97 of List I of the Seventh Schedule and Article 248 of the Constitution. We do not, therefore, accept the contention of Mr. Luthra that the power to enact sub-section (4) of Section 8 of the Act is vested in Parliament under Articles 246(1) read with Entry 97 of List I of the Seventh Schedule and 248 of the Constitution, if not in Articles 102 (1)(e) and 191 (1)(e) of the Constitution.

16. Articles 102(1)(e) and 191(1)(e) of the Constitution, which contain the only source of legislative power to lay down disqualifications for membership of either House of Parliament and Legislative Assembly or Legislative Council of a State, provide as follows:

> "102(1)(e). A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament- (e) if he is so disqualified by or under any law made by Parliament."
>
> "191(1)(e). "A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—(e) if he is so disqualified by or under any law made by Parliament.

A reading of the aforesaid two provisions in Articles 102(1)(e) and 191(1)(e) of the Constitution would make it abundantly clear that Parliament is to make one law for a person to be disqualified for being chosen as, and for being, a member of either House of Parliament or Legislative Assembly or Legislative Council of the State. In the language of the Constitution Bench of this Court in *Election Commission, India v. Saka Venkata Rao* (supra), Article 191(1) [which is

identically worded as Article 102(1)] lays down "the same set of disqualifications for election as well as for continuing as a member". Parliament thus does not have the power under Articles 102(1)(e) and 191(1)(e) of the Constitution to make different laws for a person to be disqualified for being chosen as a member and for a person to be disqualified for continuing as a member of Parliament or the State Legislature. To put it differently, if because of a disqualification a person cannot be chosen as a member of Parliament or State Legislature, for the same disqualification, he cannot continue as a member of Parliament or the State Legislature. This is so because the language of Articles 102(1)(e) and 191(1)(e) of the Constitution is such that the disqualification for both a person to be chosen as a member of a House of Parliament or the State Legislature or for a person to continue as a member of Parliament or the State Legislature has to be the same.

17. Mr. Luthra and Mr. Kuhad, however, contended that the disqualifications laid down in sub-sections (1),(2) and (3) of Section 8 of the Act are the same for persons who are to continue as members of Parliament or a State Legislature and sub-section (4) of Section 8 of the Act does not lay down a different set of disqualifications for sitting members but merely states that the same disqualifications will have effect only after the appeal or revision, as the case may be, against the conviction is decided by the Appellate or the Revisional Court if such appeal or revision is filed within 3 months from the date of conviction. We cannot accept this contention also because of the provisions of Articles 101(3)(a) and 190(3)(a) of the Constitution which are quoted hereinbelow:

> "**101(3)(a). Vacation of seats**.-
>
> (1) .....
>
> (2) .....
>
> (3) If a member of either House of Parliament-
>
> (a) becomes subject to any of s

mentioned in clause (1) or clause (2) of article 102.

his seat shall thereupon become vacant"

"**190(3)(a). Vacation of seats**.-

(1) …….

(2) …….

(3) If a member of a House of the Legislature of a State-
(a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of article 191.

his seat shall thereupon become vacant"

Thus, Article 101(3)(a) provides that if a member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (1), his seat shall thereupon become vacant and similarly Article 190(3)(a) provides that if a member of a House of the Legislature of a State becomes subject to any of the disqualifications mentioned in clause (1), his seat shall thereupon become vacant. This is the effect of a disqualification under Articles 102(1) and 190(1) incurred by a member of either House of Parliament or a House of the State Legislature. Accordingly, once a person who was a member of either House of Parliament or House of the State Legislature becomes disqualified by or under any law made by Parliament under Articles 102(1)(e) and 191(1)(e) of the Constitution, his seat automatically falls vacant by virtue of Articles 101(3)(a) and 190(3)(a) of the Constitution and Parliament cannot make a provision as in sub-section (4) of Section 8 of the Act to defer the date on which the disqualification of a sitting member will have effect and prevent his seat becoming vacant on account of the disqualification under Article 102(1)(e) or Article 191(1)(e) of the Constitution.

18. We cannot also accept the submission of Mr. Kuhad that until the decision is taken by the President or Governor on whether a member of Parliament or State Legislature has become subject to any of the disqualifications mentioned in

clause (1) of Article 102 and Article 191 of the Constitution, the seat of the member alleged to have been disqualified will not become vacant under Articles 101(3)(a) and 190(3)(a) of the Constitution. Articles 101(3)(a) and 190(3)(a) of the Constitution provide that if a member of the House becomes subject to any of the disqualifications mentioned in clause (1), "his seat shall thereupon become vacant". Hence, the seat of a member who becomes subject to any of the disqualifications mentioned in clause (1) will fall vacant on the date on which the member incurs the disqualification and cannot await the decision of the President or the Governor, as the case may be, under Articles 103 and 192 respectively of the Constitution. The filling of the seat which falls vacant, however, may await the decision of the President or the Governor under Articles 103 and 192 respectively of the Constitution and if the President or the Governor takes a view that the member has not become subject to any of the disqualifications mentioned in clause (1) of Articles 102 and 191 respectively of the Constitution, it has to be held that the seat of the member so held not to be disqualified did not become vacant on the date on which the member was alleged to have been subject to the disqualification.

19. The result of our aforesaid discussion is that the affirmative words used in Articles 102(1)(e) and 191(1)(e) confer power on Parliament to make one law laying down the same disqualifications for a person who is to be chosen as member of either House of Parliament or as a member of the Legislative Assembly or Legislative Council of a State and for a person who is a sitting member of a House of Parliament or a House of the State Legislature and the words in Articles 101(3)(a) and 190(3)(a) of the Constitution put express limitations on such powers of the Parliament to defer the date on which the disqualifications would have effect. Accordingly, sub-section (4) of Section 8 of the Act which carves out a saving in the case of sitting members of Parliament or State Legislature from the disqualifications u[illegible]),

(2) and (3) of Section 8 of the Act or which defers the date on which the disqualification will take effect in the case of a sitting member of Parliament or a State Legislature is beyond the powers conferred on Parliament by the Constitution.

20. Looking at the affirmative terms of Articles 102(1)(e) and 191(1)(e) of the Constitution, we hold that Parliament has been vested with the powers to make law laying down the same disqualifications for person to be chosen as a member of Parliament or a State Legislature and for a sitting member of a House of Parliament or a House of a State Legislature. We also hold that the provisions of Article 101(3)(a) and 190(3)(a) of the Constitution expressly prohibit Parliament to defer the date from which the disqualification will come into effect in case of a sitting member of Parliament or a State Legislature. Parliament, therefore, has exceeded its powers conferred by the Constitution in enacting sub-section (4) of Section 8 of the Act and accordingly sub-section (4) of Section 8 of the Act is *ultra vires* the Constitution.

21. We do not also find merit in the submission of Mr. Luthra and Mr. Kuhad that if a sitting member of Parliament or the State Legislature suffers from a frivolous conviction by the trial court for an offence given under sub-section (1), (2) or (3) of Section 8 of the Act, he will be remediless and he will suffer immense hardship as he would stand disqualified on account of such conviction in the absence of sub-section (4) of Section 8 of the Act. A three-Judge Bench of this Court in *Rama Narang v. Ramesh Narang & Ors.* [(1995) 2 SCC 513] has held that when an appeal is preferred under Section 374 of the Code of Criminal Procedure [for short 'the Code'] the appeal is against both the conviction and sentence and, therefore, the Appellate Court in exercise of its power under Section 389(1) of the Code can also stay the order of conviction and the High Court in exercise of its inherent jurisdiction under Section 482 of the Code can also stay the conviction if the power was not to be found in Section 389(1) of the Code. In *Ravikant S. Patil v. Sarvabhouma S. Bagali* [(2007) 1 SCC 673], a three-Judge

Bench of this Court, however, observed:

> "It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying the consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction.

In the aforesaid case, a contention was raised by the respondents that the appellant was disqualified from contesting the election to the Legislative Assembly under sub-section (3) of Section 8 of the Act as he had been convicted for an offence punishable under Sections 366 and 376 of the Indian Penal Code and it was held by the three-Judge Bench that as the High Court for special reasons had passed an order staying the conviction, the disqualification arising out of the conviction ceased to operate after the stay of conviction. Therefore, the disqualification under sub-section (1), (2) or (3) of Section 8 of the Act will not operate from the date of order of stay of conviction passed by the Appellate Court under Section 389 of the Code or the High Court under Section 482 of the Code.

22. As we have held that Parliament had no power to enact sub-section (4) of Section 8 of the Act

section (4) of Section 8 of the Act is *ultra vires* the Constitution, it is not necessary for us to go into the other issue raised in these writ petitions that sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution. It would have been necessary for us to go into this question only if sub-section (4) of Section 8 of the Act was held to be within the powers of the Parliament. In other words, as we can declare sub-section (4) of Section 8 of the Act as *ultra vires* the Constitution without going into the question as to whether sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution, we do not think it is necessary to decide the question as to whether sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution.

23. The only question that remains to be decided is whether our declaration in this judgment that sub-section (4) of Section 8 of the Act is *ultra vires* the Constitution should affect disqualifications already incurred under sub-sections (1), (2) and (3) of Section 8 of the Act by sitting members of Parliament and State Legislatures who have filed appeals or revisions against their conviction within a period of three months and their appeals and revisions are still pending before the concerned court. Under sub-sections (1), (2) and (3) of Section 8 of the Act, the disqualification takes effect from the date of conviction for any of the offences mentioned in the sub-sections and remains in force for the periods mentioned in the sub-sections. Thus, there may be several sitting members of Parliament and State Legislatures who have already incurred disqualification by virtue of a conviction covered under sub-section (1), or sub-section (2) or sub-section (3) of Section 8 of the Act. In *Golak Nath and Others* vs. *State of Punjab and Another* (AIR 1967 SC 1643), Subba Rao, C.J. speaking on behalf of himself, Shah, Sikri, Shelat and Vaidialingam, JJ. has held that Articles 32, 141, 142 of the Constitution are couched in such a wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice and has further held that this Court has the power not only to declare the law but also to

restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise, that were effected on the basis of the earlier law. Sitting members of Parliament and State Legislature who have already been convicted for any of the offences mentioned in sub-section (1), (2) and (3) of Section 8 of the Act and who have filed appeals or revisions which are pending and are accordingly saved from the disqualifications by virtue of sub-section (4) of Section 8 of the Act should not, in our considered opinion, be affected by the declaration now made by us in this judgment. This is because the knowledge that sitting members of Parliament or State Legislatures will no longer be protected by sub-section (4) of Section 8 of the Act will be acquired by all concerned only on the date this judgment is pronounced by this Court. As has been observed by this Court in *Harla v. State of Rajasthan* (AIR 1951 SC 467):

> "……..it would be against the principles of natural justice to permit the subjects of a State to be punished or penalized by laws of which they had no knowledge and of which they could not even with exercise of due diligence have acquired any knowledge."

However, if any sitting member of Parliament or a State Legislature is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act and by virtue of such conviction and/or sentence suffers the disqualifications mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act after the pronouncement of this judgment, his membership of Parliament or the State Legislature, as the case may be, will not be saved by sub-section (4) of Section 8 of the Act which we have by this judgment declared as *ultra vires* the Constitution notwithstanding that he files the appeal or revision against the conviction and /or sentence.

24. With the aforesaid declaration, the writ petitions are allowed. No costs.

B.B.B. W .

THE CHIEF ELECTION COMMISSIONER ETC.
v.
JAN CHAUKIDAR (PEOPLES WATCH) & ORS.
(CIVIL APPEAL NOS. 3040-3041 OF 2004)

JULY 10, 2013

[A.K. PATNAIK AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Representation of the People Act, 1951 - ss.4, 5 and 62 - Qualification to contest election - Person having no right to vote by virtue of the provisions of sub-section (5) of s.62 of the 1951 Act - Held: Is not an elector and is therefore not qualified to contest the election to the House of the People or the Legislative Assembly of a State - Representation of the People Act, 1950 - s.16 - Constitution of India, 1950 - Article 326.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3040-3041 of 2004.

From the Judgment and Order dated 30.04.2004 of the High Court of Judicature at Patna in C.W.J.C. No. 4880 & 4988 of 2004.

Paras Kuhad Siddharth Luthra, ASG, F.S. Nariman, Harish Chander, Mukul Gupta, Subhash Sharma, Lily Thomas (Petitioner-In-Person), Meenakshi Arora, Amit Pawan, Rajiv Kumar Sinha, S. Chandra Shekhar, Satya Narain, Shukla (Petitioner-In-Person), Saurabh Suman Sinha, Shilpa Singh, Kamini Jaiswal, Abhimanue Shrestha, Amit Kumar, Abhinav Mukerji, Tufail A. Khan, Mrinmayee Shau, Yatin Bhushan, B.V. Balaram Das, Angad Kochhar, V.K. Biju, Satya Siddiqui, Sarfraz Ahmed Siddiqui, S.K. Mishra, S.S. Rawat, V.N. Subramaniam, S. Wasim A. Qadri, P. Parmeswaran, D.S. Mahra, S. Ahmed Siddiqui, Priyanka, V.N. Raghupathi, Vasan

Anantharaman, Sibo Sankar Mishra, Vijaya Lakshmi, Pragya Singh, Saurabh Kumar, Abhisth Kumar, Vikrant Yadav, Raman Yadav, Irshad Ahmad, Mohd. Irshad Hanif, Anil Kumar Jha for the appearing parties.

The Order of the Court was delivered by

ORDER

1. These are appeals by way of Special Leave under Article 136 of the Constitution against the common order dated 30.04.2004 of the Patna High Court in C.W.J.C. No.4880 of 2004 and C.W.J.C. No.4988 of 2004.

2. The facts very briefly are that Article 326 of the Constitution provides that the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage and every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under the Constitution or any law made by the appropriate Legislature on the grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter for any such election. In accordance with Article 326 of the Constitution, Parliament has enacted the Representation of the People Act, 1950 (for short 'the 1950 Act') for registration of voters at such elections to the House of the People and to the Legislative Assembly of every State and has also enacted the Representation of the People Act, 1951 (for short 'the 1951 Act') for the conduct of elections to the Houses of Parliament and to the Houses of Legislature of each State.

3. The word "elector" is defined in the 1951 Act in relation to the constituency to mean a person whose name is entered in electoral rolls of the constituency for the time being in force and who is not subject to any of the disqualifications mentioned in Section 16 of the 1950 Act. Sectio[illegible]0

Act provides that a person shall be disqualified for registration in an electoral roll if he is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.

4. Section 4 of the 1951 Act lays down the qualifications for membership of the House of the People and one of the qualifications laid down is that he must be an "elector" for any Parliamentary constituency. Similarly, Section 5 of the 1951 Act lays down the qualifications for membership of a Legislative Assembly of a State and one of the qualifications laid down is that he must be an "elector" for any Assembly constituency in that State. Section 62 of the 1951 Act is titled "Right to vote" and it provides in sub-section (5) that no person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police. The proviso to sub-section (5) of Section 62 of the 1951 Act, however, states that the sub-section will not apply to a person subjected to preventive detention under any law for the time being in force.

5. Writ petitions C.W.J.C. No.4880 of 2004 and C.W.J.C. No.4988 of 2004 were filed in the Patna High Court contending that a person, who is confined in prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police is not entitled to vote by virtue of sub-section (5) of Section 62 of the 1951 Act and accordingly is not an "elector" and is, therefore, not qualified to contest elections to the House of People or the Legislative Assembly of a State because of the provisions in Sections 4 and 5 of the 1951 Act. By the impugned common order, the High Court accepted this contention in the writ petitions and held:

> "A right to vote is a statutory right, the Law gives it, the Law takes it away. Persons convicted of crime are kept away from elections to the Legislature, whether to State Legislature or Parliament, and all other public elections. The Court has no hesitation in interpreting the Constitution and the Laws framed under it, read together, that persons in the lawful custody of the Police also will not be voters, in which case, they will neither be electors. The Law temporarily takes away the power of such persons to go anywhere near the election scene. To vote is a statutory right. It is privilege to vote, which privilege may be taken away. In that case, the elector would not be qualified, even if his name is on the electoral rolls. The name is not struck off, but the qualification to be an elector and the privilege to vote when in the lawful custody of the police is taken away."

6. Aggrieved, by the findings of the High Court, the appellants have filed these appeals. We have heard learned counsel for the parties and we do not find any infirmity in the findings of the High Court in the impugned common order that a person who has no right to vote by virtue of the provisions of sub-section (5) of Section 62 of the 1951 Act is not an elector and is therefore not qualified to contest the election to the House of the People or the Legislative Assembly of a State.

7. These civil appeals are accordingly dismissed. No costs.

B.B.B. Appeals dismissed.